A. Whether the Respondent can use the Denial of Benefits (DoB) clause of Article 2 of the BIT to deny treaty protection to the investor.

There are two issues that need to be raised for this claim.

First, are the requirements of Article 2 of the BIT are fulfilled? In particular, it needs to be proven based on the facts of the case whether the company is owned or controlled by a person (Article 2 (1): natural or legal) that is a national of a third State (not a Contracting Party to the BIT), and whether claimant has "*substantial business activities*" in the home State (Article 2 (1)).

Second, the teams have to argue on the temporal conditions of the DoB clause, and particularly when the Respondent State needs to invoke it, i.e. when the investment is made or when the dispute arises. Depending on the side they represent, each team is expected to advance arguments primarily based on one of two divergent views of interpretation adopted by tribunals.

The interpretation of Article 2 (1) of the BIT will focus on two issues:

i. "if citizens or *nationals of a third State own or control such entity*"
ii. "and if *that entity has no substantial business activities in the territory of the Contracting Party in which it is organized*;"

The teams are expected to rely on the facts of the case and apply jurisprudence on the issues to them, to convince the tribunal to follow their argumentation, or disregard the argumentation of the opposing party.

Claimant's Arguments

1. Control or ownership by another legal entity.

The Claimant will support the view that Atton Boro Ltd. is not controlled by an entity of a third State, and in particular, that it is not controlled by Atton Boro and Company, which is the primary holding company for Atton Boro Group, a drug discovery and development enterprise. It has its own manager and accountant.

2. Substantial Business activities in the home State.

To support its claim Claimant is expected to advance the argument that it has had 2 to 6 permanent employees in Basheera since 1998 (line 1510), that manage the patents. The teams will support their position on decisions like *Pac Rim v. Ecuador* (Decision on the Respondent's Jurisdictional Objections, paras. 4.65, 4.68 – 4.69), which recognized that the existence of employees and offices is an indicator of substantial business activities.

Also, the Claimant will claim that it rented out an office space, opened a bank account (*Generation Ukraine v. Ukraine*, a request for the Institution of Arbitration Proceedings against the Respondent invoking the provisions of the BIT. paras. 15.8 & 15.9), hired a manager and an accountant (line 860) (*Generation Ukraine v. Ukraine*, paras. 15.8 & 15.9, *Amto v Ukraine*, an arbitration pursuant to the Energy Charter Treaty and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, para. 67), and commenced business.

Claimant will also make the argument that the two requirements (control/ownership and substantial business activities) of Article 2.1 are linked with the word "and", meaning that both requirements need to be fulfilled cumulatively, otherwise the provision cannot be applied.

3. **Retroactive application of the DoB clause:**

The Claimant will submit that the State needs to exercise the right of Article 2 BIT in a timely manner. Claimant will invoke cases like *Plama v Bulgaria* (a request for arbitration invoked the provisions of the ECT and the most favored nation (MFN) provision of a BIT, para.155) to support that Respondent did not exercise the right timely, but only after the Notice of Arbitration was sent, and that this belated invocation of the clause cannot have a retroactive effect. (*Plama v Bulgaria*, para. 162).

The Claimant is expected to make the policy argument that based on the wording of Article 2 BIT, inspiration should be drawn from Energy Charter Treaty (ECT) cases that dealt with the DoB issue, because of the similarity of the clauses (and not from other cases, like *PacRim v Ecuador*). Article 2 of the BIT and Article 17 of the ECT have almost identical wording.

ECT cases have rejected the application of the DoB clause with a retroactive effect. The Claimant will argue that the BIT "reserves the right" to the Respondent to deny the advantages of the treaty, but for that to happen the party must exercise this right explicitly. (*Yukos v. Russia*, a request by the claimant against respondent's indirect expropriation, lack of fair and equitable treatment, including denial of justice claims, arbitrary, and discriminatory measures, para. 1456 / *Plama v. Bulgaria*, Pre. Award, para. 155, *Khan Resources*, Award on Jurisdiction, para. 419)

Respondent's Arguments

1. **Control or ownership by another legal entity.**

The Respondent will first claim that the Claimant does not have control over the investment. In particular, it will submit that the ultimate ownership and control is exercised by Atton Boro and Company which holds all the affiliates that own the shares of Atton Boro. The shares of Atton Boro Ltd are held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company, which is not a national of the Contracting parties (see lines 1509 and 1570), thus making the latter the ultimate owner and controller of Atton Boro Ltd. (*Guaracachi v Bolivia*, a request arising out of the respondent's nationalisation of claimant's assets, para. 370; *PacRim v El Salvador*, a request arising out of the respondent's refusal to issue mining licences for claimant's mining project, para.4.81-4.82)

2. **Substantial business activities in the home State.**

The Respondent is expected to make the argument that Claimant never had any activities in Basheera, its home State, and the only reason for its incorporation there was to take advantage of the protection of the BIT. Claimant did not have any activities of its own in the home State but all the activities were associated with Atton Boro Group (the parent company). (*PacRim v El Salvador*, para. 4.75)

3. **Retroactive application of the DoB clause.**

The Respondent is expected to raise the argument that there is no time limit on the exercise of the DoB provision, and therefore, that it can be raised even after the request for arbitration,

and it can have a retroactive effect. (*Ulysseas v Ecuador*, a request arising out of respondent's measures that allegedly altered the legal and regulatory framework governing the power sector, para. 172-173)

The Respondent is expected to make the policy argument that requiring States to review every corporate structure of every investment that is made in their territory, in order to invoke the protection of the DoB clause, is utterly impractical.

The Respondent can contradict the Claimant's use of the *Yukos* and the *Plama* decisions by arguing the criticism that the cases have incurred, and by relying on the "ordinary meaning" of the phrase "reserve the right to", which according to the Oxford English Dictionary does not suggest that any further action is necessary to exercise the right. By contrast, where the authors of other treaties wished to subject the use of a denial of benefits clause to prior notice, they inserted an explicit compulsory requirement of notification, as in Article 1113(2) of the North-American Free Trade Agreement and Article 18(2) of the 2004 Canada Model BIT.

The Respondent can make the argument that after the final ratification of the BIT, the Claimant was aware of the DoB clause, and could have acted in such a way as to avoid its invocation (*Guaracachi v Bolivia*, para. 375)

B. Whether the arbitral tribunal has jurisdiction over the claims in relation to the Arbitral Award.

This issue arises out of the Respondent's objection that claims in relation to the Arbitral Award do not fall within the tribunal's jurisdiction *ratione materia*, i.e. that the Arbitral Award is not a protected "investment" under the BIT. The issue may be divided into two sub-issues.

a. First, whether the Arbitral Award is a standalone protected "investment" under Article 1(1) of the BIT.
b. Second, whether the Arbitral Award, being a consequence of an underlying protected investment (the Long-Term Agreement), is a protected "investment" within the meaning of Article 1 (1) of the BIT.

Claimant's Arguments

1. The Arbitral Award is a standalone protected investment.

   The Claimant may contend that the phrase "*claims to money*" under Article 1 (1) (c) of the BIT takes within its sweep all arbitral awards. The Claimant may further argue that treaties that seek to exclude awards and judicial decisions from the purview of "investment", do so expressly (for instance, the Korea-US FTA, Article 11.28 FN 12). The absence of such an exclusion must be interpreted to mean that the contracting States intended for arbitral awards to be protected investments under the BIT.

2. The Arbitral Award, being a consequence of an underlying protected investment (the Long-Term Agreement), is a protected "investment"

Teams are expected to rely on the decisions in *Saipem v Bangladesh* (request arising out of the actions of the respondent and of the courts of Bangladesh allegedly aimed at sabotaging

an ICC commercial arbitration proceeding and the subsequent non-enforcement of the award), *ATA v Jordan, Frontier Petroleum v Czech Republic* (request arising out of the alleged wrongful failure of respondent's courts to recognise and enforce an interim and final award in claimant's favour), *and White Industries v India* (request arising out of alleged judicial delays by the respondent that left the claimant unable to enforce an ICC award for over nine years) to argue that the Arbitral Award is a part of the *entire operation* constituting the LTA investment, and therefore is a protected investment. Further, relying on the language of Article 1 (1) of the BIT, specifically the phrase "*any change in the form of an investment does not change its character as an investment*", teams may argue that the Arbitral Award is a continuation of the *underlying investment* and therefore a protected investment.

Respondent's Arguments:

1. The Arbitral Award is not a standalone protected investment.
   Respondents are expected to point out that no tribunal has ever directly found that an arbitral award constituted an investment by itself (i.e. unconnected to an underlying investment). Respondents may further urge that the arbitral award has no territorial link with the Respondent State, since it was rendered by a tribunal seated in Reef, not Mercuria (See line 933 of the Case).
2. The Arbitral Award, despite a connection to an underlying protected investment (the Long-Term Agreement), is not a protected "investment".

Teams are expected to rely primarily on the decision in *GEA vs Ukraine* (a request arising out of the alleged misappropriation of diesel and raw materials by the respondent), to contend that an arbitral award is *analytically distinct* from any investment that it may arise out of. Teams may further urge that the Arbitral Award does not contribute to the host State's economy in any way that would justify classifying it as an investment. Teams may substantiate this contention by relying on *Romak vs Uzbekistan* (a request arising out of the claimant's unsuccessful attempts to enforce an arbitral award) to argue that the criteria for determining an investment under ICSID (including "contribution to economy") ought to be applied by tribunals outside the aegis of ICSID as well. Finally, teams may contend that the phrase "*any change in the form of an investment does not change its character as an investment*" does not have the effect of bringing arbitral awards within the meaning of Article 1 (1).

C. Whether Mercuria is liable under Article 3 of the BIT for the conduct of its judiciary in relation to the enforcement proceedings.

This claim arises out of the pending proceedings before the High Court of Mercuria for enforcement of the Arbitral Award rendered in favour of the Claimant. The arguments of the teams are expected to have two elements.

a. First, determining the applicable standard under the Fair and Equitable protection contained in Article 3(2), in relation to conduct of the host State's judiciary. The Respondent is expected to contend that the conduct must be measured against the substantially high standard of "Denial of Justice" under customary international law. The Claimant, on the other hand, may contend that the applicable standard is the comparatively lower "Effective Means" standard.

b. Second, teams are expected to set out the content of the chosen standard, and invoke facts from the case to argue whether the conduct of the judiciary amounts to a violation of Article 3(2) of the BIT.

Claimant's Arguments:

1. Applicable Standard (Effective Means).

The Claimant is expected to contend that the standard for gauging conduct of the State's judiciary under the Fair and Equitable Treatment (FET) protection, is the "*effective means of enforcing rights*" standard. In support of this contention, teams are expected to cite the use of this phrase in the preamble to the BIT as being indicative of the intention of the contracting States. Teams may rely *inter alia* on the decision in *LG&E vs Argentina (Decision on Liability,* a request arising out of certain measures adopted by the respondent, in particular the adoption of the Emergency Law of 2002*)* to argue that language from the preamble of the BIT plays a key role in interpretation of the FET standard.

2. Violation of the FET standard.
   The Claimant may cite decisions *inter alia* in *White Industries vs India* to set out the contours of the standard. Teams are expected to rely on facts of the case, particularly Exhibit I to the Notice of Arbitration (Pg. 7 of the Case), to contend that the conduct of the judiciary violates the FET protection under Article 3(2). For instance, teams may highlight that the judge discloses a bias against the Claimant (line 238 of the Case). Further, teams may contend that the delay in enforcement of the Arbitral Award without cause violates the New York Convention to which the Respondent is a Contracting party, and therefore infringes upon the Claimant's legitimate expectations.

Respondent's Arguments:

1. Applicable Standard (Denial of Justice).

The Respondent may first set out that the general standard under FET for gauging conduct of State judiciary is denial of justice under customary international law. Teams are expected to argue that the preamble to a treaty cannot be interpreted to bestow new substantial protections under the treaty (*Total S.A. vs Argentina, Decision on Liability,* a request arising out of a series of decrees and resolutions taken by the respondent in the course of an economic crisis). The Respondent may cite that cases where the "*effective means*" standard was applied dealt with cases where the phrase occurred in the body, not the preamble, of the treaty. Furthermore, teams may highlight that the phrase has been moved from the body of the treaty to its preamble in recent updates to model BITs of some States (USA, for instance). This demonstrates that the effect of the words occurring in the preamble must not be given the same effect as words occurring as part of substantive provisions.

2. Violation of the FET standard.
   The Respondent may first set out that only manifestly or clearly egregious conduct by the judiciary amounts to an internationally wrongful act (*Flughafen Zurich AG v Venezuela* paras 636-41). Teams are then expected to set out how none of the instances of condoning delay on the part of the NHA (certain statements named by the judge) and nor the seven-year period amounts to a violation of FET. Teams are also expected to argue that enactment of the Commercial Courts Act satisfies the condition

of providing effective means of enforcing rights. Finally, the Respondent is expected to refute the contention that the New York Convention provisions may be imported into the legitimate expectations of the investor. Alternatively, the Respondent is expected to argue that no provision of the convention has been violated because enforcement has not been denied, and the convention does not prescribe a time limit.

D. Whether the enactment of Law No. 8458/09 and/or the grant of a license for the Claimant's invention amount to a breach of the Mercuria-Basheera BIT, in particular, the Fair and Equitable Treatment (FET) standard;

Argument on the Definition of the FET standard

- Article 3(2) of 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 unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."
    - Wording in Article 3(2) contains an autonomous FET obligation – investor's legitimate expectations and transparency – makes no reference to international law, customary law or minimum standard of treatment.
- Claimant
  - Will rely on autonomous FET standard to maximise scope of protection.
- Respondent
  - Counter autonomous standard still requires high threshold and subject to literal interpretation in context of BIT.

Breach of FET

- Claimant
  - Respondent breach FET obligations by enactment of Law No. 8458/09 and/or the grant of a license.
    - Breach legitimate expectations
      - Claimant invested and registered IPR in Mercuria to be able to use in the course of trade – Respondent's actions violates such legitimate expectations
        - Further, LTA Cl. 5 stipulated minimum guaranteed annual order-value; Cl. 6 states, "[LTA] shall be valid for a period of 10 years effective from commencement date subject to Supplier's satisfactory performance." LTA concluded on 20 July 2004, and less than 10 years law was enacted, license granted.
    - Breach through lack of transparency

        - Respondent did not disclose intention of introducing law of non-voluntary licenses; claimant had no opportunity to take such substantial and drastic change of laws into consideration when it decided to invest in Mercuria's market.
- Respondent
    - Submits that it is in full compliance with FET obligations.
    - It had acted reasonably, within scope of regulatory powers and in the public interest (which is one of the preambles of BIT: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety […]"); these actions were necessary due to changing circumstances of epidemic.
    - Whilst Claimant's economic loss is not covered by FET standard.
    - Claimant remains owner of IPR and free to use in trade, including a right to royalties for authorised copies of the products;
        - LTA does not grant additional protection

TRIPS

- PO2 at [2] clarifies that both Basheera and Mercuria are parties to the TRIPS.

Thus, students may argue for the TRIPS standard to be applied. (i.e. whether there is a general standard amongst countries as to the TRIPS standard and whether the Respondent State's IP laws have deviated largely from that). This argument has received amici submissions on both sides of the argument in the case of *Eli Lilly v Canada* (a request arising out of the invalidation of the claimant's Strattera and Zyprexa pharmaceutical patents by the respondent).

- Claimant will:
    - submit that FET consists of legitimate expectations and against arbitrary and discriminatory patent law and that Respondent has applied this to invalidate its patents, i.e. legal security.
    - submit that there is no clause in the BIT that specifically safeguard flexibilities of international IP system, as compared to that in other BITs and e.g. in the Eli Lilly's case NAFTA Art 1110(7):
        - "This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)."
            - Note: Art 1110 of NAFTA concerns Expropriation and Compensation, but there is no such equivalent safeguard in the Basheera-Mercuria BIT counterpart; which supports that lack of such intentions when BIT was entered into.
- Respondent will counter:
    - traditional investment standards like FET and MFN cannot be used to invoke international IP obligations in investor-State arbitration. This is because these obligations are between states, owned only to states and not to private parties like the Claimant.

- there is no clause in BIT or LTA safeguarding claimant against issuance of compulsory licenses.

E. Whether termination of the Long-Term Agreement by the Respondent's National Health Authority amounts to a violation of Article 3(3) of the BIT. (umbrella-clause)

The main point of this claim is whether the conduct of the State, and specifically terminating the LTA, can amount to a violation of the umbrella clause, and consequently what is the scope of the clause. Also, the participants will have to raise the issue of the arbitration clause of the LTA, and how this provision affects the jurisdiction of the treaty-based tribunal. Finally, the LTA has been signed not with the State, but with NHA, therefore the teams will need to discuss the requirement of a "sovereign act" for the invocation of the umbrella clause.

Claimant's Arguments:

The Claimant is expected to heavily rely on the *SGS v Philippines* decision.

The Claimant will submit that the termination of the contract falls under the scope of the umbrella clause. In particular, the wording "any obligation" of Article 3(3) is capable of encompassing contractual obligations, otherwise the provision becomes ineffective. (*SGS v Philippines*, a request arising out of alleged breaches of an agreement concluded between the claimant and respondent, para. 115, 127; *BIVAC v Paraguay*, a request arising out of respondent's alleged non-payment of invoices to the claimant under a contract, para.141). The Claimant will allege that the NHA was forced to terminate the contract, after the meeting of its Director with the Minister of Health and the President of Mercuria. (UF, para. 16)

The Claimant will support that the termination of the contract was the result of a sovereign act, thus the State was acting as *imperium*, and consequently a violation of the umbrella clause has occurred. (*BIVAC v Paraguay*, para.147)

Respondent's Arguments:

The Respondent can claim that the tribunal cannot have jurisdiction over the issue of termination, since another tribunal has already adjudicated this dispute, based on the contractual clause. The latter, as a *lex specialis* provision, must prevail over the general dispute resolution clause of the BIT. (*SGS v Philippines*, para. 141; *BIVAC*)

Furthermore, the Respondent is expected to urge the tribunal to follow the reasoning (to some extent) of the *SGS v Pakistan* tribunal. For instance, it can support that the wording of Article 3 of the BIT seems susceptible to indefinite expansion, and therefore the contractual claim cannot be automatically elevated to a breach of international treaty law. (a request arising out of respondent's alleged non-payment of invoices to the claimant and its attempts to terminate an agreement for services relating to customs clearance, para. 166)

Another argument is that the umbrella clause can be invoked only under exceptional circumstances, for instance in cases of denial of justice. (*SGS v Pakistan*, para. 172)

The Respondent is also expected to argue that for the invocation of the umbrella clause, a sovereign act must have been committed. The State must have acted as *imperium.* It will claim that the termination of the contract happened by NHA, not the State itself, therefore no sovereign act was committed, and consequently the application of Article 3(3) should not be allowed.

This Bench Brief is a draft. If in the course of reviewing teams' memorials you should have any questions or suggestions, please do not hesitate to share them with the Bench Brief Committee (Nicole Halikopoulou, Lynnette Lee, and Anand Mohan fdimootcase2017@googlegroups.com).