TEAM VISSCHER

UNDER THE PERMANENT COURT OF ARBITRATION

ARBITRATION RULES 2012

ATTON BORO LIMITED

(CLAIMANT)

v.

THE REPUBLIC OF MERCURIA

(RESPONDENT)

PCA Case No. 2016-74

MEMORIAL FOR RESPONDENT

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LIST OF AUTHORITIES

Abbreviation	Citation
INVESTMENT ARBITRAL AWARDS and DECISIONS	
Alex Genin	*Alex Genin, Eastemi Credit Limited, Inc. and A.S. Baltoil v. Estonia,* ICSID Case No. ARB/99/2, Award of June 25,2001
AMTO	*Limited Liability Company AMTO v. Ukraine,* SCC Case No. 080/2005, Award of March 26,2008
ATA	*ATA Construction, Industrial and Trading Company v. Jordan,* ICSID Case No. ARB/08/2, Award of May 18,2010
Aucoven	*Autopista Concesionada De Venezuela, C.A. v. Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan,* ICSID Case No. ARB/03/29, Award of August 27,2009
Bivac	*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay,* ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction of May 29,2009

Bosh	*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award of October 25,2012
Chevron (Final Award)	*Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNCITRAL, PCA Case No. 34877, Final Award of August 31,2001
Chevron (Partial Award)	*Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award of March 30,2010
CMS	*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12,2005
Continental	*Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of September 5,2008
CSOB	*Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24,1999
Duke Energy	*Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, Award August 18,2008

EDF	*EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Dissent Regarding Cost of October 8,2009
El Paso	*El Paso Energy International Company v. Argentina,* ICSID Case No. ARB/03/15, Award of October 31,2011
EnCana	*EnCana Corp. v. Ecuador,* LCIA Case No. UN3481, Award of February 3,2006
Eureko	*Eureko B.V v. Poland,* UNCITRAL Arbitration, Partial Award and Dissenting Opinion of August 19,2005
Fedax	*Fedax N.V. v. Venezuela,* ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction of July 11,997
GEA	*GEA Group Aktiengesellschaft v. Ukraine,* ICSID Case No. ARB/08/16, Award of March 31,2011
Generation Ukraine	*Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9, Award of September 16,2003
Glamis Gold	*Glamis Gold, Ltd. v. USA,*

	UNCITRAL, Award of June 8,2009
Global Trading	*Global Trading Resource Corp. and Globex International, Inc. v. Ukraine,* ICSID Case No. ARB/09/11б, Award of December 1,2010
Impregilo	*Impregilo S.p.A. v. Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction of September 25,2005
Jan de Nul	*Jan de Nul N.V. and Dredging International N.V. v. Egypt,* ICSID Case No. ARB/04/13, Award of November 6,2008
Joy Mining	*Joy Mining Machinery Limited v.Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction of August 6,2004
Kardassopoulos	*Kardassopoulos v. Georgia,* *I*CSID Case Nos. ARB/05/18 and ARB/07/15, Award,2015
KT Asia	*KT Asia Investment Group B.V. v. Kazakhstan,* ICSID Case No. ARB/09/8, Award of October 17,2013
L.E.S.I-DIPENTA	*Consortium Groupement L.E.S.I.-DIPENTA v. République algérienne démocratique et populaire,* ICSID Case No. ARB/03/08, Award of January

	10,2005
Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. USA,* ICSID Case No. ARB(AF)/98/3, Award of June 26,2003
Malaysian Salvors	*Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, Award of Jurisdiction of May 27,2007
Metalclad	*Metalclad Corporation v. Mexica,* ICSID Case No. ARB(AF)/97/1, Award, of August 30,2000
Methanex	*Methanex Corporation v. USA* UNCITRAL, Final Award of the tribunal on jurisdiction and merits of August 3,2005
Mondev	*Mondev International Ltd. v. USA,* ICSID Case No. ARB(AF)/99/2, Award of October 11,2002
National Grid	*National Grid plc v. Argentina,* UNCITRAL, Award of November 3,2008
Nagel	*William Nagel v. Czech Republic,* SCC Case No. 049/2002, Award of September 9,2003
Occidental	*Occidental Petroleum Corporation and Occidental Exploration and Production*

	Company v. Ecuador, ICSID Case No. ARB/06/11, Award of October 5,2012
Pac Rim	*Pac Rim Cayman LLC v. Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of June 1,2012
Pan Am. Energy	*Pan American Energy LLC and BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of July 27,2006
Noble Ventures	*Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of October 12,2005
Petrobart	*Petrobart Limited v. Kyrgizia,* SCC Case No. 126/2003, Arbitral Award of March 24,2005
Pey Casado	*Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Award of May 8,2008
Plama	*Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction of February 8,2005
PSEG	*PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award of January 19,2007

Romak	*Romak S.A. (Switzerland) v .Uzbekistan,* UNCITRAL, PCA Case No. AA280, Award of November 26,2009
Rumeli	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan,* ICSID Case No. ARB/05/16, Award of July 29,2008
Rurelec	*Guaracachi America, inc., Rurelec PLC v. Bolivia,* PCA Case No. 2011-17, Award of January 31,2014
Saipem	*Saipem S.p.A. v. Bangladesh,* ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21,2007
Salini	*Salini Costruttori S.p.A. v. Morocco,* ICSID Case No. ARB/00/4 , Decision on Jurisdiction of July 31,2001
Saluka	*Saluka Investments BV (The Netherlands) v. Czech Republic,* UNCITRAL/PCA, Partial Award of March 17,2006
Santa Elena	*Compañia del Desarrollo de Santa Elena SA v. Costa Rica,* ICSID Case No. ARB/96/1, Award of February 17,2000

Sempra	*Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/16, Award of December 28,2007
SD Myers	*SD Myers, Inc v. Government of Canada,* UNCITRAL, Second Partial Award of October 21,2002
SGS v. Pakistan	*SGS Société Générale de Surveillance S.A. v. Pakistan,* ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of August 6,2003
SGS v. Philippines	*SGS Société Générale de Surveillance S.A. v. Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of January 29,2004
Suez	*Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentina,* ICSID Case No. ARB/03/19, Decision on Liability of July 30,2010
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. Mexica,* ICSID Case No. ARB (AF)/00/2, Award of May 29,2003
Toto	*Toto Costruzioni Generali S.p.A. v. Lebanon,* ICSID Case No. ARB/07/12, Decision of

	Jurisdiction of September 8,2009
Ulysseas	*Ulysseas, inc. v. Ecuador*, UNCITRAL, Final award of June 12,2012
Waste Management	*Waste Management v. Mexica*, ICSID Case No ARB(AF)/00/3, Award of April 30,2004
Wena Hotel	*Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award of December 8,2000
White	*White Industries Australia Limited v. India*, UNCITRAL, final Award of November 30,2011
William Nagel	*William Nagel v. Czech Republic*, SCC Case No. 049/2002, Award of September 9,2003
Yukos	*Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of November 30,2009
X	*X. v. Central European Republic*, SCC Case 49/2002, Final Award, 9 September,2003
OTHER DECISIONS	
El Oro	*El Oro Mining Railway Company v. Mexico* Great Britain-Mexico Claims Commission,

	Decision No.55 of June 18,1931
ELSI	*Elettronica Sicula S.p.A. (ELSI) (USA v. Italy),* ICJ, Judgement of July 20, 1989
Barcelona Traction	*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* ICJ, Judgment of February 5,1970
BOOKS	
Bishop	R. Doak Bishop , James Crawford , et al., *Foreign Investment Disputes: Cases, Materials and Commentary*, 2005
Bossche	Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization*,2013
Dolzer/Schreuer	Rudolf Dolzer and Christoph Schreuer *Principles of international investment law*,2012
Dolzer/Stevens	Rudolf Dolzer and Margrete Stevens *Bilateral Investment Treaties*,1995
Douglas	Zachary Douglas *The International Law of Investment Claims*,2009
Dugan/Wallace	Dugan, Wallace and others *Investor-State Arbitration*,2008
Naniwadekar	Mihir C. Naniwadekar *The Scope and Effect of Umbrella Clauses:* *The Need for a Theory of Deference?*

	1 Trade, Law and Development,2010
Oppenheim	Lassa Oppenheim *International Law*,1996
Paulsson	Jan Paulsson *Denial of Justice in International Law*,2005
Rabel	Ernst Rabel *The Conflict of Laws: A Comparative Study*,1958
Sauvant	Karl Sauvant *Yearbook on International Investment Law & Policy 2009-2010*,2010
Sornarajah	Muthucumaraswamy Sornarajah *The international law on foreign investment*,2010
Subedi	*Surya P Subedi* *International Investment Law: Reconciling Policy and Principle*,2008
Villiger	Mark E. Villiger *Commentary on the 1969 Vienna Convention* *on the Law of Treaties*,2009
ARTICLES	
Saldarriaga	Andrea Saldarriaga *Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement* 1-28 ICSID Review,2013

Arya/Sebastian	Garima Budhiraja Arya and Tania Sebastian *Critical Appraisal of 'Patent Illegaility' as a Ground for Setting Aside an Arbitral Award in India,* 24(2) Bond Law Review,2012
Bouhacene	Mahfoud Bouhacene *Droit international de la coopération industrielle* 48(2)Politique étrangère,1983
Douglas(2)	Zachary Douglas *International Responsibility For Domestic* *adjudication: Denial of Justice* 63 (4) International and Comparative Law Quarterly,2014
Christie	George C. Christie *What Constitutes a Taking* *of Property Under International Law* *38* British Yearbook of International Law,1962
Feit	Michael Feit *Attribution and the Umbrella Clause – Is there* *a Way out of the Deadlock?* 21 Minnesota Journal of International Law,2012
Feit(2)	Michael Feit *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity,*

	28 Berkeley J. Int'l L.142,177,2010
Gallus	Nick Gallus *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection,* 6 J. World Investment & Trade,2005
Gallus(2)	Nick Gallus *An Umbrella just for Two? BIT Obligations Observance Clauses and the Parties to a Contract* 24(1) Arbitration International,2008
Gibson	Christopher S. Gibson *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation* TDM,2009
Honlet/Borg	Jean-Christophe Honlet and Guillaume Borg *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited* 7(1) The Law & Practice of International Courts and Tribunals,2008
Jagusch/Sinclair	Stephan Jagusch and Anthony Sinclar *Denial of Advantages under Article 17(1)* Investment protection and the Energy Charter Treaty,2008
Kingsburry/Schill	Benedict Kingsburry and Stephan W. Schill *Investor-State Arbitration As Governance: Fair and Equitable Treatment, Proportionality*

	and the Emerging Global Administrative Law 2 Investor-State Disputes - International Investment Law,2011
Mejia	Sebastian Mejia *The protection of legitimate expectations and regulatory change: the Spanish case* 21 Spain Arbitration Review,2014
Mistelis	Loukas Mistelis *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement* 1-24 ICSID Revie,2013
Newcombe	Andrew Newcombe *The Boundaries of Regulatory Expropriation in International Law* 20(1) Foreign Investment Law Journal,2005
Rimmer	Matthew Rimmer *The Race to Patent the SARS Virus: The TRIPS Agreement and Access to Essential Medicines* 5(2) Melbourne Journal of International Law,2004
Rogerson	P. J. Rogerson *The Situs of Debts in the Conflict of Laws—Illogical, Unnecessary and Misleading* 49(3) The Cambridge Law Journal,1999
Rubins	Noah Rubins

	The Notion of 'Investment' in International Investment Arbitration 19 Studies in Transnational Economic Law,2004
Sarkodie/Morris	Kwadwo Sarkodie and James Morris *Enforcement of Arbitral Awards in Sub-Saharan Africa—A Risky Business?* // https://www.mayerbrown.com/pt/publications/detailprint.aspx?publication=4733
Shihata/Parra	Ibrahim F.I. Shihata Antonio R. Parra *The Experience of the International Centre for Settlement of Investment Disputes* 14(2) ICSID Review - Foreign Investment Law Journal,1999
Walde	Thomas W. Walde *Denial of Justice: A Review Comment on Jan Paulsson, Denial of Justice in International Law* ICSID Review – Foreign Investment Law Journal,2007
MISCELLANEOUS	
Australia: overview	Enforcement of arbitral awards in Australia: overview // https://content.next.westlaw.com/3-619-1718?transitionType=Default&contextData=(sc.Default)&__lrTS=20170510020341710&firstPage=true&bhcp=1
Black's Law Dictionary	Black's Law Dictionary,2009

CESCR General Comment	CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August,2000 (Contained in Document E/C.12/2000/4)
Commentaries to ILC Articles	Commentaries to ILC Articles Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,2001
Doha declaration	Ministerial Declaration on the TRIPS Agreement and Public Health adopted 14 November 2001,WT/MIN(01)/DEC/2 Article 5 (b)
ECLAC	https://idatd.cepal.org/soluciones/iTemplate-OMC- explicacion.pdf
GNI per capita	GNI per capita, World Bank national accounts data // data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=AF&view=chart
Guide	J Anthony VanDuzer, Penelope Simons, Graham Mayeda *Integrating Sustainable Development into International Investment Agreements: A* *Guide for Developing Countries*,2012
Key research	James Packard Love *Recent examples of the use of compulsory licenses on patents* 1 KEI Research Note 2 Knowledge Ecology International,2007

Muchlinski	Peter Muchlinski *A Critique of the Legitimate Expectations Doctrine in Investment Treaty Arbitration*, https://www.ejiltalk.org/a-critique-of-the-legitimate-expectations-doctrine-in-investment-treaty-arbitration/
NNPC's set-aside application	*Court of Appeal allows enforcement of an arbitral award pending foreign set-aside proceedings* // http://knowledge.freshfields.com/m/Global/r/1436/court_of_appeal_allows_enforcement_of_an_arbitral_award
OCHA Glossary	*OCHA glossary of Humanitarian Terms in relation to the Protection of Civilians in Armed Conflict* Office for the Coordination of Humanitarian Affairs Policy Development and Studies Branch New York,2003
Panel Report	*China-Measures affecting the protection and enforcement of intellectual rights* Report of the WTO Panel WT/DS362/R of January 26,2009
Paulsson's opinion	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Opinion of Jan Paulsson
Paragraph 6 protocol	Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August,2003
Reliefweb Glossary	http://www.who.int/hac/about/reliefweb-aug2008.pdf
Human rights files	*The length of civil and criminal proceedings in the case-law of the European Court of Human*

	Rights, Human rights files,16,2007
WFP	*Follow-up to the Marrakesh ministerial decision on measures concerning the possible negative effects of the reform programme on least-developed and net food-importing developing countries* WTO Committee on Agriculture G/AG/GEN/100 of November 21,2011
WHO	WHO, 56th World Health Assembly, Fourth Report of Committee A (Draft) (2003), WHO Doc A56/66 // <http://www.who.int/gb/ebwha/pdf_files/WHA56/ea5666.pdf>
WHO guidelines	Remuneration guidelines for non-voluntary use of a patent on medical technologies WHO/TCM/2005 // http://www.who.int/hiv/amds/WHOTCM2005.1_OMS.pdf
World Bank Group report	World Bank Group report on Investing across borders,2010 // http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf
World Economic Situation and Prospects, 2014	Country classification, World Economic Situation and Prospects, 2014 // www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf
WTO Kenya	*https://www.wto.org/english/res_e/booksp_e/casestudies_e/case19_e.htm*

LIST OF LEGAL SOURCES

Abbreviation	Citation
DSU	Understanding on rules and procedures governing the settlement of disputes,1994
ICESCR	International Covenant on Economic, Social and Cultural Rights,1966
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,1966
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts,2005
ILC Fragmentation	ILC, Fragmentation of International Law Difficulties Arising from The Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission UN Doc A/CN.4/L.682,2006
ILC Report	ILC, 'Report of the International Law Commission on the Work of its 58th Session' UN Doc A/61/10,2006
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10,1958
Paris Convention	Paris Convention on Protection of Industrial Property as amended on September 28,1979
PCA Rules	Permanent Court of Arbitration Arbitration Rules of December 17,2012
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, of April 15,1994
UNCITRAL	United Nations Commission on International

	Trade Law Arbitration Rules,2010
VCLT	Vienna Convention on the Law of Treaties,1969
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization,1994

STATEMENT OF FACTS

Parties to the dispute

1. The Respondent is the Republic of Mercuria (**"The Respondent or Mercuria"**). Mercuria is a developing country, with population of 67 million people. The Respondent signed the Agreement for the Promotion and Reciprocal Protection of Investment ("**BIT**") with the Kingdom of Basheera on 11 January 1998, which entered into force on 15 April 1998.
2. The Claimant is Atton Boro Ltd. (**"The Claimant or Atton Boro"**).

Greyscale crisis in Mercuria

3. Greyscale is a serious disease; it causes cracking and flaking of skin, progressively stiffening muscles, swollen limbs, and severe joint paint. Though non-fatal, the disease is chronic and incurable.
4. In 2003 Mercuria faced an upsurge in greyscale spreading. Number of estimated cases rose drastically, from 216,900 in 2003 to 578,390 in 2006.
5. Proper treatment can halt progression of the disease, and more advanced methods can even mute the symptoms completely for a few years, restoring quality of a patient's life. A global standard for treatment includes novel one-pill fixed-dose combinations ("**FDC**").
6. The treatment available in Mercuria before 2005 was only effective in case of early stage detection and required 5 to 7 pills a day.
7. In 2005, a new effective FDC drug became available in Mercuria. At the same time, its annual cost is about USD 10.000 per patient.

Investor

8. Atton Boro Ltd. was incorporated in Basheera on 5 April 1998. The Claimant's shares are currently owned by Atton Boro Group and affiliates, all of whom are ultimately controlled by Atton Boro and Company, an entity incorporated in the People's Republic of Reef ("**Reef**").
9. A patent for Valtervite, the active component of FDC drug marketed "Sanior", was assigned to the Claimant by Atton Boro Group on 15 April 1998.
10. In 2005 the Claimant established manufacturing unit to produce Sanior in Mercuria. Atton Boro and Company funded the setup of this operation.
11. The Claimant operates from rented premises in Basheera, with 2 to 6 staff members. Its primary activities are managing of portfolio of patents, support for regulatory approval,

marketing and sales, as well as legal, accounting and tax services for Atton Boro Group affiliates.

Business cooperation between the Claimant and the NHA

12. The National Health Authority ("**NHA**"), established under National Health Authorities Act, is organized in NHA trusts, which are effectively public sector corporations. The NHA operates independently and acts both as a governmental authority and a commercial entity.
13. To tackle the greyscale problem, the NHA concluded the Long-Term Agreement ("**LTA**") with Atton Boro. Under the LTA, the Claimant agreed to sell Sanior at a 25% discounted rate in accordance with purchase orders, periodically placed by NHA.
14. Parallel to the LTA, the NHA engaged in an effort to promote prevention of sexually transmitted diseases through awareness workshops and encouraged people to get tested regularly.
15. As a result, the number of Mercurian citizens regularly getting themselves tested rose from 17% to 65% in 2003. By 2006, the need for public medical support of greyscale patients prevailed over greyscale program budget in five times. The order value of Sanior doubled each quarter in 2007. Due to increased price and demand, the NHA decided to renegotiate the price for Sanior.
16. The parties to the LTA failed to reach an agreement on new terms: while Atton Boro agreed to provide an additional 10% discount, the NHA asked for 40%.
17. In June 2008, the NHA terminated the LTA on the grounds of unsatisfactory performance by Atton Boro.
18. In January 2009, an arbitral award was rendered in favor of the Claimant ("**Award**") against the NHA in Reef. The Tribunal found that unilateral termination of the LTA was unlawful and ordered the NHA to pay USD 40.000.000 of damages.
19. Enforcement of the Award, initiated in the High Court, is currently pending, as the NHA requested to dismiss Atton Boro's application as contrary to public policy.

Changes in Mercurian intellectual property law

20. On October 10, 2009, the President of Mercuria promulgated legislation introducing non-voluntary licensing. Such licenses may be granted in a limited set of circumstances in case of a public need.
21. In 2009-2010, royalty rates for drugs to treat incurable, non-fatal diseases in Mercuria ranged from 0.5 to 3 %.

22. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, applied for a license to manufacture Valtervite. After 5-month long proceedings, the High Court granted the license, with a 1% royalty to be paid to Atton Boro.
23. Atton Boro was impleaded as a party in a question of license granting. It refused to provide its bank details to HG-Pharma for royalty payments.

Arbitration

24. On November 7, 2016, relying on the BIT, Atton Boro filed the Notice of Arbitration to the PCA under 2012 PCA Arbitration Rules. The place of arbitration is Panchotta.
25. The Claimant alleged that Mercuria is liable for the LTA being terminated by the NHA, an independently operating entity. Atton Boro had already acquired an award on these grounds in commercial arbitration.
26. Additionally, the Claimant attempts to get compensation for issuance of the license for Valtervite to HG-Pharma in adversarial court proceedings, pleading a violation of TRIPS and legitimate expectations.
27. Another claim is based on the alleged failure of Mercuria to provide effective means for Atton Boro to assert its rights.
28. Atton Boro asks the Tribunal to grant USD 1.540.000.000 in damages.
29. Mercuria and Basheera are members of the WTO, parties to TRIPS, Doha Agreement, ICESCR, the New York Convention, the Paris Convention, and the VCLT (Mercuria did not yet ratify the VCLT).

SUMMARY OF ARGUMENTS

31. **Jurisdiction** The Tribunal lacks jurisdiction, since the Respondent properly invoked Article 2(1) of the BIT and denied benefits to the investor. Firstly, substantial requirements of clause are satisfied, as Atton Boro is ultimately controlled by the nationals of a third state and manages no substantial business activities in the territory of Basheera. Secondly, procedural requirements are satisfied as well, benefits were denied affirmatively, timely, and no legitimate expectations of the Claimant are affected.
32. In any event, the Tribunal does not have jurisdiction in relation to the Award. The Award does not meet explicit and implicit requirements of investment under the BIT. Moreover, it arises out of an ordinary commercial contract and cannot be qualified as "crystallization" of investment. Finally, no complex operation was carried out to level the Awards to protection under the BIT.
33. **Merits** Firstly, the Respondent's conduct in part of promulgation of the IP Law and granting the license was BIT consistent. TRIPS provisions could not be invoked as relevant interpretational context of the BIT. The Claimant has no standing to argue TRIPS application due to special jurisdiction of the DSB. TRIPS consistence of Respondent's conduct could not be estimated through umbrella clause. The promulgation of law and grant of license fall in the scope of Mercuria's police powers. It has legitimate aim to protect public health, measures were proportional. The regulation was motivated by public need and done in good faith.
34. Alternatively, the Respondent's acts are complied with FET standard. Nothing from Respondent's conduct could be estimated as specific representation about assurances of Claimant's affair's interests. Other requirements of FET standard are also met. Even with TRIPS implementation, the Respondent acted in compliance with its standards. The compliance with TRIPS standards automatically results in the BIT compliance. The Respondent submits that all the requirements of the IP protection under TRIPS, precisely Article 31 TRIPS are met. Due to the national healthcare crisis, the preliminary negotiation process with the Claimant was not binding. The Claimant was notified and was proposed an adequate remuneration. The consequent humanitarian aid falls out of the scope of Articles 31(f) and 31Bbis of TRIPS.
35. Secondly, the conduct of Mercurian judiciary in relation to the enforcement of the Award did not constitute violation of the BIT standard. The Claimant is entitled only to denial of justice guarantee and it was provided. The hearings were conducted in due manner.

Transfer of application was legitimate. Finally, denial of justice threshold was not reached.

36. Finally, termination of the LTA by NHA does not amount to the violation of Article 3(3) of the BIT (umbrella clause). Actions of NHA are not attributable to the Mercuria, neither under ILC Articles, nor under rules of representation. Alternatively, the Respondent acted as a merchant, while entering and terminating the LTA. In any event, LTA dispute resolution clause renders umbrella clause inadmissible.

ARGUMENTS

I. ATTON BORO LOST THE STATUS OF INVESTER WHEN THE BENEFITS WERE EFFECTIVLY DENIED

37. Mercuria sucessfully invoked the denial of benefits clause under Article 2(1) of the BIT. Thus the Tribunal lacks jurisdiction to hear the claim because the Claimant is not a investor. In the present case denial of benefits clause establishes jurisdiction, but not admissibility as in cases under the Energy Charter Treaty. The BIT, unlike the ECT, does not separate substantive and procedural rights.
38. Both [**A**] substantial and [**B**] procedural requirements of Article 2(1) of the BIT are met.

A. THE REQUIREMENTS OF DENIAL OF BENEFITS CLAUSE TEST ARE MET

39. The substantial requirements of the denial of benefits clause are satisfied. Firstly, [**1**] Atton Boro is wholly controlled by nationals of a third state. Secondly, [**2**] Atton Boro is not managing any substantial business activities in the territory of the Contracting Party.

1. Atton Boro is controlled by nationals of a third state

40. The Respondent submits that Atton Boro is wholly controlled by a Reef holding company Atton Boro and Company, a third state to the BIT.
41. Under Article 2(1) of the BIT treaty protection can be denied for the entrepreneur, which would normally be qualified as an investor under Article 2(1) of the BIT, but in fact is controlled or owned by nationals of a third state. The tribunal in *Aucoven*[1] when establishing the criteria of control found that majority shareholdings would normally imply the existence of control. Consequently, the sole shareholder would definitely satisfy the test.
42. In the present case, Atton Boro is incorporated in Basheera, but is funded and ultimately controlled by primary holding company, Atton Boro and Company.[2] The Claimant may argue only immediate control (Atton Boro Group) or natural persons nationality is relevant. Yet, in a situation with multiple affiliates[3] finally held by one company only the final company in the corporate structure, holding company (Atton Boro and Company), would satisfy the control requirements. Holding company is considered a parent company, which exists for the sole purpose of controlling other companies.

[1] Aucoven,§39.
[2] Record,¶48,§1510.
[3] Record,¶28,§859.

43. A state considers a legal entity its national for purposes of diplomatic protection when it is incorporated in the state.[4] The holding company of the Claimant is incorporated in Reef, and, thus, is considered to be its national.[5] Reef is a third State towards the BIT signatories. Third state is any state that is not a Contracting Party to the treaty. Therefore, the Claimant is controlled by nationals of a third State.

2. Atton Boro has no substantial business activities in the territory of Mercuria

44. The Respondent submits that Atton Boro is a shell company, with no substantial business activities in the territory of Mercuria.
45. The Respondent agrees Atton Boro has certain activity in Basheera. Yet, his activities are not substantial. No shrewd entrepreneur will set up an obvious "*shell*" company, existing only on papers, in view of Article 2 of the BIT and the emerging trend to deny treaty benefits to mailbox companies in arbitral practice.[6]
46. The term "*substantial*" is normally defined as "*of real worth or importance, significant and having substance*".[7] Atton Boro possesses primitive attributes of business activities, such as an office space, minimum number of employees and compliance with tax obligations, though it is not enough to qualify them as substantial.
47. Additionally, activities of a company are substantial when *(i)* it

> is engaged in buying, selling and contracting in the territory of the country of incorporation, beyond the normal activities or functions, required merely by the fact of its corporate existence;[8]

48. *(ii)* and when a country of incorporation is "*a place where the board of directors meet*".[9] Neither is present in the case at hand.
49. Atton Boro Limited is a vehicle for managing its portfolio of patents registered in the regions outside its place of incorporation, in South America and Africa.[10] The Claimant is not launching its production in the local market, has no selling activities. He only manages portfolio patents as well as provides further patent-related support to its clients abroad.[11] Furthermore, the need for economic connection to the state on whose nationality a company relies is the main feature of a denial of benefits clause.[12] Atton Boro lacks such

[4]Barcelona Traction,§88.
[5]Guide,¶86.
[6]Pac Rim,§4.78; Rurelec,§370.
[7]Black's Law Dictionary.
[8]Jagusch,¶20.
[9]Pac Rim,§4.72.
[10]Record,¶28,§860.
[11]Record,¶48,§1514.
[12]Dolzer/Schreurer,¶55.

connection with the state of incorporation – Basheera. It was funded to set up the manufacturing unit in Mercuria and to perform the agreements it entered into with the NHA.[13]

50. Therefore, Mercuria has a right to deny BIT protection to Atton Boro.

B. MERCURIA CORRECTLY EXERCISED ITS RIGHT TO DENY THE BENEFITS OF THE BIT

51. The right to deny treaty benefits was exercised lawfully by the Respondent. [**1**] All the procedural criteria of denial of benefits clause are satisfied and [**2**] no legitimate expectations of the Claimant may be deemed violated.

1. The procedural requirements of the denial of benefits clause are met

52. The denial was made *(i)* affirmatively, *(ii)* timely, and *(iii)* did not affect legitimate expectations of the Claimant.

(i) The Respondent affirmatively denied treaty benefits

53. To effect denial, the State must exercise the right affirmatively. Under Article 2(1) of the BIT "*each Contracting Party reserves the right to deny the advantages of this Agreement*". To determine whether this provision demands any action from the State, the "*ordinary meaning*" of the term "*reserves the right*" needs to be considered, per guidance of the VCLT applied as custom.[14] In *Plama* case the tribunal, guided by the same rules, interpreted the term as "*unambiguous*".[15] The tribunal underlined the distinction between the existence of a right and the exercise of that right. It stated:

> a Contracting Party has a right to deny a covered investor the advantages; but it is not required to exercise that right; and it may never do so.[16]

54. Thus, the right in Article 2(1) of the BIT is of reserved type. Mercuria affirmatively exercised its right when invoked Article 2(1) in Response to the Notice of Arbitration.[17]

(ii) The denial is "activated" timely

55. The Respondent timely invoked the denial of benefits clause.
56. According to Article 23(2) of the PCA Arbitration Rules[18] the Respondent may raise objections to the jurisdiction in its Statement of Defense. The same provisions are present in UNCITRAL Arbitration Rules,[19] applied by tribunals in *Rurelec*[20]and *Ulysseas*[21] cases.

[13]Record,¶50,§1572.
[14]VCLT,§31(1), Saldarriaga,¶198.
[15]Plama,§155.
[16]Plama,§155.
[17]Record,¶16,§477.
[18]PCA Rules,§23(2).
[19]UNCITRAL,§21(3).

The tribunals came to the conclusion, that the clause does not prevent a State from *"activating"* the clause after an investor had sought benefits of the treaty through a request for arbitration.[22]

57. The very purpose of the denial of benefits clause is to empower the Respondent to withdraw the BIT's benefits to investors who have already invoked those benefits.[23] Mercuria invoked the denial at the point of submitting its Statement of Defense, thus, complied with the time period set in PCA Arbitration Rules. Thus, the benefits of the Claimant were denied in time.

(iii) Prior notification is not required to exercise the right to deny

58. The Respondent was not required to notify the Claimant in advance to deny it from benefits of the BIT.
59. In *Rurelec* case the tribunal reasoned that it would be "*odd*" for a State to examine whether an investor fell within the scope of a denial of benefits clause before a dispute arose. The fulfillment of the requirements by an investor is not static and can change from one day to the next. Only when a dispute arises the respondent State will be able to assess whether such requirements are met and decide whether it would deny the benefits of the treaty in respect of that particular dispute.[24] Contrary, as stated in *Yukos* case "*would impose an impossible standard for States*".[25] It appears impracticable for a State to constantly monitor every single investor.
60. Thus, the Respondent was able to invoke denial of benefits clause only by the time the benefits were claimed, without being obliged for any prior notification.

2. No legitimate expectations of the Claimant are affected

61. Legitimate expectations of the Claimant to enjoy the advantages of the BIT may not be deemed violated.
62. An agreement or a promise generates a certain level of expectations, known as legitimate expectations.[26] The Tribunal in *Ulysses* case noted that "*the possibility of a denial of benefits is known to an investor at the time of the investment*".[27] The Tribunal in *Rurelec*

[20]Rurelec,§382.
[21]Ulysseas,§172.
[22]Ulysseas,§172.
[23]Rurelec,§376.
[24]Rurelec,§379.
[25]Yukos,§451.
[26]Muchlinski.
[27]Ulysseas,§173.

case confirmed that "*one cannot say that such a denial will come as a total surprise for the investor, since the BIT is not secret*".[28]

63. From the very moment of making an investment under the BIT, the Claimant simultaneously accepted the risk envisaged in Article 3(3) of the BIT. The offer of the state to arbitrate is subject to reservation known to investor. Hence, no legitimate expectations are affected by the denial of benefits.

II. THE TRIBUNAL LACKS JURISDICTION OVER THE ENFORCEMENT PROCEEDINGS OF THE AWARD

64. The present Tribunal has jurisdiction over disputes arising out of or in relation to the BIT.[29] Article 3 of the BIT, the alleged breach of which is at issue, grants protection only to investments. Thus, only disputes concerning investments constitute jurisdiction *ratione materiae* of the Tribunal.

65. The Respondent submits the Tribunal lacks jurisdiction in relation to the enforcement proceedings of the Award as: **[A]** Arbitral award is not an investment itself; **[B]** Award cannot be qualified as a crystallization of investment.

A. ARBITRAL AWARD CANNOT BE QUALIFIED AS AN INVESTMENT ON STANDALONE BASIS

66. The Award is not an "*investment*" under Article 1(1) of the BIT. Even if it could be deemed "*claims to money*", or a non-defined asset Award still does not fall under the general definition of investment.[30] The Award does not satisfy the notion of "*investment*", because it lacks both [**1**] legal requirements expressly provided in the BIT and [**2**] implicit requirements of the investment.

1. The Award does not satisfy explicit requirements under the BIT

67. The legal criteria are defined in the BIT directly, both in its Article 1(1) and in its Preamble.

68. Article 1(1) of the BIT requires the asset to be held in "*in the territory of the other Contracting Party"* to be an investment.

69. The Respondent does not dispute the Award is an asset held by Atton Boro. Yet, it lacks territorial link with Mercuria.

70. The parties explicitly included territorial requirement in the definition of investment. Only assets within jurisdiction of the host state may be accorded particular treatment. Tangible

[28] Rurelec,§383.
[29] Record, ¶36, lines 1142-1143.
[30] Romak, §207; Salini, §52; Douglas, ¶163.

types of assets will satisfy territorial requirement when located in the host state.[31] Localization of claims to money is a more complex issue. While a debt may have *situs* at the residence of the debtor,[32] the *situs* to right to recover damages is wherever it may be enforced.[33]

71. In *GEA* case the tribunal confirmed award was not an investment as it was enforced outside the place of issuance.[34]
72. The Award, obtained by the Claimant, does not satisfy territorial link requirement for two reasons. Firstly, it is rendered by the tribunal sited in Reef.[35] The Respondent had no control over proceedings now questioned as undermining its public policy. Secondly, the Award has a wider enforceability.[36] The Award can be enforced in any other state, signatory to New York Convention. Thus, it does not have necessary territorial connection with the Respondent.
73. Hence, the Award does not meet territorial link requirement.

2. The Award lacks inherent characteristics of investment

74. The arbitral award cannot be qualified as "*investment*" within the general meaning of the term.
75. An asset (even the listed one) that is an investment should be distinguished from a purely commercial asset. As the *Joy Mining* tribunal explained:

> …if a distinction is not drawn…the result would be that any sales or procurement contract involving a State agency would qualify as an investment.[37]

76. The contour of the term "*investments*" is established in the legal doctrine and jurisprudence. It includes the following cumulative[38] characteristics: *(i)* a contribution *(ii)* that extends over a certain period of time and *(iii)* involves some risk.[39]
77. This inherent meaning is irrespective of the application of the ICSID Convention.[40] The Claimant may argue ICSID jurisprudence is not applicable as they define the term in light of the jurisdictional requirements imposed by Article 25(1) of the ICSID Convention. However, Parties to the BIT agreed on ICSID as one of the competent forums the investor

[31]Douglas, ¶171.
[32]Rabel, ¶¶3–8, ¶¶14–16.
[33]Rogerson, ¶459.
[34]GEA, §161.
[35]Record, ¶30, line 932.
[36]Mistelis, ¶9.
[37]Joy Mining, §58.
[38]Malaysian Salvors, §85.
[39]Salini, §52; L.E.S.I-DIPENTA, §13(iv); Pey Casado, §231.
[40]Romak, §207.

may choose.[41] The substantive protection offered by the BIT cannot be narrowed or widened merely by virtue of a choice between the various dispute resolution mechanisms. It would be both "*absurd*" and "*unreasonable*".[42] Moreover, as was stressed by Prof. Douglas, the use of the term "*investment*" in both instruments (in Article 25 of the ICSID Convention and an investment treaty) imports the same basic economic attributes of an investment derived from the ordinary meaning of the term.[43]

78. Due to its nature, arbitral award is "…*a judgment with a transnational effect*…"[44] an instrument which is a bearer of legal rights.[45] In itself, arbitral award does not involve contribution to, or relevant economic activity within the territory of the host State.[46] Award cannot provide financial or other type of contribution in the territory of the Respondent and there has been no assumption of risk in expectation of commercial return in order to be qualified as an investment under the BIT.
79. To conclude, the Award does not meet requirements of investment in its inherent meaning.

B. ARBITRAL AWARD CANNOT BE QUALIFIED AS "CRYSTALLIZATION" OF INVESTMENT

80. Alternatively, the Claimant may argue Award should be deemed as a "*crystallization*" of investment. Yet, it is not the case, as firstly, [**1**] the Award does not arise out of original investment, and secondly, [**2**] the Award arises out of an ordinary commercial contract. Thus, the Tribunal lacks jurisdiction to hear the claims in relation to the Award.

1. Crystallization concept is not applicable to the present Award

81. The Award did not crystallize out of an investment. The claim to damages, appointed by the Award, is a separate new claim to money, not related to the LTA.
82. Crystallization of rights embodied in an arbitral award means a reference to the original source, where these rights firstly were determined.[47]
83. However, claim to damages was not determined in the LTA. It is a new claim emerged and affirmed in the Award due to unilateral termination of the LTA. Thus, the LTA cannot be deemed as an original source of claim to damages and the Award did not crystallize the LTA parties' rights and obligations, and consequently, any other Claimant's acts.

2. Alternatively, the Award arises out of an ordinary commercial contract

[41]Record, ¶36; lines 1148-1157.
[42]Romak, §194.
[43]Douglas, ¶165.
[44]Mistelis, ¶9.
[45]Petrobart, ¶71.
[46]GEA, §162.
[47]Saipem, §127.

84. If the Tribunal considers the Award is crystallization of rights under the LTA, the Respondent states that the LTA is a commercial contract – the sale of goods – and thus is not an investment.
85. Commercial transactions are not investments when they are ephemeral, speculative (in the sense that a profit will be realized with little or no sacrifice from the foreign actor), or eminently predictable in outcome, like a sale of goods.[48] Simple sale of goods is often cited as an example of a transaction that clearly is not an investment.[49]
86. The *Joy Mining* tribunal ruled upon the sale contract that the termination of the contract[50] risk is a normal commercial risk not sufficient to be qualified as investment risk.
87. The need to distinguish ordinary sales contract and an investment is evident,[51] while the failure would inevitably qualify any sales or procurement contract involving a State agency as an investment.[52]
88. In the present case, the LTA merely obliges Atton Boro to supply Sanior and the NHA to purchase Sanior by periodically placing purchase orders.[53] At the same time, the parties did not assume any other obligations to protect the Claimant's deliveries. Therefore, the Award arises out of an ordinary commercial contract and is not a change in the form of investment.
89. To conclude, the Tribunal lacks jurisdiction in relation to the enforcement proceedings of the Award.

C. ENTIRE OPERATION CONCEPT HAS NO EFFECT TO LEVEL THE AWARD TO PROTECTION UNDER THE BIT

90. The Respondent avers that entire operation concept (referred to also as "*whole*", "*overall*", "*complex*" operation) has no effect in the present case.
91. The Claimant may argue that Award, the LTA, patent and manufacturing unit for Sanior together could be considered correlated elements of one complex operation for the purpose of qualification of investment. Hence, this whole operation should be evaluated on compliance with criteria of investment, enshrined in the BIT.[54] However, the tribunals applied the whole operation approach when different operations, which further were included in the complex investment, were closely interrelated with the base contract

[48]Rubins, ¶309.
[49]Shihata/Parra, ¶308.
[50]Joy Mining, §57.
[51]Fedax, §28; Global Trading, §56.
[52]Joy Mining, §58.
[53]Record, ¶29, line 896.
[54]Saipem, §110; ATA, §115; White, §7.6.10.

between investor and host state. For example, in *Saipem* case the tribunal qualified as an overall operation the construction contract, construction itself, the retention money, the warranty and the related ICC arbitration.[55]

92. Yet, in the present case the manufacturing unit and the patent are not strongly related to the LTA.
93. Decision to establish the manufacturing unit in the territory of Mercuria was dictated by economic expediency and is covered by Atton Boro's own business decision and risk. There was no bar for the Claimant to deliver Sanior directly into Mercuria from the outside.
94. The Mercurian patent was obtained by Atton Boro Group in 1998 as a part of the campaign to get patent protection internationally.[56] It happened six years before the conclusion of the LTA.[57] Thus the patent was not received in specific purposes of the LTA.
95. Hence, manufacturing unit and patent are not strong related to the LTA and do not group in one complex operation.
96. To conclude, the claims in relation to the Award are not covered by the BIT.

III. THE RESPONDENT ACTIONS TOWARDS THE INVESTMENT ARE BIT CONSISTENT

97. Adoption of Law No. 8458/09 and issuance of compulsory license to HG-Pharma are BIT consistent. All the alleged violations raised by the Claimant are unfounded as far as any level of investor protection set by any correlation between the BIT and TRIPS is complied with.
98. The Respondent [**A**] complied with the standard of investor treatment envisaged in the BIT, which is the only source of law applied for establishing the legality of enactment of Law No. 8458/09 and grant of the license. Alternatively, [**B**] the Respondent observed the standard of investor treatment set by both the BIT and applicable international conventions, in particular TRIPS.
99. The application of Paris Convention for Protection of Industrial Property is redundant as far as the standard of investor protection envisaged in TRIPS is higher because it provides specific criteria for the enactment of compulsory license.[58]

[55] Saipem, §110.
[56] Record, ¶29, line 858.
[57] Record, ¶29, line 894.
[58] Paris Convention, §5(A)2; TRIPS, §31.

A. BIT'S STANDARD OF INVESTOR TREATMENT IS ENOUGH AND COMPLIED WITH

100. The BIT establishes the standard of investor protection. This standard [1] should be applied exclusively and in isolation from TRIPS. Additionally, the standard [2] was observed by the Respondent.

1. The BIT should be applied exclusively and in isolation from TRIPS

101. The Claimant could (**i**) neither rely on Article 31 of the VCLT (**ii**) nor rules of applicable law in order to invoke TRIPS provisions. Additionally, (**iii**) umbrella clause does not cover potential violation of international obligations of a state.

(i) The BIT interpretation through Article 31 of the VCLT does not cover TRIPS

102. The Claimant may argue the BIT substantive standards when interpreted should encompass the TRIPS standards of IP protection. Yet, TRIPS is incorporated neither through interpretation (a) in light of the BIT's object and purpose under Article 31(1) of the VCLT, nor (b) as a relevant rule under Article 31(3)c of the VCLT.

(a) Article 31(1) is not applicable

103. Interpretation of the BIT through object and purpose of the treaty does not cover TRIPS provisions.

104. Under Article 31(1) of the VCLT "*a treaty shall be interpreted … in the light of its object and purpose".*[59]

105. The preamble is where the object and purpose may be sought.[60] However, the interpretation should not lead to "legislation" or the revision of a treaty.[61]

106. The resort to the Marrakesh Agreement in the BIT preamble should not be viewed as one authorizing the interpretation of the BIT's provision leading to legislation or, in other words, filling the provisions with inherently new meaning. Article 3(2) of the BIT establishes the standard of investor protection that is enough by itself for the assessment of alleged BIT's violation. The complication of the BIT standard with TRIPS provisions of IP protection would lead to evident legislation of a different BIT standard.

107. Thus, the resort to object and purpose of the BIT does not provide access to TRIPS provisions.

(b) Article 31(3)c is not applicable

108. TRIPS is not a relevant agreement under Article 31(3)c of the VCLT.

[59]VCLT, §31(1).
[60]Villiger, ¶428.
[61]Ibid.

109. Under Article 31(3)c of the VCLT

> any relevant rules of international law applicable in the relations between the parties shall be taken into account with the context for the purposes of interpretation[62].

110. The rules will have to be relevant, that is concern the subject matter of the treaty term at issue.[63]

111. The subject matter of TRIPS is protection of IP rights.[64] The Claimant may argue that Article 31 of TRIPS could be invoked in the present dispute. However, TRIPS is not intended for investor protection.[65] It is intended for protection of a right holder,[66] namely holder of a patent in the sense of Article 31 of TRIPS. The subject matter of Article 3(2) of the BIT is protection of investors. Consequently, the subject matters are different.

112. Thus, the resort to relevant rules of international law does not provide access to TRIPS provisions.

(ii) The Claimant lacks standing to rely on TRIPS as applicable law to the current proceedings

113. The Claimant may argue it has standing to invoke provisions of TRIPS, in particular, Article 31. However, application of TRIPS in investment dispute is eliminated due to exclusive jurisdiction of the DSB.

114. Any dispute based on the violation of the WTO rules can only be dealt with by the DSB authorized to deal with the disputes between the WTO Members.[67]

115. Under Article 3(2) of the DSU

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.[68]

116. The DSB is a specialized institution with the deliberate aim to solve disputes arising out of the WTO Conventions violations. The WTO Dispute Settlement forum was designed to be the sole forum to adjudicate non-compliance of agreement such as TRIPS.[69] TRIPS is an agreement imposing obligations on states[70] to "*give effect to the provisions of this Agreement*".[71] Only DSB has an authority to interpret provisions of

[62]VCLT, §31(3)c.
[63]Viliger, ¶433.
[64]TRIPS, preamble.
[65]Sornarajah, ¶265
[66]TRIPS, preamble.
[67]ECLAC, ¶1
[68]DSU, §3(2).
[69]Bossche, ¶161
[70]Panel Report, §7.513.
[71]TRIPS, §1(1).

TRIPS[72] and deal with the disputes arising out of it. Consequently, TRIPS falls out of Tribunal's jurisdiction.

117. To assess the Respondent's behavior in light of TRIPS provisions the Claimant may induce its government to initiate the WTO mechanism of dispute settlement.

118. To conclude, the Claimant has no standing to induce the Tribunal consider TRIPS as applicable law to establish violation of investor treatment standard set by the BIT.

(iii) TRIPS could not be invoked through application of the umbrella clause

119. Umbrella clause envisaged in Article 3(3) of the BIT does not cover obligations of Mercuria under TRIPS. Thus, TRIPS could not be invoked by the Claimant on this ground.

120. Under Article 3(3) of the BIT:

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

121. To be protected under this clause the obligation should be made *with regard to investments of investors.* Thus, a certain link between the state's obligation and the investment should exist.

122. In the present case, Mercuria became the WTO member prior to signing the BIT.[73] Hence, Mercuria entered into TRIPS for the purposes IP rights protection itself without any regard to the investments under the BIT.

123. Thus, umbrella clause could not be invoked to apply TRIPS.

2. Enactment of the Law No. 8458/09 in combination with the grant of the license are BIT consistent

124. Mercuria's acts do not constitute any infringements of the protections guaranteed to the Claimant under the BIT. Mercuria legally promulgated the Law No. 8458/09 and granted license to HG-Pharma [**1**] acting within the scope of its police powers. Alternatively, Mercuria [**2**] complied with FET standard and [**3**] observed Article 6(2) of the BIT.

(i) Mercuria acted within the scope of its police powers

125. Promulgation of the Law No. 8458/09 and the subsequent license issuance falls within the scope of regulatory powers of Mercuria.

126. Each state has inherent right to determine its own legal and economic order.[74] However, to be within the police powers,

[72] Subedi, ¶265.
[73] Record, ¶32, §985.

> a reasonable relationship of proportionality should be present between the weight, imposed on the investor and aim sought to be realized by measure.[75]

127. The states are not liable to pay compensation for bona fide exercise of their regulatory powers, carried out in non-discriminatory manner, with legitimate purpose,[76] carried out in due process.[77]

128. In the present case, the Law No. 8458/09 adoption and grant of the license sought to achieve (a) legitimate aim, (b) was proportional, (c) carried out in non-discriminatory way, (d) in due process, and (e) good faith.

(a) legitimate aim

129. Mercuria's goal to protect public health through promulgation of the Law No. 8458/09 and its realization (grant of the license) is a legitimate governmental aim.

130. Protection of public health is a vital concern of the state and could be invoked as a ground authorizing public license.[78] In *Methanex* case, USA successfully argued that a measure that was intended to protect the health is a legitimate purpose for exercising police powers.[79] Additionally, under Article 12 of ICESCR state has obligation of comparable priority to take measures to prevent, treat and control epidemic and endemic diseases.[80]

131. In the present case, Mercuria conditioned license issuance under the Law No. 8458/09 with the public concerns, in particular, non-availability of the patented invention at a reasonable price.[81] In the situation of drastical increase of the estimated cases of greyscale in 2006[82] and actual growth of patients in 2007[83] Mercuria, in 2009, was forced to promulgate the Law No. 8458/09 and issue a license in order to enhance affordability of Sanior among the people whose survival[84] is dependent upon state's conduct. Thus, Mercuria fulfilled its obligations under ICESCR to protect the health of its citizens.

132. Thus Mercuria pursued legitimate governments aim to provide Sanior for its citizens in order to combat public health crisis.

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[74]Dolzer, ¶146
[75]Tecmed, §122.
[76]Saluka,§252; Kingsburry/Schill, ¶35.
[77]El Paso,§240.
[78]Sauvant, ¶458; Gibson, ¶458
[79]Methanex, §7, §15.
[80]ICESCR, §12.
[81]Record, ¶30, §945.
[82]Record, ¶42, §1327.
[83]Record, ¶29, §916.
[84]Record, ¶43, §1359.

(b) proportionality

133. Measures taken by Mercuria are proportionate to the legitimate aim of public health protection.

134. Following *Tecmed* tribunal reasoning, to be proportionate weight imposed by the measure on the rights of investor should be in reasonable relationship with the importance of aim sought to be achieved by the state.[85]

135. The public health concern is generally recognized consideration for the existence of the state.[86] The importance of the public health protection, especially during the crisis, is undisputable. The interest of protection should override the investor's interest of making profit if existence of the state is at issue.

136. More than every hundredth person in Mercuria was estimated to be affected by greyscale.[87] The number of patients which depended solely on public health schemes increased ten times from 2005 to 2006.[88] In 2007 the order value for Sanior doubled with each quarter, as the number of patients coming into care grew.[89] Consequently, by 2009 approximately 3,2 million people out of 67 million people were affected by the disease. In Kenya the situation was even less harsh when the officials declared the state of public health crisis towards the HIV/AIDS: 1,2 million were affected out of 34 million people.[90] The total cost of 1-year treatment of Sanior was approximately 10,000 US $. The average GDP per capita in the world in 2008 was 9,371 US $.[91] Thus it was impossible for the people of Mercuria to afford the medicals crucial for their survival. Consequently, Mercuria conduct was aimed at raising the affordability of drugs. Moreover, the measures taken should be stopped as soon as the threat to public health in Mercuria decreases, namely if the spread would be stopped and controlled.[92]

137. Thus, the Law No. 8458/09 adoption and the subsequent license issuance was the reasonable and proportional response to the public health crisis.

(c) non-discrimination

138. Mercuria's conduct was carried out in non-discriminatory way.

[85]Tecmed, §122.
[86]Christie, ¶338.
[87]Record, ¶42, §1342.
[88]Record, ¶43, §1359.
[89]Record, ¶29, §916.
[90]WTO Kenya.
[91]GNI per capita.
[92]Record, ¶30, §951.

139. A state measure will be discriminatory if it results "*in an actual injury to the alien ... with the intention to harm the aggrieved alien*" to favour national companies.[93] Discrimination appears, when measures directed against a particular party are motivated by reasons unrelated to the substance of the matter.[94]

140. The promulgation of the Law No. 8458/09 adopted by Mercuria was aimed at the granting of the non-voluntary licenses on the patent on the grounds equal to all the interested persons.[95] Mercuria was combatting against several severe diseases at that time.[96] The promulgation of the Law No. 8458/09 and grant of the license to HG-Pharma were aimed at protection of public health. Consequently, there was no intention to harm Atton Boro directly.

141. Mercuria's conduct was exercised on non-discriminatory basis.

(d) due process

142. The Law No. 8458/09 adoption and the license issuance were carried out in due process.

143. Due process is undermined when there is a "*complete lack of transparency and candour*".[97]

144. On 10 October 2009, the President of Mercuria promulgated the Law No. 8458/09. The Amendment was officially published in the Government Gazette.[98] The license under a new Law was granted on 17 April of 2010 whereas the application was filed before the High Court in November 2009. The process took more than five month, which may already be too long in the shortage of available drugs for the people of Mercuria. The High Court should have issued a license as fast as possible for the protection of people who depended solely on the government's public health schemes. The official publication and more than five months process do not amount to complete lack of transparency and candour.

145. Mercuria acted in due process.

(e) good faith

146. Mercuria acted in good faith when promulgated the Law No. 8458/09 and issued a license.

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[93]Dolzer/Stevens, ¶62.
[94]Bishop, ¶1090.
[95]Record, ¶44, §1399.
[96]Record, ¶29, §904.
[97]Waste Management, §98.
[98]Record, ¶44, §1375.

147. Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created[99] and in the situation of an "*objective disregard of the rights enjoyed by the investor*".[100]

148. In the case at hand Mercuria promulgated the Law No. 8458/09 and issued the license with the sole aim to protect public health. There was no disregard of investor's rights as far as the conduct was proportional, non-discriminatory and exercised in due process.

149. Thus Mercuria acted in good faith.

(ii) Mercuria did not violate FET

150. The Claimant may argue Mercuria failed to provide fair and equitable treatment to the investor. Yet, the relevant elements of FET are fully complied with by Mercuria, namely, (a) legitimate expectations, (b) discrimination, (c) due process and (d) good faith.

(a) Legitimate expectations

151. Legitimate expectations are established at the time when the investment was made[101] from the objective and reasonable point of view.[102] Expectations are protected only if they are legitimate and reasonable in the circumstances.[103] General instability in the political conditions of the country should lead to reduction of legitimate expectations.[104] At the same time, only the specific representations and promises made by the State to the investor may give the latter right to rely on a BIT as a "*kind of insurance policy against the risk of any changes in the host State's legal and economic framework*".[105]

152. In the present case, the Claimant made the first investment (patent) on 21 February 1998.[106] At that time Mercuria has already been fighting the serious diseases, in particular, greyscale.[107] Atton Boro is a professional in the field of pharmacology doing its business for decades;[108] while Mercuria is a developing country.[109] Such developing country as South Africa,[110] for instance, issued a national legislation for issuance a compulsory license in 1997. In 1995 the compulsory license for drugs was issued in 1997 in Israel.[111]

[99]Dolzer/Schreurer ¶157.
[100]Dolzer/Schreurer, ¶158.
[101]National Grid, §173.
[102]Suez, §209.
[103]Dolzer/Schreurer, ¶187.
[104]Bayindir, §192–7.
[105]EDF, §217.
[106]Record, ¶28, §858.
[107]Record, ¶41. §1301.
[108]Record, ¶4, §106.
[109]Record, ¶17, §511.
[110]World Economic Situation and Prospects, 2014.
[111]KEI Research, ¶18

Thus, the legitimate expectations of the Claimant no changes in legal framework of Mercuria would occur should have been reduced. Furthermore, as a WTO member Mercuria is entitled to grant compulsory licenses upon certain conditions. The Claimant could reasonably presume such changes would sooner or later occur in Mercuria's legislation.

153. Mercuria made no specific promises or representations to Atton Boro. To generate expectations, the unilateral assortation should be narrow and specified.[112] In the *Continental Casualty* case, the tribunal marked that "*political statements have the least legal value, regrettably but notoriously so".*[113]

154. The Mercuria's President tweet and the Minister's for Health statement contained no concrete assurances about patent's future regulation with regard to Claimant's business interests. Furthermore, the President's tweet is not an official representation made on the behalf of Mercuria. The President did not act in its official capacity. Thus the Claimant as a prudent investor should have foreseen that there could be a health crisis in the developing state and further changes in the legal framework of Mercuria could be made.

155. Therefore, Mercuria acted in accordance with objective legitimate expectations of the investor and acted fairly and equitably.

(b, c, d) discrimination, due process, good faith

156. Furthermore, Mercuria's actions were carried out in non-discriminatory way, in due process and bona fidae.[114]

157. Thus, FET standard set in the BIT is complied with by the Respondent.

(i) Mercuria did not expropriate Claimant's investment

158. Promulgation of the Law and grant of the non-voluntary license do not amount to indirect expropriation of Atton Boro investment.

159. Under Article 6(4) of the BIT

> non-discriminatory measures that are designated and applied to protect public health do not constitute indirect expropriation.

160. The non-discriminatory exercise of police powers by Mercuria was proved above.[115]

161. Thus Mercuria's conduct is consistent with Article 6(4) of the BIT.

[112]Mejia, ¶116.
[113]Continental, ¶261.
[114]See Section III.A(2)i above.
[115]See Section III.A(2)i above.

B. ALTERNATIVELY, EVEN IF THE RESPONDENT'S ACTIONS SHOULD CORRESPOND TO THE TRIPS STANDARDS THE BIT IS STILL COMPLIED WITH

162. If the Tribunal finds the TRIPS relevant, still Mercuria's actions are consistent with the standard set by both TRIPS and the BIT.

163. The Claimant may argue that violation of TRIPS' provisions automatically equates to violation of the BIT as far as these agreements create the same standard of the investor protection. However, [**1**] Mercuria's conduct is TRIPS consistent. Alternatively, the Claimant may argue that the BIT provides higher standard of the investor protection of TRIPS. Still, [**2**] Mercuria complied with the standard.

1. The Respondent's compliance with TRIPS standard automatically results in the BIT compliance

164. Should TRIPS be applied together with the BIT [i] the standard of investor protection in the BIT should correspond the TRIPS provisions, while [ii] the Claimant complied with Article 31 of TRIPS. Thus no BIT violation occurred.

(i) The BIT standard embraces the TRIPS standard

165. Should the Tribunal follow the Claimant's allegation on the simultaneous application of TRIPS standard of IP protection, namely, Article 31, and the BIT Article 3(2), Mercuria submits the standards should be equated.

166. However, the violation of Article 31 of TRIPS will not lead to violation of Article 6(2) of the BIT as far as Mercuria acted in non-discriminatory way and pursued protection of public health.[116]

(ii) Mercuria acted in accordance with TRIPS

167. Mercuria when granted the license to HG-Pharma observed all conditions under Article 31 of TRIPS. The license issuance was (a) performed on legal grounds; (b) the prior recourse to the Claimant is waived due to the public health crisis; (c) Atton Boro was notified about the proceedings; (d) the duration of patent use is limited; (e) Atton Boro was granted adequate royalty. (f) Article 31 (f) does not prevent the supply of the neighboring states with the patented drugs through humanitarian aid.

(a) The license was granted on legal grounds

168. Under Article 31 of TRIPS state decides on its own what are the grounds for the license issuance.[117]

[116] See Section III.A(2)i above.
[117] TRIPS, §31.

169. The Doha Declaration on the TRIPS agreement and public health, confirmed each member's freedom to determine the grounds upon which non-voluntary licenses are granted.[118]

170. In the present case, Mercuria exercised its right to determine the grounds in the Section 23C of the Law No. 8458/09.[119] The license to HG-Pharma was issued in accordance with the said Section.[120]

171. Hence, the determination of the grounds and the issuance of license itself were performed legally.

(b) HG-Pharma should not have made efforts to obtain authorization from the Claimant

172. Under Article 31(b) user should have made efforts to obtain authorization from the rightholder on reasonable commercial terms and conditions. However, this requirement may be waived by a state in case of a national emergency.[121]

173. It is for each state to decide what constitutes the case of national emergency.[122] There is no obligation of official declaration of crisis under Article 31(b) of TRIPS.

174. In the case at hand, in 2006 the Minister of Health described the situation in the state as a *crisis.*[123] In early 2008 the number of patients Mercuria had to supply doubled.[124] Consequently, at the early 2008 the number of patients depended on public health schemes was approximately 3,2 million people out of 68 million people. This fact evidence the case of national emergency which permits to waive the requirement under Article 31(b).

175. Hence, HG-Pharma should not have made the efforts to obtain the authorization from the Claimant.

(c) the Claimant was notified about the proceedings

176. Under Article 31(b) *"in situations of national emergency … the right holder shall be notified as soon as reasonably practicable"*.

177. In the present case, Atton Boro participated in the proceedings concerning the issuance of license to HG-Pharma.[125] Thus, the Claimant was notified about the use of the patent by

[118]Doha Declaration,§5(b).
[119]Record,¶44, line1390.
[120]Record,¶48, line1522.
[121]TRIPS,§31(b).
[122]Doha Declaration,§5(c).
[123]Record,¶29,line914.
[124] Record,¶29,line917.
[125]Record,¶50,line1576.

HG-Pharma even five months prior. The Claimant could have raised the arguments against the grant of the license because Atton Boro was impleaded as a party.[126]

178. Hence, the Claimant was notified as soon as reasonably practicable.

(d) the duration of patent use by HG-Pharma is limited to the absence of the threat to public health

179. Under Article 31(c) the scope and duration of non-voluntary license use shall be limited to the purpose for which it was authorized.

180. HG-Pharma got the compulsory license until the greyscale was no longer a threat to public health in Mercuria.[127] Thus, the duration of the patent use is reasonably limited. There will be no threat to public health in Mercuria when the disease is successfully controlled. Valtervite is said to prevent disease transmission.[128]

181. Thus, the duration is reasonably limited.

(e) Mercuria's conduct towards the supply of neighboring states with generic is consistent with Article 31(f)

182. Under Article 31(f) the use of the patent shall be authorized predominantly for the supply of the domestic market of the state authorizing such use.

183. This requirement and ones under the Decision of the General Council of WTO towards Article 31(f) of TRIPS deals with the export of the drugs to other state which does not have the manufacturing capacity in the pharmaceutical sector.[129]

184. The term "*export*" implies commercial supply of drugs. The Respondent submits that humanitarian aid toward neighborhood states suffering from greyscale epidemia falls out of the scope of Article 31(f) and 31bis of TRIPS.

185. The humanitarian assistance typically intends to achieve non-political, non-commercial, and non-military purposes[130] in order to "save lives and alleviate suffering of a crisis-affected population".[131]

186. The importance of close international collaboration for achieving universal availability of health innovations was widely highlighted by WHO.[132] At the same times, the international intellectual property law should be involved to prevent their "undue

[126]Ibid.
[127]Record,¶30,§947.
[128]Record,¶50,§1586.
[129]Paragraph 6 protocol.
[130]Reliefweb Glossary.
[131]OCHA Glossary, ¶13.
[132]WHO.

commercial exploitations".[133] The across-boarder movement of essential humanitarian goods for developing countries should be exempted from extensive export restrictions. This approach was supported by World Trade Organization in the context of World Food Programme.

187. The Respondent supplied three neighborhood states with essential medicines[134] to reach the non-commercial healthcare public purpose. Therefore, such activity could not be examined under TRIPS standards.

188. Thus, Mercuria did not violate Article 31(f) of TRIPS.

(f) Atton Boro was granted an adequate remuneration

189. Under Article 31(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.[135]

190. The amount of royalty is determined on the case-by-case basis. A number of countries have issued compulsory licenses on HIV/AIDS drugs with the rates from 0.5 to 2.5 %.[136] Royalty guidelines proposed by Governments[137] set royalties from 0 to 6% of the price charged by the generic competitor.

191. In the present case, Mercuria was dealing with incurable disease which could be compared to the HIV/AIDS. Thus, the established royalty of 1% is adequate in the light of established practice.

192. Hence, the Claimant was granted an adequate remuneration

2. Even if the BIT has higher standard of protection than envisaged by TRIPS, the Respondent complied with it

193. The Claimant may further argue that the BIT provides greater protection for the investors as far as TRIPS set the minimum protection for intellectual property rights and states are encouraged to provide more protection.[138] While Mercuria maintains the standard should be the same, it complied even with the higher standard.

(i) Mercuria did not violate any of FET elements

194. Mercuria's actions were carried out in non-discriminatory way, in due process, bona fidae and in accordance with the legitimate expectations of the investor.[139]

[133] Rimmer, ¶370.
[134] Record, ¶30, §958.
[135] TRIPS, §31(h).
[136] WHO guidelines, ¶5-6
[137] Id.
[138] TRIPS, ¶1.
[139] See Section III.A(2)I above.

(ii) Mercuria did not expropriate Claimant's investment

195. Mercuria acted non-discriminatory when promulgated the Law and issued the license. Thus, Mercuria did not expropriate the investment.[140]

IV. THE CONDUCT OF THE RESPONDENT'S JUDICIARY IS IN FULL COMPLIANCE WITH THE BIT

196. While a state may in principle be liable for the acts of its judiciary, the claim fails in the present case. The Respondent submits that the conduct of its judiciary was directed to ensure the parties' procedural equality and comprehensive consideration of the Award enforcement application. Length of the enforcement proceedings was objectively due.

197. The conduct of Mercurian judiciary does not amount to the BIT violation, because **[A]** the only protection the Claimant is entitled to under the BIT is denial of justice and **[B]** the threshold to establish a breach is not reached.

A. THE ONLY PROTECTION THE CLAIMANT IS ENTITLED TO UNDER THE BIT IS DENIAL OF JUSTICE

198. The BIT provides the standards of treatment to be accorded to investors. The Claimant is indeed protected against denial of justice, but to the extent of FET and/or FPS standard only. The Respondent avers that Atton Boro's claim based on Mercuria's failure to provide effective means should fail. The BIT does not set out effective means provisions triggering a higher standard of protection.

199. To be protected under standard of "*effective means of enforcement*" the latter should be a treaty-based requirement.[141] Mercuria is a developing state with "*overburdened*" judicial system. It would not enter into agreement it could not observe.

200. The parties referred to effective means in the preamble of the BIT. Interpreting Article 3(2) of the BIT under customary rule manifested in Article 31(1) of the VCLT, object and purpose, present in the preamble of the BIT, should be taken into account.[142] Parties declared the importance of providing effective means of asserting claims in the Preamble in order to make it part of the context to a vague standards FET and FPS are, not to make it a separate provision.[143]

201. Furthermore, *Duke Energy* tribunal stated that effective means "*seeks to implement and form part of the more general guarantee against denial of justice*".[144]

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[140] See Section III.A(2)iii above.
[141] Chevron(Partial Award),§242.
[142] VCLT, Article 31(1).
[143] Villiger,¶428.
[144] Duke Energy,§391.

202. The Claimant may argue violation of an unreasonable impairment standard. However, conduct of court in process of adjudication has a special nature. It could only supply the predicate conduct for a denial of justice and not for any other form of responsibility towards foreign nationals.[145]

203. To conclude, the conduct of Mercurian judiciary should not be tested against effective means standard.

B. THE CONDUCT OF MERCURIAN JUDICIARY DOES NOT AMOUNT TO DENIAL OF JUSTICE

204. The Respondent contends the Claimant was treated in full compliance with Article 3(2) of the BIT.

205. According to Article 3(2) of the BIT investments shall be accorded fair and equitable treatment and enjoy full protection and security.[146]

206. The denial of justice is a part of the standards envisaged in Article 3(2) of the BIT, either as FET[147] or FPS standard, the substance of the test being the same.[148] The FPS standard assessed as a guarantee of the physical security of foreigners and their property[149] does not cover denial of justice. Yet, if the FPS standard is "*seen as going beyond mere physical security provision by police forces"*[150] covering the legal protection of investment, the difference between FET and FPS is erased.[151]

207. Denial of justice is a *"manifest injustice ... which offends a sense of judicial propriety".*[152] The Respondent submits the conduct of its judiciary does not amount to denial of justice in form of delay, because **[1]** enforcement proceedings in Mercuria were of reasonable time, **[2]** the transfer of application is legitimate; in any event, **[3]** threshold for denial of justice test is not crossed.

1. Mercurian courts conducted the hearings of enforcement proceedings in due manner

208. No universal temporal limits for making a decision on particular types of cases exists. Thus, delay should be assessed on a case by case basis and could be considered undue only in light of particular circumstances. The tribunal in *Toto* case observed:

[145]Douglas(2), ¶29.
[146]Record, ¶34, lines 1047-1048.
[147]Dolzer/Schreuer, ¶154, Rumeli, §654; Waste Management, §98.
[148]Paulsson's opinion, ¶ 11, § 28.
[149]Dugan/Wallace, ¶ 442.
[150]Walde, ¶452.
[151]Wena Hotels,§§84–95; Occidental,§187; PSEG, §§257–259.
[152]Loewen,§132.

"…*international law has no strict standards to assess whether court delays are a denial of justice*…".[153]

209. Firstly, a period of enforcement proceedings cannot appear as a violation of denial of justice itself. Enforcement proceedings are usually long, taking more than two years.[154] When award faces objection or is subject to setting aside, enforcement proceedigns could be even lengthy[155] and drag on for many years before final resolution.[156] For example, in Nigeria set-aside proceedings were pending for nearly ten years and expert evidence suggested that there may be no decision for another 20 to 30 years.[157] When length of enforcement proceedings was claimed as denial of justice in investment cases even nine[158] and ten years[159] within one instance were not recognized as terms rising to the level violation.

210. Hence, even overall period of seven years proceedings in the present case is neither extreme nor amount to a violation of denial of justice in itself.

211. Secondly, the Respondent submits that the BIT standards should be applied taking into account "expectations" test.[160] The *Tecmed* tribunal substantiated it is the host State's obligation to provide "*treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*".[161] However, it does not mean that legitimate expectations of investor are the same in every recipient state.[162] Every BIT standard is subject to the relevant context lens, including the conditions of state's economy.[163] The Claimant is aware that Mercuria is a developing country with 67 million population and an overburdened judicial system.[164] Atton Boto should have taken into account that the Respondent's judicial system is characterized by delays.

212. Thirdly, the Respondent makes its best efforts to adhere its international obligations under the New York Convention and to react to caseload. Congestion in courts is a valid defence against denial of justice, provided that state promptly and effectively addressed

[153]Toto, § 155.
[154]World Bank Group report, ¶ 3.
[155]Australia: overview.
[156]Sarkodie/Morris.
[157]NNPC's set-aside application.
[158]White, § 10.4.24.
[159]Jan de Nul, § 204.
[160]Gallus, ¶ 713.
[161]Tecmed, § 154.
[162]Gallus, ¶714.
[163]Generation Ukraine, § 20.37.; X, § 155-156; Alex Genin, § 348.
[164]Record ¶17, lines 510-512.

it.[165] Mercuria promptly and effectively reacted to backlog in courts by passing Commercial Courts Act in order to expeditiously dispose of commercial matters.[166] Thus, the Respondent could not be found liable for denial of justice.

2. Transfer of application to a regular bench of High Court does not violate the BIT

213. The Claimant might allege that transfer of enforcement application from Commercial bench to a regular one amount to illegitimate assertion of jurisdiction. However, such transfer is within the powers of proper administration of justice. Application of domestic law is a matter of national courts.[167]

214. International tribunal is not an appellate body. It could not rule on unlawfulness of judiciary conduct, provided such conduct does not surprises the sense of judicial propriety. Except in extreme cases, application of local procedural rules does not violate international law.[168]

215. Transfer of the Claimant's application was a result of a newly passed Commercial Courts Act application. No established practice formed within two years since of its adoption. Two decisions, made by Supreme Court on 12 of April 2012 does not yet constitute practice, deviation from which could be unlawful. Commercial Courts Act was passed just two months prior to the decision, on 10 January 2012.[169] Such short period of time hardly constitutes enough time for judicial law-making to occur. Thus, transfer made within the limits of judicial propriety does not constitute denial of justice.

216. In *Idler* case assertion of jurisdiction was ruled illegitimate, when Supreme Court of Venezuela transferred the matter to inferior court. The latter was located away from the place of original suite and Jacob Idler was not notified about it.[170]

217. The High Court merely transferred the Claimant's application from one bench of the Court to another.[171] Notification of the transfer was published on the official site of High Court and available to the Claimant.[172] Thus, actions of High Court of Mercuria are within the limits of judicial propriety and do not constitute denial of justice.

[165]Chevron (Partial Award), § 264.
[166]Record, ¶30, lines 938.
[167]Paulsson, ¶73
[168]Mondev, § 136.
[169]Record, ¶30, line 938.
[170]Paulsson, ¶ 179.
[171]Record, ¶10, line 308.
[172]Record, ¶10, line 301.

3. In any event, threshold for denial of justice test is not reached

218. The Respondent submits that the threshold for denial of justice is not met.

219. Deference given to judicial authority dictates that only serious shortcomings should result in international responsibility. As stated by the Great Britain-Mexico Claims Commission: "*such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature"*.[173] The test for denial of justice is a stringent one[174] and has a high threshold.[175] Denial of justice could only been claimed *(i)* when there is a total failure of judicial system as a whole and *(ii)* no objective factors affected the length of the proceedings.

(i) The Claimant did not exhaust local remedies

220. The Respondent contends that the Claimant did not exhaust local remedies necessary to test judicial system as a whole and claim violation of denial of justice standard.

221. Exhaustion of domestic remedies requirement is a way of examining system as a whole. Thus, it is a part of denial of justice test.[176] In the wording of Paulsson: "*There can be no denial of justice before exhaustion*".[177]

222. The Claimant did not use all available remedies. Atton Boro neither appealed nor complained on the matter of undue delay. The High Court is not a final instance. It should follow the rulings of the Supreme Court, thus the latter is responsible to the High Court.

223. Therefore, the claim on denial of justice is not substantiated. Mercurian judicial system could not be announced as totally ineffective, because it was not tested through all available means.

(ii) Mercurian courts duly reacted to the specifics of the enforcement proceedings

224. Administration of justice is governed by various factors controlling the length of the proceedings. Investment tribunals[178] followed the same criteria as ECHR is testing reasonableness of time of a proceedings.[179] These include the complexity of the proceedings *(a)*, the need for swiftness *(b)*, the behaviour of the litigants involved *(c)*, the

[173]El Oro, §9.
[174]Mondev, § 127.
[175]Chevron, § 244.
[176]Paulsson's opinion, § 17; Jan de Nul, §§ 255–61; Toto, § 164.
[177]Paulsson, ¶246.
[178]White, §10.4.10; Jan de Nul, §204.
[179]Human rights files, ¶39-66.

significance of the interest at stake *(d)* and the behaviour of the courts themselves *(e).*[180] Acts of Mercurian judiciary should be tested by these criteria.

a. Setting aside proceedings are complex and timely

225. The nature of NHA's objection makes matter in hands complex. The NHA requested the Court to decline enforcement of the Award on the ground that it was contrary to public policy.[181] This ground is listed in Article 5 of New York Convention as a reason for setting aside of application. Public policy is a concept difficult to define.[182] The courts need a higher level of diligence to examine the elusive nature of public policy exception. Invocation of this argument makes the issue of enforcement complex.

b. Adjudication of commercial disputes do not require urgency

226. The Respondent admits every case of alleged violation of rights should be conceded in an efficient manner and within reasonable time. A particular need for the urgent resolution of cases exists in criminal proceedings and applications before human rights courts. However, such considerations do not apply in relation to the purely commercial transactions.[183]

c. The parties excised their procedural right to postpone the proceedings

227. The court is only an adjudicator of the dispute, while the parties are the governors. The parties have procedural rights to lead the case and determine the order of their arguments. Both Atton Boro[184] and the NHA[185] requested suspension of the proceedings several times. Though the NHA did it twice as much, it is a public entity and has more limited resources for legal services than its counterparty in the process.[186] Furthermore, the parties mutually requested for adjournment to resolve the dispute through amicable settlement.[187] Thus, the time of the proceeding was in ultimate control of the parties and they contribute to a protracted process.

[180]Chevron, § 10.4.10.
[181]Record, ¶ 30, line 936.
[182]Arya/Sebastian, ¶157.
[183]White, § 10.4.14.
[184]Record, ¶¶7, 9,10, line 220, 280, 285, 317.
[185]Record, ¶¶7,8,11,12, line 213, 215, 227, 230, 245, 251, 331, 345, 350.
[186]Record, ¶8, lines 237-239.
[187]Record ¶12, lines 350,351.

d. Significance of interests at stake

228. The only interests at stake are monetary interests of the Claimant. A billion corporation with established presence all over the world would not let its subsidiary go bankrupt as a result of USD 40 000 000 payment delay.

e. The High Court duly examined the case and observed procedurals right of the parties

229. The way of administering justice contribute to the length of the proceedings. National laws vest authority in the courts to exercise their discretion while administering justice. Atton Boro and the NHA exercised their procedural rights during proceedings. The High Court duly examined every request of the parties. In order to ensure full and comprehensive examination of the case and procedural equality of the parties the High Court had to grant such extensions. When the NHA had no excuse for its absence, the High Court was ready to react.[188] Within the judicial reform Mercurian courts acted reasonably and interpreted the law in a proper way. Moreover, the case was immediately transferred when the rule of law was clarified by Supreme Court. Therefore, Mercurian courts acted in good faith in administering enforcement proceedings.

230. To conclude, conduct of Mercurian judiciary does not violate the substantive protections of the BIT and Atton Boro's claim should fail.

V. ARTICLE 3(3) OF THE BIT IS NOT VIOLATED BY THE RESPONDENT

231. The Claimant may argue that termination of the LTA amounts to the violation of umbrella clause in the BIT. Yet, Mercuria is not liable under Article 3(3) of the BIT because [**A**] actions of the NHA are not attributable to Mercuria. Alternatively, [**B**] both conclusion and termination of the LTA are purely commercial in nature and thus fall outside the umbrella clause. In any event, [**C**] LTA dispute resolution clause overrides BIT dispute redressal mechanism.

A. NEITHER THE CONCLUSION OF THE LTA NOR ITS BREACH ARE ATTRIBUTABLE TO MERCURIA

232. The Respondent submits that Mercuria is not liable under umbrella clause because [**1**] Mercuria did not enter into the obligation with regard to LTA. The violation under the umbrella clause may only be established if the party to the BIT disregards its obligation[189].

[188] Record, ¶ 9, line 272.
[189] Hamester, §313; AMTO, § § 101, 107–8, 110.

Only a party to the contract can commit a breach of the contract[190]. Thus, Mercuria did not commit a breach of the BIT.

233. The Claimant may still argue that Mercuria is liable under the umbrella clause even if the NHA contracted in its own name.[191] Still, [**2**] the breach of the LTA is not attributable to Mercuria.

1. The NHA contracted in its own name

234. The Respondent submits that Mercuria did not enter into the LTA as far as the NHA contracted in its own name. Thus obligations under the LTA are not attributable to Mercuria.

235. Under Article 3(3) of the BIT each Contracting Party "*shall observe any obligation it may have entered into*"[192].

236. The ILC Articles are not applicable to the assessment whether the state has entered into the obligation.[193] The subject matter of the ILC Articles covers only breach of international obligation; it does not cover the entry into the obligation.[194]

237. The state is a party to the contract when it is represented by a state owned entity.[195] A convincing evidence is needed to establish the governmental involvement in the conclusion [of the agreement].[196] Consequently, the extent to which the host state was involved in the negotiations appears to play a decisive role.[197]

238. In the present case, Mercurian officials did not participate in the negotiation of the LTA.[198] The NHA has contracted in its own name. The Claimant could not have reasonable expectations that it had entered into the agreement with the state through the NHA as representative or that Mercuria intended to become a party to the LTA.[199]

239. Thus, Mercuria did not enter into the obligation with regard to the LTA.

2. Additionally, the breach of LTA is not attributable to Mercuria

240. Even if Mercuria did not enter the LTA itself, the Claimant may argue the breach may still be attributable to the Respondent, yet it is not the case. None of the ILC Articles,

[190]Gallus(2), §166.
[191]EnCana, §154.
[192]BIT, §3(3).
[193]Commentaries to ILC Articles.
[194]Ibid.
[195]Honlet/Borg, §27.
[196]Nagel, §324.
[197]Feit, ¶37.
[198]Record, ¶50, §1594.
[199]Feit, ¶37.

namely, [**i**] 5, or [**ii**] 8 can be established as a ground of Mercuria's attribution to the breach of the LTA.

(i) Article 5 of the ILC Articles is not met

241. Attribution under Article 5 of the ILC Articles is present when an entity is "*empowered by the law … to exercise elements of governmental authority*" if "*acting in that capacity in the particular instance*".[200]

242. Firstly, the entity should be empowered with governmental authorities. Secondly, the entity should act exercising governmental authorities in particular case to establish attributability. Governmental authorities comprise the actions, "*commitments and representations that only the State itself could perform*".[201]

243. Even if the NHA in principle has certain governmental authorities in fighting critical diseases in Mercuria, still it terminated the LTA as a commercial contract, due to unsatisfactory performance of Atton Boro. The governmental authorities could be involved, for instance, in the exercise of Mercuria Comprehensive HIV/AIDS Partnership because of Mercuria's engagement in its operation. As for the LTA the NHA involved in the commercial negotiations with the Claimant in early 2008, stating it would have to terminate if failed to reach the agreement. It acted independently from Mercuria when actually terminating the contract. The termination of contract did not involve the exercise of any governmental authorities as far as it appeared to be effective commercial activity. The termination of contract for the drugs purchase is not the action only state can undertake.

244. Thus, requirements of Article 5 of ILC Articles are not met.

(ii) Article 8 of the ILC Articles is not met

245. Under Article 8 of ILC Articles conduct of an entity would be attributable to the state if it is "*acting on the instructions of, or under the direction or control of*"[202] the state.

246. The conduct of an entity, although owned by and in that sense subject to the control of the State is not attributable to the State unless the State directed or controlled the specific operation and when the said conduct is an integral part of that operation.[203] A general

[200]ILC Articles, §5.
[201]Kardassopoulos, §271.
[202]ILC Articles, §8.
[203]Commentaries to ILC, ¶47.

situation of dependence and support would be insufficient to justify attribution of the conduct to the State.[204]

247. The NHA operates independently from Mercuria. The meeting with the President of Mercuria and the Minister of Health does not conclusively evidence that the NHA was anyhow forced to terminate the LTA. The NHA made a decision to terminate before that, in early 2008.[205] Thus any issues discussed by the NHA with the Minister of Health in May 2008[206] may not have influenced the NHA's decision.

248. Thus, requirements of Article 8 of the ILC Articles are not met.

B. ALTERNATIVELY, ACTIONS OF MERCURIA TOWARDS THE LTA DO NOT FALL WITHIN THE SCOPE OF UMBRELLA CLAUSE

249. The Claimant may argue the LTA is an investment contract, thus any breach of such contract is covered by the umbrella clause. Yet, the Respondent reiterates the LTA is a commercial contract,[207] not an investment one, and Mercuria did not assume obligations vis-à-vis LTA as "*a specific investment*".[208]

250. The Claimant may argue "*any obligation*" terminology in Article 3(3) should cover each and every contract entered into by the state.[209]

251. However, the breach of the umbrella clause is absent because [**1**] Mercuria acted as a merchant when entered the LTA and [**2**] termination of the LTA is commercial in nature.

1. Mercuria did not act as a sovereign when entered the LTA

252. The Respondent submits it acted as a merchant when entered the LTA. In order to establish the violation of umbrella clause the state should enter into the contract as a sovereign.[210]

253. The LTA was a purely commercial contract for the supply of the FDC drug. Mercuria acted as a merchant when buying the FDC drug. It did not enter into special partnership with the Claimant for Sanior as it previously did for HIV/AIDS drugs.[211] The public aim was to supply people of Mercuria with a greyscale treatment but not to purchase the particular drugs from the Claimant.

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[204]Commentaries to ILC, ¶48.
[205]Record, ¶30, §925.
[206]Record, ¶30, §926.
[207]See Section II.B.2 above.
[208]SGS v. Philippines, §121.
[209]Noble Ventures, §61, 62.
[210]El Paso, §81; Pan Am. Energy, §109.
[211]Record, ¶29, §886.

254. To conclude, usual commercial activity of a state is not covered by the umbrella clause.

2. The termination of the LTA has commercial nature

255. The Respondent argues that a mere breach of contract without the "*exercise of sovereign powers*" does not amount to a breach of umbrella clause.[212]

256. There should be significant interference by governments or public agencies with the rights of the investor[213] to establish exercise of a sovereign state function or power. The contract is breached on the base of a sovereign act when there is a law or legislative decree.[214]

257. The NHA terminated the LTA as a commercial contract for the purposes of effective business management. It was a heavy burden for the NHA to cope with the increasing demand for Sanior. The NHA terminated the contract to swift to the other less expensive suppliers. The termination did not involve any kind of the exercise of sovereign power.

258. Thus, it was a mere business activity of the NHA when it terminated the LTA.

C. ALTERNATIVELY, THE LTA FORUM SELECTION CLAUSE RENDERS THE UMBRELLA CLAUSE INADMISSIBLE

259. Even if the LTA is an investment-related contract, forum selection clause from the LTA overrides BIT dispute redressal mechanism.

260. The Tribunal should not ignore the specific dispute-resolution mechanism, because the specific mechanism in the contract is the clearest indication of the intent of the parties and must prevail.[215] Under international law, the maxim of lex generalis non derogat lex specialis entails that a general provision cannot override a specific provision.[216] A BIT dispute redressal mechanism is a general mechanism in relation to investments, while a contractual mechanism is a special mechanism in relation to a particular contract. This idea is supported by multiple arbitral practice.[217]

261. Moreover, Atton Boro himself admitted validity of forum-selection clause, when invoked arbitration against the NHA under the LTA before the Reef's Tribunal and received an Award in its favor.[218] No extra compensation for the LTA breach should be granted under the BIT.

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[212]CMS, §299.
[213]Ibid.
[214]Feit(2), ¶160.
[215]Naniwadekar, ¶188.
[216]Oppenheim, ¶1278-1279.
[217]Bivac, §117; Bosh, §251.
[218]Record, ¶30, §935.

262. Thus, umbrella clause under Article 3(3) of the BIT is not violated by the Respondent.

PRAYER FOR RELIEF

The Respondent respectfully requests this Tribunal to find

(1) The Tribunal lacks jurisdiction, since the Respondent properly invoked Article 2(1) of the BIT and denied benefits to the investor.

(2) In any event, the Tribunal lacks jurisdiction in relation to the Award.

Should the Tribunal find that it has jurisdiction, the Respondent pleas that:

(3) The enactment of Law and the grant of a license for the Claimant's invention is BIT consistent, in particular, obligation to accord fair and equitable treatment.

(4) The Respondent is not liable under Article 3 of the BIT for the conduct of its judiciary in enforcement proceedings.

(5) The Respondent is not liable under Article 3(3) of the BIT with regards to the LTA termination.

Respectfully submitted on 25th of September 2017.

TEAM VISSCHER

On behalf of the Respondent,

The Republic of Mercuria