TEAM WALDOCK

PERMANENT COURT OF ARBITRATION

PCA Case No. 2016-74

ATTON BORO LIMITED

(Claimant)

v.

REPUBLIC OF MERCURIA

(Respondent)

MEMORIAL FOR RESPONDENT

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EP-Resolution	European Parliament Resolution on the Future European International Investment Policy, 6 April 2011
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Wang	Wang, Peng *Public Health Regulation in Investor-State Arbitration: A Case Analysis* SRIICL Working Paper Series 2013-7, Xi'an Jiaotong University 2013

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Argentine-US BIT	Argentine - USA BIT, 1991
Bahrain-USA BIT	Treaty between the USA and the State of Bahrain concerning the encouragement and reciprocal protection of investments, 20 November 1999
FIPA	Canadian- Iinda, 2004 Model FIPA
CAFTA	The Dominican Republic-Central America-United States Free Trade Agreement of 2004
CETA commentary	European Commission commentary on the EU-Canada Comprehensive Economic and Trade Agreement – landing zones, 6 November 2012
China-New Zealand BIT	Agreement on the promotion and protection of investments, 22 November 1988
COMESA Agreement	Investment Agreement for the COMESA common investment area (2007)
Croatia-Oman BIT	Agreement between the Republic of Croatia and the Sultanate of Oman on the promotion and reciprocal protection of investments, 4 May 2004
ILC-Articles	The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts
ICJ Statute	International Court of Justice Statute
Japan-Kenya BIT	Agreement between the Government of Japan and the Government of the republic of Kenya for the promotion and protection of investment
Jordan-USA BIT	Treaty between the USA and the Hashemite Kingdom of Jordan concerning the encouragement and reciprocal protection of investments, with annex and protocol, 2 July 1997
NAFTA	North American Free Trade Agreement, 17 December 1992

NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
Paris Convention	Paris Convention for the Protection of Industrial Property, 20 March 1883
VCLT	Vienna Convention on the Law of Treaties, 3 May 1969
US-Bolivia BIT	Treaty between USA and the Republic of Bolivia concerning the encouragement and reciprocal protection of investment, with annex and protocol, 17 April 1998

ABBREVIATIONS

¶ / ¶¶	Paragraph(s)
Art(s)	Article(s)
BIT	Bilateral Investment Treaty
CIL	Customary International Law
Contracting Party	Contracting Parties of the BIT: Mercuria and Basheera
DoB	Denial of Benefits
ECT	Energy Charter Treaty
ELR	Exhaustion of Local Remedies
Facts	Statement of Uncontested Facts
FDC	Fixed dose combination
FET	Fair and Equitable Treatment
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Arbitration
ILC-Articles	International Law Commission Articles
IPL	Intellectual Property Law
HCM	High Court of Mercuria
LTA	Long Term Agreement
NoA	Notice of Arbitration
NHA	National Health Authority of Mercuria
NPM	Non-Precluded Measure
Patent	Mercurian Patent No. 0187204
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PCA Rules	Permanent Court of Arbitration Rules 2012
PO 1/2/3	Procedural Order No 1/2/3
RNA	Response to the Notice of Arbitration

STATEMENT OF FACTS

1. The Republic of Mercuria ("**Respondent"** or **"Mercuria"**) and the Kingdom of Basheera ("**Basheera**") signed the Agreement between the Republic of Mercuria and the Kingdom of Basheera for the promotion and reciprocal protection of investments (hereinafter, the "**BIT**") on 11 January 1998.

2. In 1985 the World Health Organization confirmed the existence of greyscale, a chronic, non-fatal but incurable disease in forty-three countries, including Mercuria.[1] By the late 1990s a treatment was discovered and approved.

3. In 2003, based on a report from the National Health Authority of Mercuria ("**NHA"**), the Mercurian government alerted of the threat of a possible national health crisis because of the spread of greyscale. Consequently, Respondent promoted general investment towards making business with pharmaceutical companies providers of the novel fixed-doses combinations ("**FDC**"), the most effective drug to fight the spread of the epidemic.

4. The NHA, after a lengthy negotiation period, in May 2004 entered into a Long-Term Agreement (the "**LTA**") with Atton Boro Limitted ("**Atton Boro**" or "**Claimant**") for the supply and manufacture of the drug Sanior for a 10-year duration,[2] which contained the latest advanced compound against greyscale: Valtervite.[3]

5. Claimant is a merely subsidiary of Atton Boro Group in Basheera, a leading drug discovery and development company and the real contributor to the development of the Valtervite Patent (the "**Patent**"). Such Patent was registered in Mercuria in February 1998 and later assigned to Claimant in April 1998.[4]

6. By 2005, the NHA had begun the distribution in Mercuria and reinforced the prevention campaigns that had started back in 2003 through workshops to promote

[1] PO1,Annex.3,line-1302
[2] Idem,¶10
[3] Facts,¶9
[4] Idem,¶¶3-4

awareness on sexually transmitted diseases and to encourage Mercurian population to get tested. All efforts were made to control the spreading.[5]

7. Despite all the above, the spreading continued and more cases of greyscale were detected, with the order value for Sanior doubling with each quarter in 2007.[6] The Minister for Health held a press conference manifesting her concern about the wide extension of the NHA estimations.[7] Additionally, the Minister expressed that "every measure necessary" would be used to control the crisis.[8]

8. In 2008 the number of cases had increased and it was impossible for the NHA to pay the price agreed four years before. The NHA explained to Claimant the urgent and undeniable need for a lowering of the price. However, a 10% discount was offered by Atton Boro. Eventually, the NHA was forced to terminate the LTA, based on undue hardship.[9]

9. The lawfulness of the termination of the LTA was questioned in an arbitration, which ended in an Award (the "**Award**") that favored Claimant's interests and ordered the NHA to pay compensation for damages.[10]

10. In October 2009, Respondent, under the dramatic circumstances already reached, issued a new Intellectual Property Law (the "**IPL**"), regulating the concession of compulsory licenses.[11] The IPL was a relief to all greyscale patients severely affected that were not receiving the effective greyscale treatment.

11. In April 2010, HG-Pharma, a Mercurian generic drug manufacturer, through the IPL, was granted the license to manufacture Valtervite. The High Court of Mercuria (the "**HCM**") also conceded Claimant a 1% royalty over the total earnings made by HG Pharma.[12]

12. Given that greyscale is an epidemic type of disease, Mercuria was under the obligation to control the disease. In doing so and preventing an international health

[5] Idem,¶¶11-12
[6] Idem,¶15
[7] PO1,Annex.2
[8] Idem,¶14
[9] Idem,¶15
[10] Idem,¶17
[11] Idem,¶20, PO1,Annex.4
[12] Idem,¶21

emergency, Respondent sent greyscale medicines in the form of humanitarian aid to its neighbors.

13. Respondent cares for and values the well-being of its population, and thus, considers it a priority as the BIT signed with Basheera shows.[13] Mercuria could not remain inactive at a time when its population was suffering a brutal greyscale epidemic. The Government took every measure necessary to satisfy such foremost priority.

[13] BIT Preamble

INTRODUCTION

14. Respondent submits that this Tribunal lacks jurisdiction *ratione personae* (**I.1**) since the BIT contains a denial of benefits ("DoB") clause, the requirements of which have been fulfilled in the case at hand. This clause prevents Claimant from benefiting from any BIT protection and therefore alleging any kind of breach of the BIT.

15. Secondly, this Tribunal lacks jurisdiction *ratione materiae* (**I.2**) as it is not sufficient for an asset to be a qualified investment with the mere BIT definition. Every qualified investment must be assed against a general benchmark and Claimant's assets in Mercuria are not included in such generally accepted definition of investment. Therefore, those assets are not protected by the BIT.

16. Even if the Tribunal considered differently and finds it has jurisdiction over this dispute, Respondent submits that the measures taken were a legitimate exercise of Mercuria's regulatory powers to protect public health and human rights, as it is its duty. The measures fall into the scope of Art.12 of the BIT and therefore Respondent is entitled to the exceptions of such Art. (**II.1**).

17. Moreover, Respondent submits that the measures did not amount to an indirect expropriation (**II.2**) since there was not a substantial deprivation on the alleged investment.

18. Lastly, this Tribunal should find that Respondent acted in a fair and equitable manner (**II.3**), respecting the due process, and did not wrong Claimant's legitimate expectations.

19. BITs are not insurances of bad business judgements.[14] Therefore, Claimant cannot use the BIT to justify its own bad assessment and expect Respondent to compensate for such carelessness.

[14] *Maffenzi*,¶64, *MTD*,¶178

I.ADMISSIBILITY AND JURISDICTION

20. The Tribunal has the power to rule on its own jurisdiction according to the *Kompetenz-Kompetenz* principle, which finds its expression in Art.21(1) of the Permanent Court of Arbitration Rules 2012, (the "PCA Rules") Respondent submits that this Tribunal is not entitled to decide on the present dispute since it lacks *ratione personae* and *ratione materiae* jurisdiction.

1. THE TRIBUNAL LACKS JURISDICTION *RATIONE PERSONAE*

21. This Tribunal lacks jurisdiction *ratione personae* because the BIT contains a DoB clause (**1.1**) and the conditions required by such clause are met (**1.2**).

1.1. THE BIT CONTAINS A DOB CLAUSE

22. The prerogative of the DoB enshrined in Art.2 of the BIT grants the host State the power to deny the protection of the BIT as long as the investors fulfills Art.2 requirements.

23. BITs include DoB clauses for the purpose of counterbalancing broad definitions of "investor" and "investment".[15] The BIT follows this formula and thus the protection offered to investors is narrowed down by the DoB clause included in Art.2.

24. The definition of "investor" enshrined in Art.1(2) of the BIT reads:

> "(a) any natural person having the nationality of either Contracting Party in accordance with its laws.
>
> (b) any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of that Contracting Party."

25. Therefore, such broad definition must be read together with Art.2 of the BIT, which states:

> "Each Contracting Party **reserves the right** to deny the advantages of this Agreement to:
>
> 1. a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized.

[15] US-Bolivia BIT

> 2. an investment, if the denying Contracting Party establishes that such investment is an investment of an investor of a third state with or as to which the denying Contracting Party:
>
> (a) does not maintain a diplomatic relationship; or
>
> (b) adopts or maintains measures that:
>
> i) prohibit transactions with Investors of that state; or
>
> ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments." [16]

26. Art.2 works as a filter, it prevents third parties from enjoying the benefits of the BIT without complying with the obligations therein.[17] This provision is a measure against nationality planning based on seeking the best treaty conditions.[18]

27. In light of the above, Claimant must not enjoy the benefits of the BIT since Respondent has validly invoked the DoB clause (A) and such provision is applicable to the case at hand due to its retroactive effect (B).

A <u>Respondent invoked the DoB provision properly</u>

28. Claimant may allege that the mentioned reservation of the right implies a specific prior notice to investors by Respondent and the existence of a time limit that Respondent has not allegedly respected.

29. However, Respondent invites the Tribunal to interpret Art.2 pursuant to Art.31(1) of the VCLT,[19] according to which, in a good faith manner, a term must be understood following its "ordinary meaning" together with their context and the object and purpose of the treaty. Therefore, to make the DoB clause effective, the host State only has to invoke the clause as Respondent did in the RNA.[20]

30. As held in *Tokios Tokelés*, arbitral tribunals cannot impose other limitations to the scope of the BIT than those agreed by the Contracting Parties.[21]

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[16] Emphasis added
[17] Mistelis/Baltag,p.1302
[18] Dolzer/Schreuer,p.52
[19] Art.31(1) VCLT
[20] RNA,¶5
[21] *Tokios Tokelés*,¶36

31. According to the *Pac Rim* tribunal, the imposition of limitations not justified by the wording of a clause creates significant practical impediments and is thus inconsistent with the object and purpose of such clause.[22] In other words, additional limitations modify the scope of the provision and subsequently it also alters its underlying purpose agreed by the Contracting Parties.

32. Hence, Respondent submits there are no formal requirements to allege the DoB clause. In particular, there is no obligation to previously notify the investor about the exercise of the reserved right to deny (**i**) and not either a time-limit to allege the DoB clause (**ii**).

i Art.2 of the BIT does not require Respondent to give prior notice to the investor

33. Although Claimant alleged that Respondent has not validly exercised its right to deny the benefits of the BIT, this is not correct. Claimant could base these allegations on the interpretation of several ECT cases[23] where the existence of this right is considered different than the exercise of it.[24] These tribunals have established that the exercise of the right to deny implies the host State must previously inform the affected investor of such intentions. However, the differences between ECT cases and the case at hand must not go unnoticed.

34. Firstly, the wording differs:

> "each Contracting Party reserves the right to deny the advantages of this **Part** to […]"[25]
>
> "Each Contracting Party reserves the right to deny the advantages of this **Agreement** to […]"[26]

35. The benefits subject to the denial of the ECT are limited to those included in Part III of the ECT, i.e. the "Investment, Promotion and Protection Part", while the DoB clause of the BIT refers to the refusal of all the benefits of the BIT.

[22] *Pac Rim*,¶4.85
[23] *Plama*,¶157-65; *Yukos*,¶¶457-8; *Liman*,¶227; *Ascom*,¶745
[24] *Plama*,¶155
[25] Art.17(1) ECT, emphasis added
[26] Art.2 BIT, emphasis added

36. This is crucial as the location of the recourse to arbitration in the ECT is in Part V, "Dispute Settlement",[27] and therefore it is not subject to the DoB clause.

37. The parties to the ECT give an "unconditional consent"[28] to arbitration, not subject to any later refusal. On the contrary, the consent to arbitration given by the Contracting Parties under the BIT is conditioned by Art.2, so it is a possible benefit to be denied.

38. Moreover, on the one hand, the ECT is a multilateral treaty with fifty-four different signatory states.[29] The drafting of the treaty was influenced by a lot of parties that shaped together the purpose of ECT provisions. All of them agreed on a single DoB clause whereby accommodating different practices regarding its use.

39. For this reason, in multilateral treaties such as the ECT, there is a greater level of flexibility to perform. It seems reasonable to ask host States for a previous notice of the denial so that the investor is able to act accordingly.[30]

40. Nonetheless, the BIT only involves two Contracting Parties. The investor is able to anticipate the behavior of the host State and thus a prior notice is not necessary.

41. On the other hand, some treaties contain a DoB clause which explicitly requires a prior notification or consultation from the host State to foreign investors. This is the case of the NAFTA,[31] the DR-CAFTA,[32] and the Japan-Kenya BIT,[33] among others.

42. However, the DoB clause of this BIT does not mention any similar requirement. If the real intention of the Contracting Parties was the establishment of a compulsory previous notification to the investor, they could have easily written so.

43. There are numerous arbitral decisions under different BITs where, even though the DoB clause is not expressed in mandatory terms, tribunals have held that no prior notice should be given to the specific investor.[34] Respondent submits that the ECT

[27] Art.26 ECT
[28] Art.26(3)(a) ECT
[29] ECT
[30] *Plama*,¶157
[31] NAFTA Arts.1113, 1803(1), 2006(1)
[32] DR-CAFTA Arts.10.12, 18.3(1), 20.4(1)
[33] Japan-Kenya BIT, Art.23(2)
[34] *EMELEC*,¶71; *Ulysseas*,¶¶172-4; *Rurelec*,¶¶376-84

cases are no relevant precedent when it comes to the interpretation of the DoB clause: the specific differences revealed between the BIT and the ECT call for a separation.

44. In conclusion, although Art.2 establishes a reserved right, it does not require any prior notification by Respondent to investors to be validly applied. The mere reliance by Respondent suffices for a valid use of the right to deny.

ii Art.2 of the BIT does not establish any time-limit for its applicability

45. The *Pac Rim* tribunal, under CAFTA-DR, determined the absence of a time-limit for the host State to allege the DoB due, whenever there is no specific mention of such time-limit.[35] Quite the contrary, deeming the existence of a time-limit was considered an untenable burden for the host State, who would consequently be put under undue pressure to constantly monitor every investor.

46. In the present case, as it occurs in *Pac Rim*, the wording of Art.2 of the BIT does not establish any time-limit for the effectiveness of the denial. A different interpretation would add impositions not agreed by the Contracting Parties and it would consequently constitute a practical blockage to investment.

47. Additionally, jurisdictional issues, under most investment arbitration rules,[36] may be alleged until the memorial for Respondent is submitted. In particular, Art.21(3) of the PCA Rules,[37] grants freedom to Respondent to either counterclaim or rely on a claim with the intention of seeking compensation in its statement of defense or even after if the Tribunal considers justified the delay.

48. Since the applicability of the DoB clause is a jurisdictional objection,[38] the only applicable time-limit is until the submission of this Memorial.

[35] *Pac Rim*,¶¶4.56,4.83
[36] ICSID Arbitration Rules Art.41; UNCITRAL Rules Art.21(3); PCA Rules Art.21(3)
[37] NoA,¶2
[38] *EMELEC*,¶71; *Ulysseas*,¶¶172-4; *Rurelec*,¶¶376-84

49. Respondent submits the allegation of the DoB clause was made timely through the RNA[39] in less than a month after the NoA and no further formal requirements should avoid its application.

B The DoB clause has a retroactive effect

50. As stated in *Rurelec* the objective pursued by DoB clauses is to give the host State the opportunity to refuse the advantages of a BIT to certain alien investors in case such benefits are inappropriately being claimed.[40] Thus, it is at that time when the host State assess whether that investor fulfils the requirements of the DoB clause.[41]

51. Moreover, it would be uncomfortable for a host State to analyze whether an investor is subject to the refusal of all the BIT benefits without any dispute involved.[42] This pre-examination would also be contrary to the positive investment environment desired by the BIT as well. The Pac Rim tribunal considered the non-allowance of the allegation of the DoB provision once arbitral proceedings have started deprives the clause of any effectiveness.[43]

52. Respondent invites the Tribunal to follow the interpretations of *Pac Rim* and *Rurelec* and determine the validity of the retroactive effect of the DoB clause. In this vein, Respondent submits that the normal sequence of events is the following: an investor invokes the BIT, the host State examines whether that investor satisfies the DoB conditions, the host State eventually decides to make use of its right to deny the benefits of the BIT where the relevant conditions are met, and, if so, it may withdraw those advantages at any time until the submission of the memorial.[44]

53. Additionally, Claimant could not argue that it is left in an uncertain or fragile position regarding its legal relations with the investment.[45] On the one hand, the content of the BIT and, thus, the possibility of the denial of its benefits to certain investors is public, so it is perfectly known in advance by any conscious investor. On the other hand, if the clause is finally applied, it would only imply that the

[39] RNA,¶5
[40] *Rurelec*,¶376
[41] Idem,¶378
[42] Idem,¶379
[43] *Pac-Rim*,¶4.53
[44] *Rurelec*,¶378
[45] *Ulysseas*,¶¶172-3

investor is controlled or owned by nationals of a third state not party to the BIT and that it has no substantial business activity. The investor intentionally performed in such a way as to exclude himself from the protection of the BIT and cannot blame the host State for that.

54. Furthermore, the retroactive effect of the DoB clause also derives from its jurisdictional nature.[46] Respondent has not forfeited its right to rely on the DoB, since it may put forward jurisdictional objections until the submission of its memorial.

55. Therefore, as long as Respondent makes use of the DoB clause at any point before the submission of its memorial, as it did twice, in the RNA and hereby in this memorial, its effects should be acknowledged.

1.2. THE REQUIREMENTS OF THE DOB CLAUSE ARE MET

56. Further to the valid exercise of the DoB clause, Respondent submits Claimant is not entitled to the benefits of the BIT since the latter satisfies the two objective requirements of Art.2(1): Claimant is controlled and owned by a national of a third state (**A**) and Claimant does not have substantial business activities in Basheera (**B**).

A Claimant is controlled and owned by nationals of a third state

57. The first requirement demanded by Art.2(1) of the BIT is the control or ownership of the investor by citizens or nationals of a third country. This condition looks beyond the mere formal structure of the investor for the purpose of determining whether the incorporation of the "investor" in the territory of host State has been a mere strategic decision to take advantage of the protection offered under the BIT or a legitimate corporate planning.

58. In the case at hand, it is undisputed that Claimant is a wholly owned subsidiary of Atton Boro Group.[47] The Parties have also admitted Atton Boro and Company funded Claimant to settle its manufacturing unit in Mercuria.[48] Moreover, Atton

[46] *EMELEC*,¶71; *Ulysseas*,¶¶172-4; *Rurelec*,¶¶376-84
[47] Facts,¶4
[48] PO3,line-1573

Boro and Company is a legal entity incorporated under the laws of People's Republic of Reef's and acts as the primary holding of Atton Boro Group.[49]

59. The chain of companies is ruled under the same group of shareholders and are driven by uniformed economic motives. The Patent was synthesized by Atton Boro Group, but its protection was secured under fifty jurisdictions by Atton Boro and Company. It was not until 1998 that the Patent was assigned to Claimant in exchange for shares.[50]

60. Respondent submits that Atton Boro and Company's shareholders own and control Claimant indirectly through its holding company Atton Boro Group and directly through the shareholding acquired after Claimant exchanged the Patent for shares. This makes Atton Boro Group the owner of Claimant.

61. It is a matter of fact that some Atton Boro and Company's shareholders are private individuals with several nationalities, different from Mercuria and Basheera.[51] In light of all previously stated, Claimant is not only owned but also controlled by citizens of other nationalities than those of the Contracting Parties and, thus, the first condition of the DoB clause is certainly satisfied.

B Claimant does not have substantial business activities in Basheera

62. The Contracting Parties decided as the second requirement, that investors would hold substantial business activities in the territory where they are established. In addition to the firs requirement,[52] Respondent is empowered to refuse the BIT protection in such cases where the investor is a mere intermediary character for interests materially foreign.[53]

63. Atton Boro Group is a leading drug discovery and development enterprise whose object is the creation of patents.[54] As a result, Claimant's parent company is the one

[49] PO2,¶3
[50] PO3,line-1575
[51] Idem,line-1570
[52] **Jurisdiction 1.2.A**
[53] *Waste*,¶80
[54] Facts,¶3

who synthesized the Valtervite compound, registered however by Atton Boro and Company[55] and eventually assigned to Claimant.[56]

64. Pursuant to the LTA it was Claimant who undertook to manufacture and supply the FDC drug Sanior, which include the Valtervite compound. However, had Claimant carried some of these activities in Basheera, there should necessarily be some trace of them.

65. On the contrary, the manufacturing unit of Claimant is actually located in Mercuria.[57] And Claimant owns no additional plant, factory or laboratory in Basheera for the production of the FDC drugs.

66. By the end of 2006, around a third of all Mercurian greyscale patients—i.e. nearly 90.000 people[58]—were being treated using Sanior.[59] It should at least raise doubts that such level of activity was only performed by an average between 2 to 6 employees that work for Atton Boro in Basheera. Moreover, if we take into account that these employees are not really skilled for the manipulation of pharmaceutical compounds; they include a manager accountant, a commercial lawyer, a patent attorney and no laborers, engineers, and drivers.

67. The Contracting Parties concluded the BIT in January 1998,[60] although the instruments of ratification were not exchanged until March 1998.[61] The closeness in time dates is most telling: the dates of registration of the Patent in Mercuria by Atton Boro and Company in February 1998[62] and the incorporation of Claimant right after the ratification of the BIT on 1 April of that same year, with the subsequent assignment of the Patent only two weeks later.[63]

68. The proximity of all these events evidences once more that the only purpose of the establishment of Claimant in Basheera was to take advantage of the protection

[55] Idem,¶3
[56] Idem,¶4
[57] Idem,¶¶5,11
[58] PO1,Annex.3,line-1340
[59] Facts,¶11
[60] Idem,¶1
[61] PO2,¶2
[62] Facts,¶3
[63] PO3,line-1575

afforded through the BIT: the group of companies' performance has depended on the conclusion and ratification of the BIT.

69. In addition, it is another uncontested fact that the group of companies already had an established presence in Bahseera's pharmaceutical market by the time Claimant was created.[64] However, there is no record of an increase in the headcount since the settlement of Claimant. Even more, Claimant lacks any real link to Basheera's economy [65] where it is allegedly established. Claimant's proper payment of the taxes[66] derived from its office with 2-6 workers is not a relevant contribution to the Basheeran gross national product and is not either comparable to the volume of business generated in other countries where Claimant holds a real business activity.

70. The creation of Claimant was caused by two objectives and none of which performed in Basheera. Claimant is a vehicle for carrying on business in South American and African countries, where it provides several services.[67] Similarly, Claimant is used for the setting up of Atton Boro and Company manufacturing unit in Mercuria and perform the contracts entered into with the NHA.[68]

71. All the above reveals Claimant is a mere vehicle company born to obtain the protection of the BIT in the operations carried out in territories different from Basheera. Atton Boro and Company's intentions with the settlement of Claimant in Basheera was treaty shopping,[69] i.e. nationality planning based on the enjoyment of the best treaty conditions.[70]

72. Eventually, Respondent submits the DoB provision contained in Art.2(1) has been properly applied in the present dispute and its requirements are totally fulfilled by Claimant, therefore, this Tribunal lacks jurisdiction *ratione personae* to rule on the merits of this case.

[64] Facts,¶4
[65] Mistelis,p.1311
[66] PO3,line-1574
[67] PO2,¶3, Facts,¶4
[68] PO3,line-1572
[69] Doler/Scheur,p.52
[70] Ibidem

2. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE MATERIAE*

73. Claimant's assets are not investments, and, therefore, Respondent has not given consent to arbitrate this dispute under Art.8 of the BIT. Respondent will support its view arguing that the BIT's definition of investment is not sufficient to grant substantive protection to any asset (**2.1**), those assets must be assessed against a general benchmark to be considered as protected investments (**2.2**), and Claimant's assets cannot be considered as investments according to the appropriate assessment against that general benchmark (**2.3**).

2.1. THE BIT DEFINITION IS NOT SUFFICIENT TO QUALIFY CLAIMANT'S ASSETS AS PROTECTED INVESTMENTS

74. Respondent alleges that, in addition to the definition contained in Art.1(1) of the BIT, assets owned by a national of one Contracting Party must be assessed against a general benchmark of the concept of investment widely accepted in international investment law (**A**), the meaningful function performed by international investment arbitration (**B**), and the existence of other dispute resolution methods which would be meaningless if all assets were granted protection under investment treaties (**C**).

A <u>There is a standardized concept of investment against which assets must be assessed</u>

75. Several awards and authorities have identified the existence of a concept of investment that goes beyond the definitions of BITs. If an asset warrants substantive protection, it must comply with the definition of the BIT and also with the general hallmark of investment. If the asset does not fall within the scope of that general definition, protection cannot be granted under international investment law.

76. This concept was developed in the *Salini* case, and it has become the leading precedent in investment arbitration ("IIA"), so it is perfectly applicable to this dispute.

B <u>IIA performs a meaningful function that must be preserved</u>

77. Following a finalist interpretation of the role of IIA, its purpose is to protect actual investments, not to avail an additional dispute resolution mechanism for simple

contractual claims. IIA solves breaches of international obligations assumed by a State, not private controversies which arise in a contractual relationship.

78. A mechanical application of the categories listed in Art.1(1) of the BIT would produce "a result which is manifestly absurd or unreasonable".[71] Such an outcome is contrary to Art.32(b) of the VCLT because it would do away with any practical limitation to the scope of the concept of "investment". In particular, it would render meaningless the disctinction between investments, and purely commercial transactions. As it was stated by the *Joy Mining* tribunal*:*

> "contracts involving States and private parties are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order"[72]

79. Therefore, a consolidated trend exists among tribunals according to which the concept of investment is not unlimited, and every asset must be assessed against a certain benchmark in order to be considered worthy of protection.

C <u>The existence of other dispute resolution methods would be meaningless if all assets were granted protection under investment treaties</u>

80. Furthermore, an approach that considered any asset listed in Art.1(1) an investment would mean that every contract entered into between a national of Basheera and a State entity of Mercuria (regardless of the nature and object of the contract), as well as every award or judgment in favor of a national of Basheera (irrespective of the nature of the underlying transaction), would constitute an investment under the BIT.

81. Thus, by entering into the BIT, the Contracting Parties would renounce to, the application of domestic law, and surrender the jurisdiction of their own domestic courts, even if the contract is a simple one-off sales transaction.

82. In the case at hand, Claimant employed a dispute resolution method sponsored by the LTA, a commercial. These kinds of dispute resolution methods would have no meaningful role at all if every asset were granted the substantive protection that investments enjoy.

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[71] Art.32(b) VCLT
[72] *Joy Mining*,¶42

2.2. ASSETS MUST BE ASSESSED AGAINST A GENERAL BENCHMARK TO BE CONSIDERED AS PROTECTED INVESTMENTS

83. The BIT definition is not enough to qualify an asset as a protected investment according to IIL. A general benchmark has been developed both by the doctrine and arbitral tribunals. A proof of the existence and necessity of it is the fact that such benchmark is required to evaluate categories of assets not listed in the definitions of the BIT, which are usually non-exhaustive lists (**A**). Furthermore, Respondent invites the Tribunal to use the so-called *Salini* test as the general benchmark (**B**).

A <u>A general benchmark is required to assess those categories of assets not listed in Art.1(1) of the BIT</u>

84. The list of Art.1(1) is not exhaustive. There may exist categories different from those mentioned in the list which, nevertheless, could properly be considered protected investments under the BIT. Accordingly, there must be a benchmark against which to assess these non-listed assets or categories of assets in order to determine whether they constitute an investment within the meaning of the BIT. The term investment has a meaning in itself that cannot be ignored.

85. A literal application of the terms of the BIT effectively ignores requirement of Art.31(1) of the VCLT of interpreting the terms of the treaty according to their ordinary meaning, their context and the object and purpose of the treaty. The BIT object and purpose is reflected in its preamble, which declares that the Contracting Parties entered into the BIT "with an aim to stimulate the flow of private capital and the economic development of the States*"*.[73] Therefore, the Contracting Parties have established their intention of considering as an investment not all assets, but those which contribute to the economic development of the States.

86. As a result, Claimant's assets must qualify as an investment according to the general definition provided in other proceedings and in CIL. A construction based solely on the "ordinary meaning" of the terms of the list contained in Art.1(1) of the BIT, as advocated by Claimant, is inconsistent with the given context and ignores the object and purpose of the BIT.

[73] BIT Preamble

87. To sum up, Claimant's assets must fall within the general definition of investment, as well as within the definition of the BIT, but the latter it is not sufficient by itself to grant substantive protection. Investment protection is an intent to protect a particular kind of assets, distinguishing them from mere ordinary transactions, and therefore not all assets can be considered as protected investments.

B The *Salini* test is applicable in the present dispute

88. Despite the fact this proceeding is not an ICSID arbitration procedure, Respondent invites the Tribunal to follow the definition drawn by the *Salini* indicia. These indicia were developed based on the text of Art.25 of the ICSID. Other tribunals[74] which did not belong to the ICSID have used this test as a benchmark against which assets must be assessed.

89. This test was developed in the *Salini* decision. The tribunal stated the following:

> "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition" [75]

90. Therefore, the *Salini* criteria which draw the contours of the definition of investment are contribution, duration of the contribution and risk assumed by the investor. According to many arbitral awards[76] and to the interpretation in light of the preamble of the BIT,[77] one must add a fourth requisite: investment fosters the development of the host State, i.e. a contribution to the economic development of the host State.

91. Another argument in favor of the applicability of the *Salini* test in the present dispute is the inclusion in Art.8(2)(a) of the BIT of the possibility of resorting to arbitration in accordance with the ICSID Convention. If *Salini* test were not applicable in the present controversy to decide which assets are granted protection,

[74] *Romak*,¶¶194-196*; AES*,¶¶30-31
[75] *Salini*,¶52
[76] *Ibidem*; *Romak*,¶198; *CSOB*,¶64
[77] BIT Preamble

this would mean that the definition of investment would vary merely because of the choice of forum by the investor.

92. As a result, the substantive protection offered by the BIT would be narrowed or widened simply by the choice of dispute resolution mechanisms made by the investor. This result would be absurd, and could allow "forum shopping" by investors, who would be able to choose among all methods sponsored by the BIT depending on the nature of the asset from which the dispute arises and depending on which method favors the most the protection of the relevant asset. This view was supported by the tribunal in the *Romak* case.[78]

93. Thus, Respondent alleges that the *Salini* test is applicable, since it is the benchmark against which Claimant's assets must be assessed in order to determine whether or not they are investments. Furthermore, the four requirements must be fulfilled for an asset to be granted substantive protection under the BIT. Respondent will proceed to analyze every asset present in this controversy and prove that at least one of the requirements is missing in every asset.

2.3. CLAIMANT'S ASSETS IN MERCURIA ARE NOT PROTECTED INVESTMENTS

94. Respondent alleges that none of Claimant's assets are protected investments, because they do not fall within the notion of investment developed by arbitral tribunal and generally accepted in IIA.[79] Respondent will now show how neither the Patent (**A**), nor the LTA (**B**), nor the Award (**C**) can be considered protected investments when they are assessed against, the *Salini* test.

A <u>Patent</u>

95. Despite the fact that patents are mentioned in Art.1(1)(d) of the BIT, this is not enough to consider a patent a protected investment.[80] Patents will be investments if they meet additional criteria.

96. The Patent held by Claimant is not an investment because it does not fulfill the contribution requirement: it was Atton Boro Group outside of Mercuria, and not

[78] *Romak*,¶194
[79] **Jurisdiction 2.2**
[80] **Jurisdiction 2.2**

Claimant by itself who made the necessary contributions to isolate the compound during the R&D process. The act of applying for a patent and paying the administrative fees is not the kind of contribution required for an asset to be considered a qualified investment. Claimant was not involved in the R&D process, and such process had successfully ended when Claimant filed for the Patent. Therefore, Claimant did not make any significant contribution nor assumed the particular risk linked to investments when filing for the Patent. As a result, the Patent cannot be considered as an investment protected under the BIT.

97. Furthermore, the existence of a separate agreement, the TRIPS, to which Mercuria and Basheera are contracting parties,[81] is sufficient proof of the intention of the States not to include controversies related to patents and intellectual property rights within the scope of the BIT. If the Contracting Parties had intended to protect these assets through the BIT, they would not have signed an alternative agreement to protect them. Last but not least, the WTO has exclusive competence over those TRIPS provisions which enshrine patent protection.[82]

98. This view is supported by the preamble of the BIT:

> "building on their respective rights and obligations under […] other multilateral, regional, and bilateral agreements and arrangements to which they are both parties"

99. This statement clearly indicates the intention of the Contracting Parties of respecting the mechanisms set in other agreements, such as the TRIPS, and separate the obligations assumed in those agreements from the ones assumed in the BIT.

100. Thus, the controversies related to the Patent do not arise out of the BIT, and as a result are not subject to arbitration under Art.8 of the BIT. This Tribunal lacks jurisdiction to decide on the merits of the dispute regarding the Patent.

B LTA

101. Regarding the LTA, Respondent will prove how the presence of an umbrella clause in the BIT does not automatically equate contractual controversies to controversies arising out of the BIT (**i**). In addition to this, Respondent will also explain why the

[81] PO2,¶2
[82] RNA,¶7

NHA's acts cannot be attributed to Respondent (**ii**). To conclude its argument, Respondent will show how the LTA does not pass the *Salini* test (**iii**).

i The umbrella clause does not automatically convert contract controversies into controversies arising out of the BIT

102. As it has been explained above, contract claims are not equivalent to investment claims regardless of what the BIT says; IIA needs to keep its essence in order to perform a meaningful role. The clause by itself does not convert any contractual undertaking into an obligation protected by the BIT and subject to IIA. This view is supported by the tribunals in several cases such as *SGS*[83] and other Argentinian ones.[84]

103. Pursuant to the findings of the tribunal in *SGS*[85] if a wide interpretation were chosen, it would amount to incorporating by reference an unlimited number of state contracts whose violation would be treated as a breach of the treaty.[86]

104. The *Joy Mining*[87] tribunal ruled against its jurisdiction on the matter due to the lack of a link between contractual breach and treaty violation. In this dispute, such connection does not exist either. The umbrella clause protects "obligations entered into with regard to investments of investors".[88] It has been proved that Claimant is an investor of Basheera but should be denied the benefits of the BIT.[89] Furthermore, the obligations entered into through the LTA are not related with any asset which could be considered an investment.

105. Even following a wider approach to the effect of umbrella clauses, the LTA would still not qualify as an investment. It is imperative the State acted in use of state prerogatives when supposedly defaulting. However, Respondent will now prove that this element is not present in this dispute.

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[83] *SGS*,¶167
[84] *El Paso*,¶67; *CMS*,¶299
[85] *SGS*
[86] *Idem*,¶168
[87] *Joy Mining*
[88] Art.3(3) BIT
[89] **Jurisdiction 1**

ii The NHA's acts cannot be attributed to Mercuria

106. The NHA is a public-sector corporation, but it is not a State organ, as it does not belong to any of the three powers which classically form the State structure. It is not part of the legislative, executive or judicial system. Therefore, it does not pass the structural test. Its acts cannot be attributed to Respondent pursuant to Art.4 of the ILC Draft Articles.

107. Furthermore, when performing under the LTA, the NHA displayed commercial acts, or *acta juri gestionis*. The LTA was a commercial contract equivalent to those signed by two private pharmaceutical companies, involving periodical exchanges of goods and money. The LTA does not involve *acta juri imperii*.

108. Last but not least, there were not any state prerogatives or state functions involved in the signing, performance or termination of the LTA. There is no record of direct participation by Mercurian officials in the negotiation of the LTA.[90] Any private company could have taken the same actions that the NHA took. As a result, the actions of the LTA do not pass the functional test, and cannot be attributed to Mercuria pursuant to Art.5 of the ILC Draft Articles.

109. As a result, the NHA acts regarding the LTA are not attributable to Respondent, and are therefore not subject to arbitration under Art.8 of the BIT.

iii The LTA does not pass the *Salini* test either

110. The sale of goods, the activity envisaged by the LTA, does not constitute an investment, and to interpret the term otherwise would expand the notion of "investment" almost infinitely. An investment risk entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. When there is risk of this sort, the investor simply cannot predict the outcome of the transaction.

[90] PO3,¶8

111. Therefore, the LTA does not pass the *Salini* test and cannot be considered as a qualified investment either.

C The Award

112. An award can never be considered an investment by itself. Various tribunals have reached this decision, among them *Saipem,*[91] *Romak,*[92] and *White Industries.*[93]

113. Furthermore, the *GEA Group* tribunal also argued that:

> "The fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within (the host State)"[94]

114. This reasoning can be applied to the Award relevant in this dispute, since it does not involve any economic activity in the territory of Mercuria by itself. The only effect of accepting jurisdiction regarding the Award would be to add a new instance of review of the enforcement proceedings, which are being held before the HCM.

115. Even if the Tribunal decided to follow the approach which considers awards as investments, the LTA is the underlying asset of the Award and it has been sufficiently explained above why the LTA is not an investment.[95] Therefore, the Award would still not be considered a protected investment even with the less restrictive approach.

116. As a result, none of the controversies which arise out of or in relation to the BIT, are investments, because none of them are disputes with respect to investments of investors of a Contracting Party, and Respondent has not given consent to arbitrate the present dispute before this Tribunal.

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[91] *Saipem*,¶127
[92] *Romak*,¶211
[93] *White Industries*,¶7.6.10
[94] *GEA Group*,¶162
[95] **Jurisdiction 2.3.B**

II.MERITS

1. RESPONDENT'S ACTIONS WERE A RESPONSE TO A NATIONAL EMERGENCY

117. The present dispute revolves around the epidemic spreading of greyscale, a chronic disease,[96] constituting a menace for the Mercurian population and its public health and economy.

118. Due to the extremely rapid spreading and the contagious nature of the disease, Respondent had to make difficult choices; it decided what was best for its people. The disease grew during the years of the LTA, and by 2006, a health crisis was declared by the Minister for Health. Respondent took measures in order to prevent the situation from being even more chaotic and irreversible.

119. Therefore, Respondent hereby submits that the measures were legitimate under the scope of Art.12 of the BIT (**1.1**). Alternatively, circumstances in Mercuria are also included in Art.25 ILC Draft Articles (**1.2**). Lastly, Respondent followed its obligations in relation to human rights (**1.3**).

1.1. ACTIONS BY RESPONDENT WERE LEGITIMATE MEASURES UNDER ART.12 OF THE BIT

120. The BIT includes in its Art.12 a non-precluded measure clause ("NPM"). This kind of clause ensures that Respondent is able to take measures when faced with a war, an armed conflict, or an emergency in international relations. A rightful invocation of this clause precludes the applicability of the protections granted in the BIT.[97]

121. Thereby, a measure that falls under the scope of Art.12 can never amount to a violation of the BIT, nor give rise to liability of the State invoking it.[98]

122. Respondent submits its ability to invoke this clause because Art.12 of the BIT is a self-judging NPM clause (**A**), the circumstances meet the requirements of Art.12 (**B**) and the measures were taken as a last resort (**C**).

[96] Facts,¶6
[97] Burke-White/VonStaden,p.311
[98] Ibidem

A Art.12 of the BIT is a self-judging NPM clause

123. Respondent hereby invokes Art.12 of the BIT as a complete defense for its actions. As previously stated, Art.12 is a NPM clause[99] and reads as follows:

> "**Nothing** in this Agreement shall be construed as preventing a Contracting Party from taking **any measure necessary** for the protection of its essential **security** interests in time of war or armed conflict or other **emergency** in international relations."[100]

124. Firstly, scholars have interpreted the clause independently from CIL, stating that if the clause is included in the BIT, it is meant to increase government's flexibility in taking measures when faced with exceptional circumstances.[101] In order to interpret the clause, it is necessary to examine its wording and the intention of the parties when including such clause in the BIT.[102]

125. Secondly, the phrasing of Art.12 does not mention a third party, who would be responsible for the review of the precluding measures. Other NPM clauses specifically refer to the "UN Charter".[103] In these cases the parties are bound by the decisions of the UN Security Council. In the case at hand, no mention to a third party is made, thus Art.12 is a self-judging NPM clause, which allows Respondent to unilaterally invoke it.

126. Consequently, if the measures taken by Respondent fall into the scope of Art.12, the protection given by the BIT to Claimant comes in second place whereas the priority becomes to solve such exceptional circumstances.

B Greyscale was a threat to national and international public health, falling into the scope of Art.12

127. As seen in the section below, the NPM provision has an explicit self-judging character, which allows Respondent to include the greyscale crisis as a situation of emergency falling under its scope.

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[99] Art.XI Argentine-US BIT
[100] Art.12 BIT
[101] Burke-White/VonStaden,p.312
[102] *LG&E*,¶213;*Sempra*,¶391
[103] FIPA

128. In order to define the scope of this clause, it is necessary to examine its structure. The wording "**nothing** in this agreement"[104] is found in several Canadian and Indian BITs[105] and applies to the entire BIT. The circumstances, the permissible objectives,[106] are also defined in the wording. In the present case, the NPM clause refers to a security objective ("its essential security interest"[107]), commonly used in the Indian and USA BITs,[108] as well as an emergency objective.

129. Furthermore, according with Art.31 of the VCLT, the term shall be interpreted in accordance with the object and purpose of the treaty in question.[109] The BIT preamble states the desire of both parties to protect health and safety.[110] For this, the term "emergency in international relations" should be interpreted along these lines, understanding that a health crisis falls under its scope.

130. If a public health crisis is not addressed, it could easily turn into an economic and social crisis. The past experience with the Ebola showed how a lack of capacities and a minimization by West African authorities, led to a spiraling out of control and forced the WHO to declare the Ebola outbreak a Public Health Emergency of International Concern (PHEIC).[111] Moreover, it has been stated by the WHO, that the national level is on the front-line of any spreading and the state is "the primary actor responsible and accountable for issuing appropriate alerts and responding to a crisis".[112]

131. Additionally, Respondent submits that the Contracting parties are part of the TRIPS Agreement[113] and more specifically, the Doha Convention. In this Convention, the WTO recognize the gravity that comes from public health problems for the developing and least developing countries. It makes also reference to the

[104] Art.12 BIT, emphasis added
[105] US-India BIT,art11(2);FIPA,art.10, emphasis added
[106] W.Burke/White Von Staden,p.332
[107] Art.12 BIT
[108] UK-India BIT art.12(2); US-Panama BIT, art.X(1)
[109] Art.31 VCLT
[110] BIT Preamble
[111] UN,p.6
[112] Idem,p.7
[113] PO2,¶2

difficultness that brings to a state, the presence and spreading of epidemic disease, naming specifically HIV/AIDS and malaria.[114] Art.4 of the Doha Convention states:

> "each member has the right to determine what constitutes a national emergency, it being understood that public health crisis, including those relation to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency"[115]

132. In conclusion, this Tribunal should conclude that Art.12 is a self-judging NPM clause and that it is in Respondent's discretion to define whether an epidemic health crisis falls into its scope, which is the case here.

C <u>The measures were adopted as the last resort, having tried other methods to face the crisis</u>

133. Even though the measures fall into the scope of the NPM clause and Respondent cannot be found responsible for the damaging of Claimant's investment, this Tribunal should take also into account the previous measures adopted in order to avoid the mentioned situation.

134. This Tribunal should consider all the measures that were previously taken in order to prevent the spreading. In 2003, Respondent engaged in multiple campaigns with the purpose of promoting prevention of sexually transmitted diseases.[116] Additionally, Respondent conducted workshops in educational institutions and workplaces and multiplied the number of patients tested through the NHA.[117]

135. Overall, it is important to remember that the first large measure that was taken to secure the Mercurian public health was the LTA itself. In 2003, following the NHA's annual report, pharmaceutical companies were invited to make an offer to Respondent. For this, it seems illogical to argue that the measures taken did not follow a public and emergency purpose.

[114] Doha Convention,¶1
[115] Idem,¶5(d)
[116] Facts,¶13
[117] Idem,¶12

136. In conclusion, other means were adopted in order to avoid the collateral damages, Respondent tried to tackle the health crisis while complying with its obligations and Claimant cannot argue that a solution was not propositioned.

1.2. MEASURES ADOPTED BY MERCURIA ARE COVERED BY ART.25 ILC DRAFT ARTICLES

137. Additionally, if this Tribunal finds that Art.12 does not apply to the present case, Respondent submits that the measures taken were still encompassed in Art.25 of the ILC Draft Articles on State Responsibility, which states the following:

> *"*1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> the international obligation in question excludes the possibility of invoking necessity; or
>
> the State has contributed to the situation of necessity."[118]

138. Respondent submits that the requirements of Art.25 were met since Mercuria was facing a grave and imminent peril (**A**), the measures taken do not impair an essential interest of Basheera (**B**) and Respondent did not contribute to the situation of necessity (**C**).

A <u>Grave or imminent peril</u>

139. According to the ILC, a danger will be "grave" when it is "objectively established and not merely apprehended".[119] Greyscale was confirmed as an epidemic disease in Mercuria by the WHO in 1985.[120] From that moment, the Mercurian government

[118] ILC Draft Articles
[119] Hoelck-Thjoernelund,p.437
[120] PO1,Annex.3,line-1229

has been concerned with curbing the spread. Therefore, it is clear that the danger was objectively established.

140. Respondent submits that having dealt with previous cases of epidemic spreading, the intent was to avoid catastrophic consequences that are visibly found in the countries were the disease was not well-treated. Looking at Sub-Saharan Africa, the epicenter of the HIV/AIDS epidemic,[121] it can be noticed how life expectancy of this area was reduced considerably reaching unimaginable levels: in Zimbabwe before the pandemic an adult would live until 71 years whereas in 2010 its life expectancy was of only 34.6 years.[122]

141. Seeing what consequences may come from a poor handling of a disease of such characteristics, it seems completely reasonable to categorize greyscale as a grave and imminent peril. What is more, the Doha Convention has estimated an epidemic spreading as a national emergency and sets an example mentioning HIV/AIDS.[123]

B <u>The measures taken do not impair an essential interest of Basheera</u>

142. Firstly, as it has been thoroughly developed,[124] Respondent submits that Claimant does not carry out substantial activity in Basheera and moreover, it is controlled by several citizens of a third state. Hence, it cannot be concluded that the measures adopted seriously impaired an essential interest of Basheera.

143. Nevertheless, if this Tribunal came to find that the DoB clause does not apply to the case at hand, Respondent submits that since Atton Boro is a private company, the hypothetical loss of profit cannot be considered an essential interest of Basheera, but an individual interest of a private company.

144. In this sense, the tribunal in *CMS* argued that because the interests affected in the dispute corresponded to a company from the private sector, there was no indication that an essential interest of the contracting state was affected.[125]

[121] UNAIDS,p.22
[122] Ibidem
[123] Doha Convention,¶1
[124] **Jurisdiction 1.2.B**
[125] *CMS*,¶250

145. Consequently, the investment of Claimant cannot be considered an essential interest of Basheera.

C Respondent has not contributed to the situation of necessity

146. Lastly, Respondent has not contributed to the present situation in any way. Clearly, all efforts were aimed at the control of the disease; the main purpose of the measures being to avoid a greater health crisis. As it has been previously developed,[126] prevention campaigns and control means were established by Respondent before engaging into the measures questioned in this dispute.

147. For the above-mentioned reasons, Respondent invokes a state of necessity situation in accordance with Art.25 of the ILC Draft Articles, given the exceptional and grave circumstances that were present in Mercuria.

1.3. MEASURES ADOPTED BY MERCURIA FOLLOWED ITS OBLIGATIONS IN RELATION TO HUMAN RIGHTS

148. Respondent submits that all the measures fall within the scope of its duty to protect human rights. As stated by the WHO Constitution in its Preamble, governments have the task to lay down the tools necessary to obtain the highest standard of health.[127]

149. This standard is enshrined in several international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). As party to the ICESCR,[128] Mercuria has the obligation to satisfy Art.12 of such Covenant, which states the following:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

150. In the present case, public health was directly attained because of the nature of the greyscale disease. Being chronic and incurable, the non-treatment would have been

[126] **Merits 1.1.C**
[127] Sornarajah,p.472
[128] PO3,line-1535

a significant contributor to a decline of the standard of public health, leading to an unstable and difficult situation.

151. The BIT must be interpreted in a way that does not exclude the fulfillment of other international obligations between signatory states.[129] The opposite would lead to a denial of the right to public health of Mercurian citizens in favor of a private foreign investor.

152. It is therefore understandable that the measures taken by Respondent aimed at the fulfillment of its obligations towards its citizens, satisfying its right to a standard of health.

153. In conclusion, Respondent must be found relieved from any liability to the measures adopted during the health crisis based not only on the NPM clause enshrined in Art.12 of the BIT, but also based in Art.25 of the ILC Draft Articles. The measures were taken in good faith and with the sole purpose of answering to an emergency situation and to protect human rights. For all of the above, Respondent requests this Tribunal to reject all Claimant's allegations of the BIT breaches.

2. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT

154. Claimant, despite lacking a qualified investment in Basheera under the BIT,[130] argues that the IPL and the non-voluntary license concession amounted to an indirect expropriation of the Patent and breaches Art.6 of the BIT, which states:

> "The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment."

155. However, that is disingenuous since the regulatory measures are legitimate and fall under the scope of Art.6(4) of the BIT (**2.1**). Such provision allows the parties to regulate when the most essential public interests are at risk. Furthermore, Respondent submits not even a substantial deprivation of the investment has not occurred (**2.2**).

[129] *Suez*,¶1003
[130] **Jurisdiction 2**

2.1. THE IPL WAS ISSUED IN ACCORDANCE WITH ART.6(4) OF THE BIT

156. Art.6(4) of the BIT is a NPM, often included in BITs as a limitation to the application of investors' protection in exceptional circumstances.[131] Concretely, Art.6(4) states:

> "Non-discriminatory measures of a Contracting Party that are designated and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article"

157. On these grounds, the IPL does not amount to an expropriation as Respondent pursues the public welfare objective of fighting the greyscale health crisis (**A**) and the measures taken were neither discriminatory nor arbitrary (**B**).

A <u>The IPL pursues a public welfare objective</u>

158. States hold the right and obligation to regulate creating a balance between private and public interests.[132] The doctrine of police powers expresses that the pursuit of a public purpose exempts some State actions that otherwise would require compensation.[133]

159. The importance of public health relating public governance is commonly supported, considered "the most fundamental objective of public policy and regulatory of any democratic government".[134] Claimant cannot control regulatory measures taken by the government and public good might be ranked higher than private interests. The validity and need of measures could be beyond the extent of the BIT itself.[135] In any event, by virtue of Art.6(4), Respondent is explicitly entitled to make use of its regulatory power and issue the IPL.

160. In the case at hand, the situation was getting out of control and the well-being of Mercurian citizens was in danger. In fact, the country was facing a health emergency since the increase of confirmed citizens with greyscale had increased 13 times over only three years, from 20,485 in 2003 to 266,298 in 2006.[136] Besides,

[131] Burke/Von Staden,p.311
[132] Montt,¶7
[133] Newcombe/Paradell,¶23; Brownlie,p.532
[134] Wang,p.21
[135] Ibidem
[136] PO1,Annex.3,lines-1339-1340

the estimated number of people has also drastically increased up to 578,390 citizens.[137] The fact that it is a sexually-transmitted disease makes its spread easier and its control harder.

161. Moreover, the epidemic spreading of greyscale was also very costly to treat. Being Mercuria a developing country, its citizens could hardly afford a treatment worth USD 10,000 annually.[138] With those prices, the ability of the government to subsidize the treatment was also limited.

162. At the time of the existence of the LTA, the health budget expenditure was untenable. With the originally agreed prices, by 2006 the supply of drugs to the poorest 100,000 patients costed around 1 billion USD. This was rapidly accelerating and corresponded to nearly a third of the overall health budget and five times the greyscale program budget.[139] The crisis was unable to fight at those prices and the whole public health system was in risk.

163. Despite the NHA's intent, Claimant refused to renegotiate a more affordable discount than 10%, seeking selfish reasons and not accounting the situation of the country. Eventually, the LTA terminated in June 2008.[140]

164. Such termination meant the absence of any effective greyscale treatment for Mercurian patients.[141] Under those circumstances and the continuously spreading of greyscale, Respondent exercised his regulatory power and amended the existing IPL.[142] Thus, Respondent made sure its population could enjoy the necessary medicines to fight the epidemic.

165. Overall, Respondent clearly followed a public purpose when issuing the IPL, the greyscale crisis was getting out of hand and the issuance of the IPL was the only option to save the people of Mercuria.

[137] Idem.3,line-1343
[138] Idem,line-1355
[139] Idem,lines-1363-1366
[140] Facts,¶17
[141] PO3,line-1583
[142] PO1,Annex.4

B The IPL and license concession were not discriminatory

166. The IPL was issued fully respecting the non-discriminatory and non-arbitrary principle. Generally, discriminatory claims can be based on "race, religion, political affiliation, disability and a number of other criteria".[143] The IPL was issued in response to the present severe health crisis and future ones reaching all kind of patents without any distinction nor based on specific traits.[144]

167. Referring to arbitrariness, it could be defined as something "fixed or done capriciously or at pleasure; without adequate determining principle" and "without cause based upon the law".[145] The establishment of some reasonable and rational association to the alleged object pursue of a policy should be enough for it not being considered as arbitrary conduct although it is not the best suitable course of action under the circumstances for everyone.[146]

168. Respondent had a determining principle when issuing the IPL: facing the crisis caused by the greyscale epidemic.[147] Respondent's actions do not comply with the definition of arbitrariness and neither constitute a "willful disregard of the law",[148] in words of the *Siemens* tribunal. Respondent took the best possible response.[149]

169. Additionally, the Patent concession was based on a series of neutral requirements expressed in the law[150] and not based on any specific trait. Since it applies to all requests, any producer could ask for a compulsory license. Therefore, there is not "intent of the measure to discriminate".[151]

170. The IPL was neutral and focused on solving the greyscale crisis. It did neither differentiate among any discriminative criteria nor target a specific patent. Valtervite Patent was requested because its suitability to the existing needs just as any other FDC patent could have been chosen.

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[143] Dolzer/Schreuer,p.12
[144] PO1,Annex.4,line-1395
[145] Black´s Law Dictionary
[146] UNCTAD,p.78
[147] **Merits 1.2**
[148] *Siemens*,¶318
[149] *Enron*,¶281
[150] PO1,Annex.4
[151] *LG&E*,¶146

2.2. THERE HAS NOT BEEN SUBSTANTIAL DEPRIVATION OF CLAIMANT'S INVESTMENT

171. Claimant alleges a substantial deprivation of its investment due to the decrease of its profits with the increase in competition. However, an interference with the Patent's ability to carry on its business does not amount expropriation when the Patent continues to operate, even if profits are diminished.[152]

172. When examining if indirect expropriation has taken place, tribunals highly consider "the degree of interference with the property right and the character of governmental measures".[153] In this sense, when the interference causes a severe economic impact or a total impairment, a substantial deprivation of the investment occurs. Nonetheless, Respondent's interference does not approach such impact (**A**).

173. Another relevant criteria is the duration of the imposed measure,[154] as permanent decisions might imply an indirect expropriation. On the contrary, Respondent submits that the effects of the IPL are temporary (**B**) and once greyscale crisis is over, the effects of the license will be revoked.

A <u>The interference from Respondent does not approach severe economic impact or total impairment</u>

174. Claimant argues that it has been indirectly expropriated, being now unable to compete with an investment whose value has been reduced to nil. However, indirect expropriation requires a substantial deprivation of the investment[155] and it is not found in this dispute. If State's actions only affect a portion of the investment but the investor can continue with his activities the tribunals in *Pope & Talbot* and *Feldman* established there is no such deprivation.[156] The degree of interference must reach a total impairment of the investment in order for an indirect expropriation to occur.[157]

[152] *Pope &Talbot*,¶¶101-102
[153] OECD,p.10
[154] *Myers*,¶232
[155] *Telenor*,¶64
[156] *Pope & Talbot*,¶100; *Feldman*,¶152
[157] Dolzer/Schreuer,p.28

175. Similarly, the *CMS* tribunal rejected the existence of substantial deprivation as the investor had full ownership and control of the investment without the Government interfering in the day-to-day operations.[158]

176. Claimant still holds the Patent, the factories, brand name and know-how. It can freely produce Valtervite without any intervention from Mercuria. The granting of the compulsory license is not sufficient to cause the claimed decrease in value. The refusal to compete and adapt its prices to the market, which caused the economic damages, is exclusively Claimant's choice.

B <u>The compulsory license is temporary</u>

177. In *Tecme*d, the tribunal expressed that measures taken by a State amount to indirect expropriation "if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way".[159] In the case at hand, the concession to HG-Pharma is temporary until the end of the public health crisis and it will be suspended once the greyscale public health is no longer a threat.[160]

178. The aforesaid circumstances reveal the absence of the obligatory requirements to find an indirect expropriation. The issuing of the IPL and the compulsory license are not permanent nor irreversible and did not cause a destructive impact to Claimant's investment. In conclusion, this Tribunal should find that an expropriation has not taken place.

3. MERCURIA ACTED IN ACCORDANCE WITH THE FET PRINCIPLE

179. Contrary to Claimant's allegations that Respondent has infringed the protections guaranteed under the BIT,[161] the treatment provided to Claimant complied with all the BIT obligations and, in particular, with the fair and equitable level enshrined in Art.3(2) of the BIT:

> "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by

[158] *CMS*,¶263
[159] *Tecmed*,¶116
[160] Facts,¶21
[161] NoA,¶13

> unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."

180. For the interpretation of the standard, Respondent invites the Tribunal to follow the approach supported by the OECD[162] and the European Parliament[163] and to recognize the undeniable connection between the FET standard and CIL. Consequently, such link limits the threshold liability of the State as well as the room for arbitrators to interpret it.[164]

181. The understanding of the standard highly depends on the specific wording used.[165] In the present case, Art.3(2) BIT must be read together with Art.11, which states that international law obligations shall prevail over the rules contained in the BIT as long as those obligations are more favorable. Hence, the whole BIT must be interpreted in accordance to those international law obligations.

182. The BIT ruling the *Lemire* case,[166] shared an identical underlying object and purpose with the present BIT and the tribunal determined that the real intentions of the contracting parties was to facilitate the development of the host State's economy rather than the protection of the alien investment per se.[167]

183. Investment treaties only list host States' obligations regarding the foreign investment but they are not subjective declarations of rights to the investor.[168]

184. Moreover, the Contracting Parties clarified that the achievement of the economic objectives must always be "in a manner consistent with the protection of health",[169] as it could not be otherwise.

185. In any case, Claimant was treated with fairness and in an equitable manner: Respondent did not frustrate any legitimate expectations (3.1); the measures taken were not discriminatory (**3.2**) and do not amount to a denial of justice (**3.3**).

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[162] OECD FET
[163] *EP-Resolution*,¶19
[164] UNCTAD,p.12
[165] Dolzer/Schreuer,p.138
[166] *Lemire*
[167] *Lemire*,¶273
[168] *Nikkens*,¶19
[169] BIT preamble

3.1. MERCURIA RESPECTED CLAIMANT'S LEGITIMATE EXPECTATIONS

186. The FET principle includes in its scope the protection of the legitimate expectations that the host State could have created to the investor.[170] Nevertheless, these expectations are not open subjective assumptions of the investor but objective expectations according to the circumstances,[171] e.g. the level of development of the host State.[172]

187. Furthermore, there must be a balance between investor's legitimate expectations and the host State's right to regulate.[173] Any reasonable investor would not expect from the FET a greater protection than the one provided by good governance.[174]

188. Therefore, the Tribunal should only protect the legitimate expectations that any sensible investor could anticipate. In doing so, the level of development of Mercuria and the increasing spreading of the greyscale epidemic disease must be taken into account.

189. Accordingly, Respondent's conduct was totally consistent with such expectations: LTA's expectations are not protected under the FET (**A**), Respondent only made informal representations to general investors (**B**) and the new IPL was necessary and reasonable (**C**).

A <u>LTA's expectations are not protected legitimate expectations</u>

190. Claimant claims that the termination of the LTA frustrated certain legitimate expectations. However, there is an essential difference between the protected legitimate expectations and the mere contractual rights originated from a commitment between two private parties under domestic law.[175]

[170] Dolzer/Schreuer,p.145
[171] *El Paso*,¶358; *Lemire*,¶273
[172] *Duke*,¶340
[173] *El Paso*,¶358
[174] *Nikkens*,¶20
[175] *Duke*,¶355

191. In this sense, the tribunal in *RFCC* established that the solely infraction possibly committed by any ordinary contract partner is not enough to be considered as a breach of the FET standard.[176] Likewise, the tribunal in *Parkerings* stated:

> "contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law"[177]

192. Therefore, a breach of an international substantive protection as FET requires something further[178] as the use of sovereign capacity by the host State against the investor and its investment or a misuse of the governmental power.[179]

193. Firstly, Respondent submits the absence of any relation to the LTA and its termination since the LTA concerned Claimant and the independent NHA.[180] Thus no allegation against Respondent regarding this issue should be allowed.

194. However, even if this Tribunal was to consider differently, Respondent submits that the termination of the LTA was an act of an ordinary contract partner. No governmental power was exercised at any point. The BIT cannot serve Claimant as a tool to penalize breaches of extra-BIT regulations incurred by Respondent.[181]

195. Therefore, the frustration of the expectations arose from the so-called LTA cannot amount to a violation of an international substantive protection such as the FET.

B <u>Respondent only made informal representations to general investors</u>

196. Claimant has also referred to several supposed assurances made by Respondent as a source for legitimate expectation.[182]

197. Respondent does not deny that representations by the host State are capable of generating legitimate expectations worth of protection under the FET grounds.[183]

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[176] *RFCC*,¶¶33-34
[177] *Parkerings-Compagniet*,¶344
[178] *Parkerings-Compagniet*,¶¶344–345; *EDF*,¶¶238–260
[179] *Impregilo*,¶¶266–70
[180] **Jurisdiction 2.3.Bii)**
[181] *Saluka*,¶442
[182] NoA,¶12
[183] *Parkerings-Compagniet*,¶331;*Total*,¶120

Nevertheless, a certain level of specificity is required, such as a concrete object or addressee.[184]

198. In this vein, the tribunal in *Glamis* considered that protected expectations require a "quasi-contractual relationship […] whereby the State has purposely and specifically induced the investment".[185]

199. Additionally, in *Metalclad,* representations of the Mexican government were accepted as deserving the FET protection due to its character of "definitive, unambiguous and repeated".[186] The mere manifestation by the State of the possibility to negotiate does not constitute a basis for any investor to assume that a relevant representation was made.[187] Neither does the communication of a host State of good economic or legal conditions as an ideal business scenario.[188]

200. Furthermore, investment awards are likewise consistent in attributing little legal value to all political statements.[189] The encouragement by political proposals is not a reliable source for claiming legal assurances.[190]

201. In the press statement on January 2004, the Minister for Health of Mercuria invited investors to make business.[191] Although it was concerning the supply of FDC drugs, it did not include any conditions or further details that could turn this statement into a definitive and unambiguous promise. The announcement was a simple invitation to negotiate.

202. Similarly, the declaration of the Mercurian President in the micro blogging platform Twitter is another, even more general and vague, political proposal.[192]

203. Lastly, the Tribunal should also refuse to consider the invitation made by the NHA to Claimant in relation to the supply of FDC drug as a source of legitimate expectation. Repeatedly, the NHA's acts cannot be attributable to Respondent.[193]

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[184] Potestà,p.21
[185] *Glamis*,¶766
[186] *Metaclad*,¶¶78,101; *Feldman*,¶148
[187] *Frontier Petroleum*,¶¶76,455,465
[188] *White Industries*,¶10.3.17
[189] *Continental*,¶261
[190] *El Paso*,¶395
[191] Facts,¶8
[192] *El Paso*,¶395
[193] Facts,¶9

In any event, this invitation is another appeal to subsequent negotiations, as it resulted afterwards.[194]

204. In conclusion, Respondent invited Claimant to make business and to negotiate but its political declarations are so broad and general that Claimant could not reasonable expect any protected legitimate expectation from them.

C The issuance of the IPL was reasonable

205. Every state has the inalienable right to create and amend its own regulatory framework as one of the fundamental prerogatives that derives from its sovereignty. Such power is at the same time a duty and can only lead to protected legitimate expectations when the regulatory modification is contrary to public interests or reasonable objectives.[195]

206. The *Saluka* tribunal determined that the entering into an investment treaty with a FET provision does not mean that the host State is committed to freezing its legal structure.[196] Otherwise such commitment would constitute a burdensome obligation for the host State.[197]

207. The tribunal in *El Paso* expressed that, with such commitment the "legislation could never be changed: the mere enunciation of that proposition shows its irrelevance".[198] Similarly, the economy and legal life evolves by nature.[199] It is unrealistic to expect an absolute stability within the FET clause with no further qualifications, i.e. with no stability clause or other additional guarantees on behalf the host State.[200]

208. In order to assess whether the host State has exceeded its regulatory power, all circumstances need to be thoroughly analyzed, it cannot be conducted through an abstract yardstick of good governance.[201]

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[194] Facts,¶9
[195] *Impregilo*,¶291
[196] *Saluka*,¶351
[197] Potestà,p.30
[198] *El Paso*,¶350
[199] *Idem*,¶352
[200] *Saluka*,¶304
[201] Potestá,p.30

209. Moreover, investors' own conduct plays a crucial role. Any investor must be well aware of the state's right to regulate and anticipate to the possible regulatory changes.[202] The tribunal in *EDF* asserted that no alien investor is allowed to rely on the BIT as an "insurance policy" and to pretend to be protected against any single risk associated to the host State's regulatory power.[203]

210. Since 2003, Mercuria's population was severely affected by greyscale[204] and Respondent validly used its prerogative powers to issue the new IPL.

211. Against Claimant's allegations,[205] the IPL is in accordance with the TRIPS Agreement and with the Doha Convention[206] and thus such international commitments cannot be the basis of any allegedly legitimate expectations later frustrated.

212. Furthermore, the regulatory change was not either abrupt[207] since Mercuria previously advised its epidemic concern and declared that:

> "the government would take every measure it deemed necessary to make ensure that patients of greyscale could avail treatment"[208]

213. Claimant, as a diligent and experienced investor,[209] should have considered in advance that changes in the law are an assumed risk, especially in the context of developing countries.[210] Besides, this assumed risk is already factored into the price of Sanior.

214. In conclusion, since the contractual expectations from the LTA are not able to be included within the FET protection, the informal declarations made by Respondent are not sufficiently specific and the regulatory modification was perfectly foreseeable under the circumstances given, the Tribunal should determine the absence of any legitimate expectations on Claimant's side.

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[202] UNCTAD FET,p.86
[203] *EDF*,¶217
[204] Facts,¶6
[205] NoA,¶13
[206] **Necessity ¶131**
[207] *CNTA*¶¶42-44
[208] Facts,¶14
[209] Idem,¶5
[210] *Parkerings-Compagniet*,¶333; *Total*,¶156

3.2. MEASURES ADOPTED BY MERCURIA WERE NON-DISCRIMINATORY

215. Discrimination occurs when there is a differential treatment applied to different parties in similar situations.[211] In this case, Respondent has not made a distinction between the treatment given to Claimant and the rest of the pharmaceutical companies. Respondent acted responsibly and in accordance with its obligation towards Mercurian population.[212]

216. As it has been thoroughly exposed, the termination of the LTA is not attributable to Respondent, therefore, the only measure that Claimant could argue as discriminatory is the passing of the IPL. Nevertheless, it has been established that the IPL had no discriminatory intent.[213] The IPL passed in October 2009 affected both local and foreign-owned competitors.[214] Nothing in the wording of the IPL denotes any kind of favoritism for a specific company or sector. The vocabulary present in the Section 23 C is general, using terms such as "any person" or "nature of the invention" and the grounds necessary to invoke the law are not specific to a sector nor company. The grounds necessary are requirements that could be met by any company having a license in Mercuria.

217. Lastly, Claimant was accorded a 1% royalty of total earnings by the HCM, which HG-Pharma had every intention to pay.[215] The payment has not been effectuated because of Claimant's negative to inform HG-Pharma of its bank details.[216] Claimant argues that the royalty rate attributed to Claimant, falls into the range of usually established [0.5%;3%] royalties in Mercuria.[217] There is no discrimination possible since the royalty is no lower nor higher than the usual rates applied.

218. In conclusion, Respondent submits that in no way its conduct can be found discriminatory, since it has not treated or singled out Claimant and all the measures were taken in *bona fide* and with the public interest at aim.

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[211] *Antoine Goetz*,¶121
[212] Facts,¶15
[213] **Merits 2.1.B**
[214] PO1,Annex.4
[215] Facts,¶21
[216] PO3,line-1595
[217] Idem,line-1590

3.3. MEASURES ADOPTED BY RESPONDENT DO NOT AMOUNT TO A DENIAL OF JUSTICE

219. Claimant has alleged that the actions by the judiciary amount to a denial of justice. In this vein, the due process requirements are satisfied when the state enables legal tools for investors, in order to protect their investments and to raise claims against the actions that could affect said investments.[218]

220. Respondent submits that there are no grounds to establish a denial of justice, firstly because Claimant has not exhausted local remedies (**A**); in any case, Claimant bears the burden of proving the denial of justice (**B**) and it has failed to do so, since Respondent has acted in accordance with the international standards of access to justice (**C**).

A Claimant has not exhausted local remedies

221. A claim for denial of justice needs to be based on certain elements that are substantive to the standard. One of those requirements is the exhaustion of local remedies ("ELR");[219] in order to claim a denial of justice, the wrongdoing must be perpetuated by the entire judicial system.[220] As *Paulsson* points out: "there can be no denial before exhaustion".[221]

222. Claimant has failed to exhaust available remedies since it did not pursue the actions provided by the new IPL. Mercurian Law gives the patent holder the possibility to question the validity of the non-voluntary license, after being granted, before a two-judge bench of the HCM.[222]

223. Claimant might submit that ELR is subject to qualifications if said local remedies would be ineffective.[223] However, Respondent recalls that no local remedies have been put at test, since Claimant has directly decided to avoid them.

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[219] *Spiegel*,¶63
[220] Paulsson,¶¶100-108.
[221] *Idem*,¶¶90-100
[222] PO3,line-1580
[223] *Ambatielos*,pp.122-123

224. Since the domestic system has not been tested as a whole,[224] it cannot be argued that the system has failed and therefore, Respondent cannot be held responsible for a denial of justice.

B Claimant bears the burden of proving the denial of justice

225. Alternatively, in case this Tribunal found that Claimant exhausted the local remedies, Respondent submits that a denial of justice claim needs to be sustained by "clear, convincing and conclusive evidence".[225] This necessity has been stated by numerous arbitral tribunals, such as the *Chattin* tribunal, which confirmed that "convincing evidence is necessary to fasten liability" [226] in order to argue a denial of justice.

226. It has to be noted that international tribunals are not "supra-national courts of appeal";[227] denial of justice is therefore a very serious accusation that interferes with the national judiciary system. For this reason, Claimant has the burden of proof and needs clear and convincing evidence of highly egregious conduct.[228]

227. In the case at hand, Claimant has not gathered proof of the supposed failing judicial system.

C Respondent has acted in accordance with international standards of access to justice

228. Respondent is aware that any State can be liable for the acts of its judiciary, following Art.4 of the ILC Articles. However, public international law does not define what a reasonable court delay is, as there are no strict standards to measure if the delay amounts to a denial of justice or not.[229]

229. Following the reasoning of the tribunal in *Chevron*, "denial of justice has to be proved and the test for establishing such standard sets a high threshold".[230] Thus,

[224] *Interhandel*,¶6
[225] *Chevron*,¶247
[226] *Chattin*,¶¶282-288
[227] *EDF*,¶221
[228] *Ibidem*
[229] *Toto*,¶155
[230] *Chevron*,¶244

the standard requires "a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety".[231]

230. International tribunals have identified several factors which are relevant to determine whether delays in judicial proceedings amount to a denial of justice. The factors vary from the complexity of the enforcement proceedings to the need for a swift resolution and the behavior of both litigants and National courts.

231. In *White Industries*, a nine-years delay did not constitute a claim of denial of justice. The tribunal considered that a developing country with a population of 67 million people and an overstretched judiciary system had an incredible amount of work that could explain the delay. The tribunal then went on affirming that even if the delay is of nine years, it could not be argued that the judicial system as a whole is defective.[232] Furthermore, it was found that there were no signs of bad faith from India and therefore the conduct did not amount to an "egregious conduct" or a particularly serious shortcoming.[233]

232. In the case at hand, the HCM has respected the due process during all the enforcement proceedings and Claimant cannot argue that its claim was not heard. The delay alleged by Claimant was not due to a specific Respondent's desire but to the overburdened judiciary system from a developing country such as Mercuria. Due to the country's situation, the enforcement proceedings took longer compared to the developed countries standards. As it was previously stated, access to justice and means for protection were available to Claimant throughout the process.

233. In conclusion, Respondent alleges that Mercuria cannot be held liable because the measures adopted fall into the scope of Art.12 of the BIT and answer to a situation of national health crisis, which is also covered by Art.25. In the event that this Tribunal finds Respondent liable, Respondent shows proof of the lack of substantial deprivation and FET that has been provided to Claimant. Respondent cannot be found liable for Claimant's bad business decisions since it had nothing to do with the ill-fated resolutions.

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[231] *Chevron*,¶244
[232] *White Industries*,¶10.4.18
[233] *Idem*,¶10.4.23

234. Respondent has acted diligently in accordance with international law standards and has not breached any of the provisions of the present BIT.

PRAYER FOR RELIEF

For all of the above mentioned, Respondent respectfully requires this Tribunal to hold that:

1. This Tribunal lacks jurisdiction over treaty claims submitted by Claimant in the present dispute, according to Art.8 of the BIT, since:
   a) Respondent has properly exercised the Denial of Benefits clause contained in Art.2 of the BIT;
   b) None of Claimant's assets can be considered protected investments under a proper construction of Art.1(1) of the BIT.

2. In case this Tribunal decided it has jurisdiction, Respondent asks the Tribunal to conclude that:
   a) Respondent has not violated any of the substantive protection provisions contained in the BIT, and in particular, Respondent has not violated neither Art.3(1), (2) nor Art.6 (1), (2);
   b) Respondent's actions are in any event exempt from international responsibility pursuant to Art.6(4) and Art.12 of the BIT;
   c) All Claimant's claims be dismissed.

In any event, Respondent requests the Tribunal to:

3. Order Claimant to pay for all costs related to these proceedings.

RESPECTFULLY SUBMITTED ON SEPTEMBER 25, 2017 by

_____/s/_____

WALDOCK

On behalf of Respondent, the Republic of Mercuria