**Team: Baxter**

**FOREIGN DIRECT INVESTMENT**
**INTERNATIONAL ARBITRATION MOOT COMPETITION**
**2 - 5 NOVEMBER 2017**

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**ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE PERMANENT COURT OF ARBITRATION**

*Atton Boro Limited (Claimant)*

*v.*

*The Republic of Mercuria (Respondent)*

**PCA ARBITRATION CASE No. 2016 - 74**

# MEMORIAL FOR RESPONDENT

September 25, 2017

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# LIST OF AUTHORITIES

**BOOKS**

| | |
|---|---|
| Baumgartner | *Baumgartner, Jorun,* Treaty Shopping in International Investment Law, First Edition, 2016. |
| Black's Law Dictionary | *Bryan A. Garner,* Black's Law Dictionary, 10th Edition, 2016. |
| Dörr/Schmalenbach | *Dörr Oliver / Schmalenbach, Kirsten*, Vienna Convention on the Law of Treaties, A Commentary (2012). |
| Dolzer/Schreuer | *Dolzer, Rudolf / Schreuer, Christoph,* Principles of International Investment Law, Second Edition, 2012. |
| Kröll/Mistelis/Viscasillas | *Kröll, Stefan / Mistelis, Loukas / Viscasillas, Pilar Perales,* UN-Convention on the International Sales of Goods (CISG), Commentary, First Edition, 2011. |
| Kronke/Nacimiento/Otto/Port | *Kronke, Herbert, / Nacimiento, Patricia / Otto, Dirk / Port, Nicola Christine,* Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention, 2010. |
| Malbon/Lawson/Davison | *Malbon, Justin / Lawson, Charles / Davison, Mark,* The WTO Agreement on trade-related aspects of intellectual property rights, Commentary, 2014. |
| McLachlan/Shore/Weiniger | *McLachlan, Campbell / Shore, Laurence / Weiniger, Matthew*, International Investment Arbitration: Substantive Principles, 2007. |
| Muchlinski/Ortino/Schreuer | *Muchlinski, Peter / Ortino, Federico / Schreuer, Christoph,* The Oxford Handbook of International Investment Law, 2008. |
| Oxford Dictionary | *John Simpson / Edmund Weiner,* The Oxford English Dictionary, 2nd Edition, 1989. |

| | |
|---|---|
| Roe/Happold | *Roe, Thomas / Happold, Matthew*, Settlement of Investment Disputes under the Energy Charter Treaty, 2011. |
| Salacuse | *Salacuse, Jeswald W.*, The Law of Investment Treaties, 2nd Edition, 2015. |
| Stoll/Busche/Arend | *Stoll, Peter-Tobias / Busche, Jan / Arend, Katrin*, WTO - Trade-Related Aspects of Intellectual Property Rights, 2009. |
| UNCTAD-ICTSD | *United Nations Conference on Trade and Development / International Center for Trade and Sustainable Development*, Resource Book on TRIPS and Development, 2005. |
| Van den Bossche/Prévost | *Van den Bossche, Peter / Prévost, Denise*, Essentials of WTO Law, 2016. |
| Villiger | *Villiger, Mark E.*, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources 2nd Edition, 1997. |

**ARTICLES**

| | |
|---|---|
| Born/Šćekić | *Born, Gary / Šćekić, Marija*, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', in: Practising Virtue: Inside International Arbitration, August 20, 2015. |
| Davey/Sapir | *Davey, William J. / Sapir, André*, The Soft Drinks Case: The WTO and Regional Agreements, World Trade Review, Volume 8, Issue 1, 2009, pages 5-23. |
| Oliveira/Miranda | *De Oliveira, Leonardo V. P. & Miranda, Isabel*, International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil, Journal of International Arbitration, Volume 30, Issue 1, 2013, pages 49-70. |

| | |
|---|---|
| Ganesh | *Ganesh, Aravind,* Cooling off period (Investment Arbitration), Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, MPILux Working Paper 7, 2017. |
| Gibson | *Gibson, Christopher,* A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation, American University International Law Review, Volume 25, Issue 3, 2010. |
| Hudson | *Hudson, Manley O.*, Article 24 of the Statute of the International Law Commission, 1950. |
| Lin | *Lin, Tsai-yu,* Inter-Mingling TRIPS Obligations with an FET Standard in Investor-State Arbitration: An Emerging Challenge for WTO Law?, Journal of World Trade 50, No. 1, 2016. |
| Malik | *Malik, Mahnaz,* The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?, November, 2011. |
| Newcombe | *Newcombe, Andrew Paul,* The Boundaries of Regulatory Expropriation in International Law, ICSID Review - Foreign Investment Law Journal, Volume 20, Issue 1, 2005. |
| Ryabinin | *Ryabinin, Andrey*, Procedural Public Policy in Regard to the Enforcement and Recognition of Foreign Arbitral Awards, Central European University, March 30, 2009. |
| Scherer/Moss | *Scherer, Matthias / Moss, Sam*, Resisting Enforcement of a Foreign Arbitral Award under the New York Convention, IPBA Journal No. 51, September 2008, pages 17-26. |

| | |
|---|---|
| Schill | *Schill, W. Stephan,* Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law, in: International Investment Law and Comparative Public Law, 2010. |
| Shihata/Parra | *Shihata, Ibrahim F.I / Parra, Antonio R.,* The Experience of the International Centre for Settlement of Investment Disputes, ICSID Review - Foreign Investment Law Journal, Volume 14, Issue 2, October 1, 1999, Pages 299–361. |
| Taubman | *Taubman, Antony,* Rethinking TRIPS: 'Adequate Remuneration' for Non-Voluntary Patent Licensing, Journal of International Economic Law, Volume 11, No. 4, 2008. |
| Treves | *Treves, Tullio,* Customary International Law, Max Planck Encyclopedia of Public International Law, 2006. |
| Ufot | *Ufot, Dorothy,* Public policy as a ground for setting aside or for the refusal of enforcement or recognition of Awards under the New York Convention, 2002. |

**OTHERS**

| | |
|---|---|
| Essential drugs and medicines policy | *WHO,* Essential drugs and medicines policy. |
| General Comment | *Office of the United Nations High Commissioner for Human Rights,* Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12 ICESCR), August 11, 2000. |
| IBA | *IBA Subcommittee on Recognition and Enforcement of Arbitral Awards,* Report on the Public Policy Exception in the New York Convention, General Report, October 2015. |

| | |
|---|---|
| NutraSweet Company | *NutraSweetCompany,*<http://www.nutrasweet.com/company.asp>, (accessed September 20, 2017). |
| World Bank | World Bank Country and Lending Groups, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>, (accessed September 22, 2017). |

# LIST OF LEGAL SOURCES

## ARBITRAL DECISIONS

| | |
|---|---|
| *A*ES | *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Award, September 23, 2010. |
| Aguas del Aconquija | *Compania de Aguas del Aconquija S.A., Vivendi Universal v. The Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002. |
| Amto | *Limited Liability Company Amto v. Ukraine* (SCC Case No. 080/2005), Final Award, March 26, 2008. |
| Apotex | *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, August 25, 2014. |
| Azinian | *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States* (ICSID CASE No. ARB(AF)/97/2), Award, November 1, 1999. |
| BG Group | *BG Group Plc. v The Republic of Argentina* (UNCITRAL), Final Award, December 24, 2007. |
| Burlington | *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction, June 2, 2010. |
| Ceskoslovenska Obchodni Banka | *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Jurisdiction, May 24, 1999. |
| Chevron | *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Partial Award on the Merits, March 30, 2010. |

| | |
|---|---|
| Continental | Continental Casualty Company v. The Argentine Republic, (ICSID Case No. ARB/03/9), Award, September 5, 2008. |
| Deutsche Bank | *Deutsche Bank AG v. The Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, October 31, 2012. |
| Duke Energy | *Duke Energy Electroquil Partners, Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), August 18, 2008. |
| Eastern Sugar | *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, (SCC No. 088/2004), Partial Award, March 27, 2007 |
| Electrabel | *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, November 25, 2015. |
| El Paso | *EI Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/IS), Decision on Jurisdiction, April 27, 2006. |
| El Paso, Award | *EI Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/IS), October 31, 2011. |
| EMELEC | *Empresa Eléctrica del Ecuador v. Republic of Ecuador* (ICSID Case No. ARB/05/9), Award, June 2, 2009. |
| Enron | *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, January 14, 2004. |
| Fedax | *Fedax NV v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award on Jurisdiction, July 11, 1997. |
| Frontier | *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL), Final Award, November 12, 2010. |

| | |
|---|---|
| GEA | *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, March 31, 2011. |
| Grand River | *Grand River Enterprises Six Nations, Ltd. v. United States of America* (UNCITRAL), Award, January 12, 2011. |
| Guaracachi | *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17), Award, January 31, 2014. |
| Impregilo | *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award, June 21, 2011. |
| Jan de Nul | *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, November 6, 2008. |
| Joy Mining | *Joy Mining Machinery Limited v. The Arab Republic of Egypt (*ICSID Case No. ARB/03/11), Award on Jurisdiction, August 8, 2004. |
| Kardassopoulos | *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, July 6, 2007. |
| Lauder | *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award, September 3, 2001. |
| LG&E | *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, October 3, 2006. |
| Loewen | *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, June 26, 2003. |
| Maffezini | *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, November 13, 2000. |

| | |
|---|---|
| MCI | *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, July 31, 2007. |
| Metalclad | *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, August 30, 2000. |
| Middle East | *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award, April 12, 2012. |
| Mondev | *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, October 11, 2002. |
| Murphy | *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4), Award on Jurisdiction, December 15, 2010. |
| Noble Ventures | *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, October 12, 2005. |
| Pac Rim | *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, June 1, 2012. |
| Pan American | *Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic*, (ICSID Case No. ARB/04/8), Decision on Preliminary Objection, July 27, 2006. |
| Parkerings Compagniet | *Parkerings Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, September 11, 2007. |
| Petrobart | *Petrobart Limited v. The Kyrgyz Republic*, UNCITRAL, Award, February 13, 2003. |
| Philip Morris | *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, July 8, 2016. |

| | |
|---|---|
| Plama | *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, February 8, 2005. |
| Plama, Award | *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award, August 27, 2008. |
| Romak | *Romak S.A. v. The Republic of Uzbekistan (*PCA Case No. AA280), Award, November 26, 2009. |
| Rompetrol | *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008. |
| Rumeli | *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan (*ICSID Case No. ARB/05/16), Award, July 29, 2008 |
| Saipem | *Saipem S.p.A v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation of provisional measures, March 21, 2007. |
| Salini | *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 31, 2001. |
| Saluka | *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award, March 17, 2006. |
| SGS v. Pakistan | *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003. |
| SGS v. Paraguay | *SGS Société Générale de Surveillance S.A v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Award, February 10, 2012. |

| | |
|---|---|
| Starrett | *Starrett Housing Corporation, Et Al. v. The Government of the Islamic Republic of Iran* (Iran-United States Claims Tribunal, Case No. 24), Interlocutory Award, December 20, 1983. |
| Tecmed | *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award, May 29, 2003. |
| Ulysseas | *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Interim Award, September 28, 2010. |
| Urbaser | *Urbaser S.A. v. The Argentine Republic* (ICSID Case No. ARB/07/26), Award, December 8, 2016. |
| Western | *Western NIS Enterprise Fund v. Ukraine* (ICSID Case No. ARB/04/2), Order, March 16, 2006. |
| White Industries | *White Industries Australia Limited v. India* (UNCITRAL), Final Award, November 30, 2011. |
| Wintershall | *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008. |
| Yukos | *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Interim Award on Jurisdiction and Admissibility, November 30, 2009. |

**INTERNATIONAL AND DOMESTIC COURT CASES**

| | |
|---|---|
| Ansell | *Ansell S.A. v. MedBusinessService-2000*, Highest Arbitrazh Court of the Russian Federation (Supreme Court of Arbitration of the Russian Federation), A40-24208/10-63-209, August 3, 2010. |
| Constitution of the Maritime Safety Committee | ICJ, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, June 8, 1960 (ICJ Reports 1960, pages 150-172). |

| | |
|---|---|
| EC-Bananas III | *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, AB-2008-8, WT/DS27/AB/RW/USA, Reports of the Appellate Body, November 26, 2008. |
| Mexico-Soft Drinks | *Mexico - Tax Measures on Soft Drinks and other Beverages*, AB-2005-10, (WT/DS308/AB/R), March 6, 2006. |
| Military and Paramilitary Activity in and against Nicaragua | *ICJ, Case concerning the Military and Paramilitary Activity in and against Nicaragua* (Nicaragua v. United States of America), Judgement, June 27, 1986 (ICJ Reports 1986, pages 14-150). |
| Renusagar | *Renusagar v. General Electric*, Supreme Court of India, AIR SC 860, October 7, 1993. |
| Reparations | *ICJ*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, April 11, 1949 (ICJ Reports 1949, pages 174-220). |
| Peru-Agricultural Products | *Peru — Additional Duty on Imports of Certain Agricultural Products*, AB-2015-3, WT/DS457/AB/R, July 7, 2015. |

**TREATIES**

| | |
|---|---|
| Czech Republic-United States BIT | Treaty concerning the reciprocal encouragement and protection of investment between the United States of America and the Czech and Slovak Federal Republic, December 9, 1992. |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |

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| Mercuria-Basheera BIT | Agreement between the Republic of Mercuria and the Kingdom of Basheera for the promotion and reciprocal protection of investments |
| NAFTA | North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, January 1, 1994. |
| Netherlands-Poland BIT | Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of Investments, February 1, 1994. |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |

**OTHERS**

| | |
|---|---|
| Doha Declaration | *Declaration on the TRIPS agreement and public health*, Doha WTO Ministerial 2001, TRIPS, WT/MIN(01)/DEC/2, November 20, 2001. |
| General Assembly | *United Nations, General Assembly* (A/HRC/35/L.18/Rev.1), Human Rights Council, Thirty-fifth session, Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, June 21, 2017. |
| ILC Articles | Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, 2001. |
| Remuneration Guidelines | *Remuneration Guidelines for non-voluntary use of a patent on medical technologies*, Health Economics and Drugs TCM Series No. 18, 2005. |

# LIST OF ABBREVIATIONS

| | |
|---|---|
| Art(s). | Article(s) |
| BIT | Agreement for the Promotion and Reciprocal Protection of Investments |
| CSR | Corporate Social Responsibility |
| e.g. | Exempli Gratia |
| FDC | Fixed Dosed Combinations |
| FET | Fair and Equitable Treatment |
| Ibid. | Ibidem |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| IIA | International Investment Agreement |
| ISD | Investor-State Dispute |
| l./ll. | line/lines |
| LTA | Long Term Agreement |
| NHA | National Health Authority |
| No. | Number |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| ¶/¶¶ | Paragraph(s) |
| PCA | Permanent Court of Arbitration |
| p/pp | page(s) |
| UNCTAD | United Nations Conference on Trade and Development |
| ICTSD | International Center for Trade and Sustainable Development |
| USD | US Dollar |
| VCLT | Vienna Convention on the Law of Treaties |
| WHO | World Health Organization |
| WTO | World Trade Organization |

# STATEMENT OF FACTS

1. Respondent, the Republic of Mercuria ("**Respondent**"), concluded an Agreement for the Promotion and Reciprocal Protection of Investments ("**BIT**") with the Kingdom of Basheera ("**Basheera**") on January 11, 1998.

2. Claimant is Atton Boro Limited ("**Atton Boro**" or "**Claimant**"), a wholly owned subsidiary of Atton Boro Group located in Basheera, was incorporated in April 1998 as a vehicle for carrying on business in South American and African countries. Atton Boro Group is a leading drug discovery and development enterprise.

3. With a new synthesised compound called Valtervite, Atton Boro Group claimed it would radically improve treatment for greyscale patients. Atton Boro Group's parent company, Atton Boro and Company, obtained Mercurian Patent No. 0187204 on February 21, 1998, which was later assigned to Claimant. Claimant was primarily involved in long-term public-private collaborations with states and state agencies for the manufacture and supply of essential medicines. Therefore, it concluded several such agreements with the National Health Authority ("**NHA**"), which was set up to ensure public health.

4. Since 2002, Mercuria has been increasingly infested by the chronic incurable disease "greyscale", which exhibits terrible symptoms, such as progressively stiffening muscles, swelling of the limbs, severe joint pain, and cracking or flaking of the skin

5. In 2003, the NHA published an annual report, which cautioned that greyscale could lead to a national crisis within ten years unless comprehensive measures were taken to combat the disease.

6. As a consequence of this urgent situation, the NHA and Atton Boro entered into a Long-Term Agreement ("**LTA**") in 2004. The LTA obligated Claimant to sell Sanior to the NHA at a 25% discounted rate while the NHA annually placed new purchase orders. In Clause 6, the Parties agreed that the LTA *"shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance."*

7. Consequently, Atton Boro set up its manufacturing unit for Sanior in Mercuria and supplied its first consignment in June 2005. The NHA then began to distribute Sanior throughout Mercuria.

8. In spite of these efforts, greyscale continued to spread exponentially. As a result, the NHA doubled the order value for Sanior each quarter in 2007. In early 2008, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior, because it could no longer afford to supply Sanior to all of its infected citizens. For that reason, the NHA asked Claimant for a further discount of 40% for Sanior. However, Claimant rejected this outright, thereby depriving Mercurian citizens of the right to adequate medical treatment.

9. Because of this unsatisfactory performance, the NHA terminated the LTA on June 10, 2008. Claimant then invoked arbitration under the LTA, alleging that the NHA prematurely terminated the LTA. In January 2009, a Tribunal seated in Reef, a third country, granted an Award in favour of Claimant.

10. Atton Boro filed enforcement proceedings before the Mercurian High Court ("**the Court**") on March 3, 2009. In response, the NHA requested the Court to refuse the enforcement of the Award because it was contrary to public policy.

11. On October 10, 2009, the new Intellectual Property Law No. 8458/09 ("**the Law**") was promulgated by the President of Mercuria. This law permitted the Court to grant licences to use patented inventions under specific circumstances.

12. The Mercurian generic drug manufacturer, HG-Pharma, filed an application before the Court in November 2009 to obtain a licence to produce Valtervite. On April 17, 2010, the Court followed granted the licence to HG-Pharma, on the condition that the licence be revoked when greyscale is no longer a threat to public health in Mercuria.

## SUMMARY OF ARGUMENTS

13. Respondent submits that the Tribunal has no jurisdiction over the dispute. Specifically, Claimant did not make a protected investment under the BIT. Additionally, the amicable negotiations, required by Art. 8.1 BIT, did not take place. Moreover, in any event, Respondent can invoke the Denial of Benefits Clause under Art. 2.1 BIT (**Part One**).

14. Respondent did not violate any substantial protections of the BIT. Specifically, the Law did not indirectly expropriate Claimant's investment under Art. 6.2 BIT, and the compulsory licence to HG-Pharma serves 'public welfare objectives' and is therefore not an indirect expropriation under Art. 6.4 BIT. Moreover, these measures did not breach the Fair and Equitable Treatment ("**FET**") Standard of Art. 3.2 BIT, and the non-enforcement of the Award does not constitute a breach of Art. 3 BIT. Additionally, Respondent did not violate any of its obligations under the Umbrella Clause of Art. 3.3 BIT (**Part Two**).

15. Accordingly, Respondent requests that this Tribunal deny Claimant any compensation and impose all costs related to these proceedings on Claimant (**Part Three**).

# ARGUMENTS

## PART ONE: JURISDICTION AND ADMISSIBILITY

16. Respondent submits that this Tribunal lacks jurisdiction to adjudicate any of the claims brought forward by Claimant. In particular, neither the LTA nor the Award constitute protected 'investments' under Art. 1.1 BIT (**A**). Additionally, the requirement of amicable negotiations in Art. 8.1 BIT is not fulfilled (**B**). Moreover, Respondent can invoke the Denial of Benefits Clause under Art. 2.1 BIT, which would deny Claimant the advantages of the BIT (**C**).

### A. Claimant did not make a protected 'investment'

17. The Tribunal should find that neither the LTA (**I**) nor the Award (**II**) fall within the definition of an 'investment' according to Art. 1.1(c) and (e) BIT. According to Art. 1.1 BIT "*the term 'investment' means any kind of asset*".

### I. The LTA is not an 'investment'

18. The LTA cannot be considered an 'investment' within the meaning of Article 1.1(e) BIT because it is a sales contract (**1**). Moreover, the *Salini* criteria cannot be applied to define an 'investment' (**2**).

#### 1. The LTA is a sales contract and not an 'investment'

19. The LTA does not fall within the meaning of 'investment' under Art. 1.1(e) BIT because it is a simple 'sales contract' rather than an 'investment contract'. According to Art. 1.1(e) BIT, an 'investment' includes *inter alia "rights, conferred by law or under* ***contract****"*.

20. The definition of 'contract' in Art. 1.1(e) BIT does not encompass every kind of 'contract'. Caselaw has firmly established that a contract which constitutes an 'investment' must be distinguished from a simple sales contract.[1] Notably, the Tribunal in *Joy Mining* found that a sales contract can never be seen as an 'investment' because such an interpretation would render "*any sales or procurement*

[1] *Joy Mining*, ¶58; see also: *Petrobart*, pp.50-51.

*contract involving a State agency [to] qualify as an investment*".[2] Accordingly, that Tribunal found that a simple sales contract must be "*kept separate and distinct*" from the term 'investment' "*for the sake of a stable legal order*".[3] This distinction also finds support in the academic literature; *Ibrahim Shihata* and *Antonio Parra*, for example, consider a "*simple sale of goods [...] as an example of a transaction that clearly is not an investment*".[4]

21. A 'sales contract' is commonly defined as "*a contract where goods are exchanged for money*".[5] Conversely, 'investment contracts' are "*agreements [which] describe specific rights and duties of the parties concerning a specific investment*".[6] In the case at hand, the LTA is an Agreement under which the NHA purchased Sanior from Atton Boro by periodically placing purchase orders for money.[7] Therefore, there was an exchange of goods for money, and accordingly, the LTA must be considered a 'sales contract'.

22. Claimant may argue that the LTA was an 'investment contract' rather than a 'sales contract' because the LTA's sole subject matter concerned the purchase of Sanior, and Sanior contains Valtervite, which is an ingredient in which Claimant invested. However, such an interpretation would lead to absurd results. Although Claimant invested in Valtervite, that does not mean any contract for the purchase of any good containing Valtervite is also Claimant's 'investment'; if this were the case, every contract for the sale of a product containing, e.g., Nutrasweet - an artificial sweetener owned by Pharmacia and used in more than 5,000 products worldwide[8] - would also be considered an 'investment'. Clearly, such an interpretation of 'investment contract' would be overbroad, and as such, Claimant's 'investment' in Valtervite cannot render any contract for the sale of any product containing Valtervite an 'investment contract'.

23. Consequently, the LTA is a simple 'sales contract' and hence not an 'investment contract'. As a result, the LTA is not an 'investment' according to Art. 1.1(e) BIT.

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[2] *Joy Mining*, ¶58.
[3] *Ibid.*; see also: *Petrobart*, pp.50-51.
[4] *Shihata/Parra*, p.308.
[5] *Mistelis*, in : Kröll/Mistelis/Viscasillas, ¶25.
[6] *Noble Ventures*, ¶51; see also *SGS v. Paraguay*, ¶91.
[7] Case, ll.895-896.
[8] *NutraSweet Company.*

**2. The *Salini* criteria cannot be applied**

24. Claimant may attempt to define 'investment' according to the *Salini* criteria. However, the *Salini* criteria cannot take precedence over definitions in an IIA,[9] and the definition of the term 'investment' in Art. 1.1 of the Mercuria-Basheera BIT is different than the one accorded by the *Salini* criteria. Therefore, the provisions of the BIT prevail over the *Salini* criteria. Although the Tribunal in *Salini* used Art. 25(1) of the ICSID Convention for its definition of 'investment',[10] the ICSID Convention has no binding authority in the case at hand. Indeed, several Tribunals refused to apply the *Salini* criteria because they are not "*fixed or mandatory as a matter of law*".[11]

25. The LTA cannot fall under the ICSID definition of 'investment' because the present case is governed by the PCA Rules. The exclusion of an application of the ICSID rules is provided by the regulation in Art. 8.2 BIT. According to this Article, Claimant had the choice to submit the dispute to arbitration under the ICSID Convention, but nevertheless Claimant chose an arbitration in accordance with the PCA Rules. The choice of forum in the BIT, coupled with the definition of 'investment' under Art. 1.1 BIT, clearly indicate the intent of both Parties to create an avenue to opt out of the *Salini* criteria by choosing the PCA over the ICSID as a venue. If Claimant had wanted the application of the *Salini* criteria under Art. 25(1) ICSID, it could have decided for an arbitration under the ICSID Convention. Therefore, the ICSID rules, hence the *Salini* criteria, are not applicable.

26. Accordingly, because the intent of the Parties in the BIT takes precedence over the *Salini* criteria, and because Claimant clearly exercised an option to opt out of the *Salini* criteria by choosing arbitration under the PCA rather than ICSID Rules, this Tribunal should find that *Salini* is inapplicable to the case at hand.

**II. The Award does not constitute an 'investment'**

27. Claimant asserted that it made an 'investment' within the meaning of Art. 1.1 BIT because it received the Award. However, the Award is not an 'investment' because 'claims to money' are not 'investments' within the meaning of Art. 1.1(c) BIT (**1**).

[9] See *Saluka*, ¶241; *Yukos*, ¶¶415-416; *Rompetrol*, ¶97.
[10] *Salini*, ¶52.
[11] *Deutsche Bank*, ¶294; see also: *Ceskoslovenska Obchodni Banka*, ¶90; *MCI*, ¶165.

Additionally, the Award cannot be an 'investment' itself because there is no underlying 'investment contract' that could transform it into an 'investment' (**2**).

**1. 'Claims to money' are no 'investment'**

28. According to Art. 1.1(c) BIT, an 'investment' entails *inter alia* "*claims to money, and claims to performance under contract having a financial value*". However, the mere fact that an Award involves a 'claim to money' does not automatically render the Award a 'claim to money' an 'investment' within the meaning of Art. 1.1(c) BIT. Indeed, in *Romak,* the Tribunal noted with specific reference to 'claims to money' that categories of 'investments' enumerated in a BIT "*do not constitute an all-encompassing definition of "investment*".[12] Indeed, the Tribunal rejected *Romak*'s argument that an Award, as a "*right given by decision of the authority*", could fall within the BIT's reference to 'claims to money', and found that considering Awards to be 'claims to money' would lead to a "*new instance of review of State court decisions concerning the enforcement of arbitral Awards*" and would constitute a *de novo* review "*of the State court's decision not to enforce the Award.*"[13] Such an interpretation, the Tribunal in *Romak* found, "*is inconsistent with the [international arbitral] context*" and would run afoul "*of the object and purpose of the [BIT].*"[14] If a 'claim to money' does not correspond to the 'ordinary meaning' of the term 'investment' - i.e. "*a commitment of funds or other assets with the purpose to receive a profit or return from that commitment of capital"*[15] - "*the fact that it falls within one of the categories listed in [the BIT, e.g., 'claims to money'] does not transform it into an investment.*"[16]

29. The present BIT, similar to the BIT in *Romak,* lists possible indicators for 'investments' in Art. 1.1(a)-(e) BIT and these indicators include 'claims to money'. However, like the Award in *Romak,* the fact that the Award in the present case involves a right to payment cannot automatically render it a 'claim to money' as an 'investment' within the meaning of Art. 1.1 BIT because the Award is not "*a commitment of funds or other assets with the purpose to receive a profit or return*

[12] *Romak*, ¶180; see also: *Joy Mining*, ¶58; *Fedax, ¶42.*
[13] *Romak*, ¶186.
[14] *Ibid.*, ¶183.
[15] *Ibid.*, ¶177.
[16] *Ibid.*, ¶207.

*from that commitment of capital*",[17] and therefore does not correspond to the definition of 'claim to money' as listed in Article 1.1 BIT.

30. If Claimant's argument were adopted, every Award rendered in favour of the Basheeran national resulting out of the contractual relationship with Mercuria, which obviously would contain 'claim[s] to money', would constitute an 'investment' under Art. 1.1 BIT. This conclusion would produce absurd results, and it would imply that the BIT would subjugate domestic law to arbitral whims, and would abdicate the jurisdiction of domestic courts every time either Contracting Party concludes a contract or a simple one-off sales transaction with a national of the other Party. Therefore, in the present proceeding, the 'claim to money' contained in Claimant's Award cannot be considered an 'investment'.

**2. The Award itself is not an 'investment'**

31. The Award itself cannot constitute an 'investment' regardless of whether the LTA was an 'investment'. A Tribunal in *GEA* found that even if the underlying agreement was an 'investment', this would have no effect on the characterisation of the Award as an 'investment'.[18]

32. In the case at hand, like the contract in *GEA*, the LTA between Claimant and Respondent only established rights and obligations that gave rise to an Award. Thus, just like with the Award in *GEA*, the question of whether the LTA itself was an 'investment' is irrelevant to the question of whether the Award was an 'investment'.

33. Even if the Tribunal does not follow this view, the underlying agreement must constitute an 'investment' in order to consider the Award an 'investment'. According to the decision in *Saipem*, the rights embodied in an Award are not created by the Award itself, but by the underlying contract.[19]

34. As already established, although Respondent agrees that the LTA is the underlying contract for the Award, it is not an 'investment', but rather, a simple 'sales contract'.[20] Therefore, because the LTA is not an 'investment', the Award itself cannot be an

[17] *Romak*, ¶177.
[18] *GEA*, ¶161.
[19] *Saipem*, ¶127; see also *Romak*, ¶211.
[20] See Memorial, ¶23.

'investment' as well.

## B. Claimant did not fulfil the pre-arbitral steps pursuant to Art. 8.1 BIT

35. Even if the Tribunal finds that Claimant did make an 'investment', it still lacks jurisdiction because no amicable negotiations took place before Claimant filed its Notice of Arbitration. In particular, the duration of six weeks is inadequate to establish amicable negotiations (**1**). Additionally, insufficient amicable negotiations must lead to a lack of jurisdiction (**2**).

### I. No sufficient period of time for 'amicable negotiations'

36. The duration between Claimant's notice of intent to initiate arbitration and its Notice of Arbitration did not provide enough time for 'amicable negotiations'. According to Art. 8.1 BIT:

> "*Any dispute between an investor of one Contracting Party and the other Contracting Party arising out of or in relation to this Agreement [...] shall,* ***failing settlement through amicable negotiations****, be settled by arbitration.*"

37. The vast majority of BITs require that Parties attempt to resolve disputes amicably for a period of three to six months before pursuing arbitration,[21] and in the absence of a specific timeframe for 'amicable negotiations' spelled out in the BIT, the Tribunal in *Western* found that a period of at least six months was necessary due to the logistical complications involved in negotiations between a multinational corporation and a state.[22]

38. In the case at hand, Respondent, through its Foreign Ministry, was notified on September 20, 2016 of Claimant's intent to initiate arbitration, and Claimant filed its Notice of Arbitration before the PCA on November 7, 2016.[23] Thus, the amount of time between Claimant's intent to settle the dispute through 'amicable negotiations' and its Notice of Arbitration before the PCA was only six weeks.

39. As *Western* indicates, even where a BIT is silent on a definite timeframe for 'amicable negotiations', a period of six weeks is far too short given the complexity and the

[21] *Born/Šćekić*, p.230; *Salacuse*, p.406; Ganesh, p.2; *Dolzer/Schreuer*, p.268; see e.g. Art. 8(2) Netherlands-Poland BIT; Art. 1120 NAFTA; Art. 6(3)(a) Czech Republic-United States BIT.
[22] *Western*, ¶8.
[23] Case, l.41.

context of the matter at issue. On the one hand, a multinational pharmaceutical conglomerate like Claimant wields great power, influence, and interest in a variety of sectors and jurisdictions, and can exploit these facets at will; on the other hand, Respondent, as a developing country with limited resources, needs time to assess the impact of Claimant's claims, and its governmental organs, although highly capable, are stretched financially thin, as evidenced by the caseload of its overburdened judiciary.[24] In order to balance these opposing forces, the amicable settling of a legal dispute between a state and a billion dollar company needs time and diplomatic behaviour. Consequently, this Tribunal should find that the six-week period Claimant took before it filed its Notice of Arbitration was too short for suitable negotiations.

## II. Absence of amicable negotiations results in a lack of jurisdiction

40. Claimant may suggest that the fact that it failed to adequately pursue 'amicable negotiations' within a reasonable timeframe does not automatically equate to a lack of jurisdiction. Such a suggestion would be misguided because the purpose of Art. 8.1 BIT would be rendered useless. According to Art. 31(1) VCLT:

> *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its* ***object and purpose****."*

41. As the ICJ established, Tribunals should avoid interpretations that "*render superfluous the greater part of [an Article]*".[25] The 'object and purpose' of Art. 8.1 BIT is to establish the pre-arbitral requirements before the investor can initiate arbitration. An interpretation that simply ignores one of these requirements would 'render superfluous' the purpose of including pre-arbitral requirements. Just as the Tribunal cannot simply ignore the definition of 'investor' or 'investment' because this would defeat the 'object and purpose' of the Articles containing those definitions, ignoring the amicable negotiations requirement in Art. 8.1 BIT would defeat its 'object and purpose' as well.

42. In the light of this understanding, Tribunals have specifically stated that 'amicable negotiations' are a jurisdictional requirement and a precondition for jurisdiction.[26]

[24] Case, ll. 510-512.
[25] Constitution of the Maritime Safety Committee; see also *Dörr*, in Dörr/Schmalenbacher, Art.31 ¶53.
[26] *Enron*, ¶88; see also: *Burlington*, ¶315; *Murphy*, ¶¶149-156; *Wintershall*, ¶145.

Indeed, as the Tribunal in *Burlington* noted, the purpose of amicable negotiations "*is to grant the host state an opportunity to redress the problem before the investor initiates proceedings*".[27] By initiating proceedings before Mercuria had an opportunity to redress Claimant's grievances, Claimant deprived Respondent of the opportunity to redress the problem.[28] Thus, because the 'amicable negotiations' mentioned in Art. 8.1 BIT are mandatory pre-arbitral steps and Claimant failed to honor them, this Tribunal cannot exercise jurisdiction.

## C. Respondent can invoke Denial of Benefits

43. Even if the Tribunal finds that Claimant made a protected investment under Art. 1.1 BIT, Claimant cannot refer to the rights provided by the present BIT due to Respondent's invocation of Art. 2.1 BIT. It reads:

> "*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*".

44. Claimant is owned and controlled by nationals of a third state **(I)**, has no substantial business activity in Basheera **(II)**, and Respondent has invoked the Denial of Benefits Clause in a timely and appropriate manner **(III)**.

## I. Claimant is owned and controlled by nationals of a third state

45. Art. 2.1 BIT accords Respondent the right to deny the BIT's advantages to Parties that are owned and controlled by a national of a third state. A company has the nationality of the state in which it has obtained legal personality.[29] In *Plama*, the Tribunal found that a natural person 'owned' and 'controlled' a subsidiary because the person owned 50% of the company that 'owned' and 'controlled' this subsidiary.[30]

46. Like in *Plama*, Claimant is wholly owned by Atton Boro Group, an affiliate of Atton Boro and Company. Atton Boro and Company is incorporated in Reef, hence 'obtained its legal personality' in Reef and is therefore not a national in one of the

[27] *Burlington*, ¶315.
[28] *Salacuse*, p.428.
[29] *Dolzer/Schreuer*, p.47.
[30] *Plama*, Award, ¶¶84-95.

Contracting Parties to the BIT. Moreover, Claimant is 100% 'owned' by Atton Boro Group, and therefore, Atton Boro Group controls Claimant *a fortiori.* Additionally, Atton Boro and Company is the primary shareholder of Atton Boro Group.[31] Thus, Claimant is a subsidiary of Atton Boro and Company according to the standard set out in *Plama.* Therefore, Claimant is 'owned' and 'controlled' by a 'legal entity' of a third state, and thus, both the 'own' and 'control' requirements of Art. 2.1 BIT are fulfilled.

## II. Claimant has no 'substantial business activity' in Basheera

47. Claimant does not have 'substantial business activity' as required by Art. 2.1 BIT. 'Substantial business activity', for which Claimant carries the burden of proof,[32] encompasses buying and selling goods and concluding contracts 'in the territory of the Contracting Party in which it is organized'; actions such as filing returns or holding meetings do not suffice.[33] Those activities which merely guarantee a legal entity's existence in a territory cannot amount to 'substantial business activity'.[34] Moreover, a subsidiary cannot bring a claim on the sole grounds that its parent company has 'substantial business activity' in the Contracting Party's territory.[35]

48. As a company incorporated in Basheera solely as a vehicle for carrying on business in South American and African countries,[36] Claimant has no 'substantial business activity' within the territory of Basheera. Although Claimant's employees work as managers, accountants, commercial lawyers, and patent attorneys, these employees only provide support for sales in South America and Africa rather than concluding contracts or executing any other 'business activity' relevant to the territory of Basheera. Even if Claimant's activity could be considered 'substantial business activity', which it cannot, it would nevertheless fail to take place 'in the territory' of Respondent because the sales and contracts supported by the employees in Basheera take place entirely in South America and Africa.

49. Furthermore, the Tribunal may find that Claimant's parent company, Atton Boro Group, has 'substantial business activity' in Basheera because it is established in

[31] Case, ll.846-847.
[32] *Amto*, ¶64.
[33] *Roe/Happold*, p.78.
[34] *Ibid.*
[35] *Plama*, ¶169; see also: *Pac Rim*, ¶4.66.
[36] Case, ll.860-861.

Basheera's pharmaceutical market. However, Atton Boro Group's activity is not sufficient to establish 'substantial business activity' because a parent company's business activity cannot be automatically transferred to all of its subsidiaries without cause. Therefore, this Tribunal should find that Claimant has no 'substantial business activity' in Basheera.

## III. The Denial of Benefits Clause was invoked in a timely manner

50. Art. 2.1 BIT is silent on the matter of when it can be properly invoked. However, caselaw establishes that Denial of Benefits Clauses must be invoked at the earliest opportunity, and moreover, can be invoked retrospectively.

51. Several Tribunals have decided that there is no reason to refuse the retrospective invocation of the benefits of an investment treaty.[37] In *Guaracachi*, the Tribunal found that whenever a BIT includes a Denial of Benefits Clause, an investor must be aware of the fact that a Respondent can invoke that clause.[38] This point of view is supported by the decision in *Ulysseas*, which found that the requirements for "*a valid and effective denial of advantages*" must be met on the date Claimant raises its claims under the BIT.[39] This finding underlines that the conditions for an effective Denial of Benefits must be fulfilled only once an investor has claimed the benefits that the state intends to deny.

52. Claimant posed its claims in its Notice of Arbitration on November 7, 2016.[40] There was no earlier claim, and as already mentioned above, the Denial of Benefits requirements ('ownership', 'control', and 'substantial business activity') were already fulfilled as of November 7, 2016. Respondent's first chance to invoke the Denial of Benefits Clause was in its Response to the Notice of Arbitration, which it issued on November 26, 2016,[41] wherein Respondent immediately invoked the Denial of Benefits Clause. Thus, the requirements to invoke Art. 2.1 BIT were already met on the date Claimant raised its claims, and Respondent invoked Art. 2.1 at the first possible date. Accordingly, Respondent invoked the Denial of Benefits Clause in a

[37] *Guaracachi*, ¶¶376-378; see also: *Ulysseas*, ¶173; *EMELEC*, ¶71.
[38] *Guaracachi*, ¶372.
[39] *Ulysseas*, ¶¶173-174.
[40] Case, l.40.
[41] Case, l.460.

timely manner.

53. Moreover, Art. 2.1 BIT does not require that the Denial of Benefits Clause can only be invoked prior to an investment. Therefore, Respondent can invoke Denial of Benefits retrospectively.

**D. Conclusion**

54. In conclusion, Respondent respectfully requests that this Tribunal find that it does not have jurisdiction over the present case because, first, the LTA and the Award are not protected ‘investments’ under Art. 1.1 BIT. Second, no ‘amicable negotiations’ according to Art. 8.1 BIT took place. Finally, the requirements of Art. 2.1 BIT are fulfilled, and Respondent invoked the Denial of Benefits Clause of Art. 2.1 BIT in a timely and appropriate manner.

## PART TWO: MERITS

55. Even if the Tribunal finds that it has jurisdiction over the present dispute, the claims presented lack merit. Respondent states that the Law and the granting of a compulsory licence to HG-Pharma neither indirectly expropriated Claimant pursuant to Art. 6.2 BIT nor breached the Fair and Equitable Treatment Standard ("**FET Standard**") of Art. 3.2 BIT (**A**). Additionally, the non-enforcement of the Award does not constitute a breach of the BIT (**B**). Moreover, Respondent submits that it did not violate any obligations under Art. 3.3 BIT (**C**).

### A. The enactment of the Law and the granting of the licence did not breach substantial protections of the BIT

56. Respondent submits that each of Claimant's assertions concerning the Merits must fail. Respondent neither indirectly expropriated Claimant (**I**) nor breached the FET Standard under Art. 3.2 BIT (**II**). Moreover, Respondent did not create unfavourable conditions for Claimant (**III**).

#### I. Respondent did not indirectly expropriate Claimant's 'investment'

57. Neither the enactment of the Law (**1**) nor the grant of the non-voluntary licence (**2**) constitute an indirect expropriation.

#### 1. The Law does not constitute an indirect expropriation pursuant to Art. 6.2 BIT

58. The reform of Respondent's legal framework does not constitute an indirect expropriation within the meaning of Art. 6.2 BIT. According to Art. 6.2 BIT, the investments of investors of one Contracting Party shall *inter alia:*

> "*not be directly or indirectly expropriated [...] except for public purposes, or national interest, against immediate full and effective compensation*".

59. An indirect expropriation is any measure taken by a state which deprives the benefits of an investment even though a nominal ownership may remain.[42]

60. Claimant may erroneously assert that the enactment of the Law constitutes an indirect expropriation. However, the Law only regulates the process of application for a

[42] *Middle East,* ¶107; see also *Starrett,* p.1123.

compulsory licence; it does not hand out random compulsory licences to every applicant. The Court decides over the Law's extent at its own discretion. The mere existence of an application process and the fact that the Court can decline the granting of a licence within that process does not deprive any patent holder of anything. Therefore, the Law does not 'deprive Claimant of the benefits' of its patented invention.

61. Consequently, this Tribunal must find that the enactment of the Law did not indirectly expropriate Claimant's investment under Art. 6.2 BIT.

**2. The granting of the licence is not an indirect expropriation under Art. 6.4 BIT**

62. The granting of the compulsory licence is not an indirect expropriation because it fulfills the requirements of Art. 6.4 BIT; namely, it is non-discriminatory (**a**) and it is designated and applied to protect legitimate public welfare objectives (**b**).

**a) The granting of the licence is a non-discriminatory measure**

66. The granting of the licence is a 'non-discriminatory measure' pursuant to Art. 6.4 BIT. A discriminatory measure is one that accords less favourable treatment to foreign investments than it accords to domestic ones.[43]

67. Although the Court granted a non-voluntary licence for Valtervite to HG-Pharma, a Mercurian company, it utilised a non-discriminatory measure to do so.[44] Section 23(C)(1) of Law No. 232/76 states that "*any person interested*" in a "*grant of a non-voluntary licence*" can apply for any patent. Although Valtervite, as a patent, is an 'investment' under Art. 1.1(d) BIT, Law No. 232/76 nevertheless accords the Court an ability to grant compulsory licences for patents to and from any company, regardless of whether the company is domestic or foreign. Accordingly, the law draws no distinction between foreign investors and domestic ones, and thus, it cannot accord foreign investors less favourable treatment. Therefore, the licence was granted to HG-Pharma in a non-discriminatory fashion.

[43] *Lauder*, ¶257.
[44] Case, l.950.

**b) The granting of the licence is designated and applied for public welfare**

68. The granting of the licence is designated and applied for public welfare and thus fulfills the requirements of Art. 6.4 BIT. According to Art. 6.4 BIT, the granting of the licence must be "*designated and applied to protect legitimate public welfare objectives, such as public health"*. The term 'designated' implies that the legitimate public welfare objective must be the purpose of the measure.[45] Moreover, the licence must be 'applied' in a manner that serves public welfare. Section 23(C)(1) of Law No. 232/76 lists acceptable grounds for the granting of a compulsory licence, and one valid allowance arises when a "*patented invention is not available to the public at a reasonably affordable price*".

69. In the wake of the most devastating greyscale epidemic Mercuria has ever seen, the Court utilised the non-discriminatory language in the Law to ensure that those citizens suffering from greyscale yet unable to afford the exorbitant costs of Claimant's treatment would nevertheless have access to affordable medication. By the most generous World Bank estimates, the average per capita income in a country like Mercuria amounts to about USD 11 per day.[46] A single FDC pill costs USD 27, and greyscale patients need to consume one pill per day to maintain basic health.[47] To make matters worse, according to a recent NHA report, the total number of persons living with greyscale in Mercuria rose from 20,485 in 2003 to 266,298 in 2006,[48] and these numbers have since continued to rise.[49] In 2006, the NHA projected that Mercuria would need to spend more than USD 1 billion to provide Sanior treatment to its most impoverished citizens - a number that accounts for nearly one-third of its overall health budget and 500% of the budget accorded to the greyscale program.[50] If the 1,000% increase between 2003-2006 continues, which appears likely, by 2009 Mercuria faced another 1,000% increase in the number of citizens affected by greyscale, presumably accompanied by another 1,000% increase in associated costs. Therefore, by 2009, the Sanior treatment program would have already cost more than thirty times the annual health budget, and if treatment were accorded in such a case,

[45] *Black's Law Dictionary*, 'designate'; *Oxford Dictionary*, 'designate'.
[46] World Bank.
[47] Case, ll.1352-1354.
[48] Case, ll.1359-1361.
[49] Case, ll.917-918.
[50] Case, ll.1363-1365.

much of the public would be deprived of other forms of healthcare. Therefore, without a compulsory licence, there are only two possible results of the greyscale epidemic if it continues its exponential growth: either the Mercurian people suffer without treatment because Sanior is too costly, or the state goes bankrupt and then cannot supply treatment to its people.

70. Under these circumstances, the Court granted a compulsory licence for Valtervite to HG-Pharma "*until greyscale was no longer a threat to public health*"[51] presumably under Law No. 232/76's 'reasonably affordable price' allowance, which indicates a 'legitimate public welfare' purpose for the Court's action. Given the fact that it was impossible for the state to provide treatment without Sanior for this chronic and incurable disease, the grant of the compulsory licence to HG-Pharma was the only way to ensure the health of the Mercurian people. Indeed, as the Court emphasised, the licence was granted only for the treatment needed and only for the duration necessary. Consequently, the licence was designated for a public welfare objective because its purpose was to serve public health, and it was applied in a manner that served this legitimate purpose.

71. In conclusion, the grant of the licence to HG-Pharma was non-discriminatory and designated and applied to protect the legitimate public welfare objective of public health according to Art. 6.4 BIT. Thus, it did not constitute an indirect expropriation.

## II. Respondent did not breach the FET Standard

72. Respondent did not breach the FET Standard because Respondent's actions fell within its *right to regulate* (**1**). Furthermore, the Law (**2**) and the grant of the compulsory licence to HG-Pharma (**3**) do not constitute a breach of the FET Standard. According to Art. 3.2 BIT "*[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment*".

### 1. Respondent exercised its *right to regulate*

73. Respondent's enactment of the Law as well as the Court's granting of the compulsory licence to HG-Pharma complied at all times with the FET Standard because the law

[51] Case, ll.949-951.

was passed in accordance with Respondent's *right to regulate*. Furthermore, that right outweighs Claimant's right to a simple patent expectation.

74. Over the past decade, a plurality of Tribunals have found that the *right to regulate* must be considered a key element when defining the FET Standard.[52] Furthermore, Tribunals have emphasised the need to weigh the *right to regulate* cautiously against Claimant's legitimate expectations.[53] Contrary to antiquated arbitration practice, it is now well established that the protection of an investor's legitimate expectations cannot be limitless.[54]

75. A state's *right to regulate* includes the legitimate sovereign right to create the legal possibility to grant compulsory licences for public purposes.[55] The Law enabled the Court to grant compulsory licences under just such conditions. Specifically, a compulsory licence can be granted if reasonable requirements of the public have not been satisfied, the patented invention is not available to the public at a reasonable and affordable price, or if the patented invention does not work in the territory of Mercuria. All of these requirements demonstrate Respondent's aim of making crucial technologies available for legitimate public purposes. Hence, the enactment of the Law is encompassed by Respondent's *right to regulate*. The Law itself does not deprive Claimant of any legitimate expectations, and there are no general expectations of profit Claimant may have that could possibly outweigh Respondent's legitimate sovereign right to create the legal possibility of granting compulsory licences for public purposes. Therefore, Respondent's *right to regulate* was legitimately exercised and cannot undermine Claimant's legitimate expectations.

**2. The enactment of the Law did not breach the FET Standard**

76. The Law did not deprive Claimant of its legitimate expectations under the FET Standard. Specifically, Respondent's legal framework is stable and reliable (**a**). Additionally, Respondent did not breach any representations it made to Claimant (**b**).

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[52] *Philip Morris*, ¶422; see also: *Impregilo*, ¶290; *Apotex Holdings*, ¶9.37; *Parkerings-Compagniet*, ¶332.
[53] *Electrabel*, ¶166; see also: *El Paso*, Award, ¶358; *Saluka*, ¶¶305-306.
[54] *Duke Energy*, ¶340; see also: *Plama*, Award, ¶219; *AES*, ¶¶9.3.27-9.3.35; *Impregilo*, ¶¶290-291; *El Paso*, Award, ¶¶356-357.
[55] See *Newcombe*, p.41; *Taubman*, p.947; *Gibson*, p.370.

**a) Respondent did not breach Claimant's expectation that it could rely upon the stability of Respondent's legal framework**

77. By enacting the Law, Respondent did not violate Claimant's legitimate expectations, namely the right to rely upon the stability of Respondent's legal framework. The Tribunal in *Parkerings Compagniet* highlighted that "*it is a state's right to enact, modify or cancel a law at its own discretion*".[56] Even if it is undeniable that the stability of the legal framework constitutes a part of the FET Standard, the Tribunal in *Saluka* found that Claimant cannot expect "*that the circumstances prevailing at the time the investment is made remain totally unchanged*".[57] Thus, the legitimate expectations of a Claimant are not undermined by a state changing its legal framework so long as such changes remain stable.

78. The enactment of the Law did not undermine the stability of Respondent's legal framework since it did not affect the legal framework as a whole but only a small fragment of its patent legislation, namely Law No. 232/76. This change was well within the authority of the state and did not depart from the routine, unsurprising functions of the state. Indeed, the international investment regime presupposes a degree of instability, especially in developing countries, where it is more predictable that prevailing circumstances may change, e.g., by an outbreak of a public health epidemic to which a host state reasonably reacts by enacting new legislation. Therefore, because law is predictably dynamic and never entirely static, it would be both unrealistic and irrational for Claimant to expect that Respondent's entire legal framework would 'remain totally unchanged'.

79. Thus, by enacting the Law, Respondent did not violate Claimant's expectations that it could rely upon Respondent's legal framework.

**b) Respondent did not breach any representations it made to Claimant**

80. Respondent did not make any assurances or representations which could have given Claimant any legitimate expectations. As the Tribunal in *Tecmed* noted, in order to create legitimate expectations, representations must occur in or before the moment in

[56] *Parkerings Compagniet*, ¶332; see also: *AES*, ¶9.3.29.
[57] *Saluka*, ¶305; see also: *El Paso*, Award, ¶350; *Continental*, ¶258.

which an investment is made.[58]

81. In the case at hand, Respondent never led Claimant to believe that it would never pass a measure that would potentially allow its courts to issue compulsory licences. Claimant may argue that the Mercurian Minister of Health's January 19, 2004, press statement, in which he lauded the success of a previous partnership between Claimant and Respondent,[59] or the January 20, 2004, Twitter statement by the President of Mercuria noting that *"Mercuria will do away with red tape and roll out the red carpet for investors"*,[60] constitute such representations. However, such an argument would be severely misguided. These actions took place years after Claimant obtained its Valtervite Patent on February 21, 1998. Consequently, they cannot have affected Claimant's decision to invest, and therefore, cannot be considered representations. Thus, Respondent did not violate any representations made to Claimant.

**3. The granting of the compulsory licence does not breach the FET Standard**

82. The granting of the licence does not constitute a breach of the FET Standard because Respondent acted in a transparent manner (**a**) and TRIPS is not applicable in the BIT as part of the FET Standard (**b**).

**a) Respondent acted in a transparent manner**

83. The granting of the licence was made in accordance with the international standard of transparency set out in *Metalclad*, which requires that an investor is able to receive information about "*all relevant legal requirements for the purpose of initiating, completing and successfully operating investments*".[61]

84. While operating its investment Valtervite, Claimant always had the opportunity to obtain information regarding anything about the legal framework of the state. In spite of this, Claimant never asked for any specific information, and indeed, Respondent would never have denied such requests. Thus, Respondent fulfilled the requirements of the *Metalclad* transparency standard.

[58] *Tecmed*, ¶154; see also: *LG&E*, ¶130; *Duke Energy*, ¶340.
[59] Case, ll.885-888.
[60] Case, ll.888-890.
[61] *Metalclad*, ¶76; see also: *Schill*, pp.168-169; *Duke Energy*, ¶340.

**b) Claimant has no legitimate expectations arising out of TRIPS**

85. Claimant may state that Respondent breached standards codified in TRIPS by granting a compulsory licence to HG-Pharma and thereby violated its obligation of FET. However, TRIPS cannot be considered a part of the FET Standard (**aa**). Moreover, this Tribunal does not have the authority to make a decision in relation to any claim regarding to TRIPS because WTO jurisdiction is exclusive (**bb**), and even if the Tribunal decides otherwise, Respondent did not breach any of its obligations constituted in TRIPS (**cc**).

**aa) TRIPS is not a part of FET**

86. TRIPS cannot be considered as part of the FET Standard, and therefore, cannot create legitimate expectations. A Tribunal in *Grand River* pointed out that the FET Standard "*must be determined by reference to customary international law, not to standards contained in [...] treaties*".[62] More specifically, that Tribunal found that "*[a] violation of [a] treaty does not establish a violation of [the FET Standard]*".[63] Indeed, this view was confirmed by *Tsai-yu Lin*, who noted that TRIPS "*could not be used as the legal basis to establish a violation of the FET standard*".[64]

87. TRIPS is not part of 'customary international law' but merely a treaty. As the ICJ established, 'customary international law' requires a *general practice* and a *opinio iuris*.[65] 'General practice' requires a "*long period of time*".[66] TRIPS came into force in 1995. The BIT at issue came into force three years later in 1998. As already established, legitimate expectations must exist at the time the investment was made.[67] The patent was granted in 1998, and therefore, in order for TRIPS to apply, TRIPS must have been 'customary international law' in 1998. A period of three years, however, cannot be considered a 'long period of time' sufficient to establish 'general practice'. Therefore, TRIPS was not 'customary international law' at the time the investment was made.

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[62] *Grand River*, ¶176; see also *Mondev*, ¶121.
[63] *Grand River*, ¶176.
[64] *Lin*, p.81
[65] See e.g. *Military and Paramilitary Activity in and against Nicaragua*, p.98.
[66] *Treves*, ¶24; *Hudson*, ¶11; *Villiger*, ¶60.
[67] See Memorial ¶80.

88. Moreover, Claimant asserted that it had 'legitimate expectations' arising out of TRIPS. However, the present dispute is first and foremost governed by the BIT. Although it is undeniable that general principles of law, as well as international custom, can be considered when interpreting the BIT, expanding the FET Standard to TRIPS would go too far for the reasons described above. Furthermore, considering TRIPS as part of the FET Standard would create a 'backdoor' for investors to raise WTO claims in investment arbitration, regardless of the fact that only states have the right to make such claims, because it is impossible to find a breach of legitimate expectations without evaluating whether the underlying treaty was violated too. Thus, for the reasons mentioned above, TRIPS cannot be 'used as the legal basis to establish a violation of the FET Standard'.

**bb) WTO jurisdiction is exclusive**

89. Even if this Tribunal would find that Claimant had legitimate expectations arising out of TRIPS, it does not have the authority to decide on any claim in relation to TRIPS because TRIPS is part of WTO law,[68] and hence, even if WTO law were to apply, it requires that claims in relation to TRIPS fall within the WTO's exclusive jurisdiction.[69]

90. The case at hand concerns a dispute settlement before an investment Tribunal, not before a WTO Panel. Thus, unless the BIT at issue indicates a clear intent (e.g. through a waiver) to litigate TRIPS issues in arbitral Tribunals rather than at the WTO, this Tribunal is not the correct forum to apply TRIPS. Art. 23(1) DSU states:

> "*When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements […] they shall have recourse to, and abide by, the rules and procedures of this Understanding*."

91. Art. 23 DSU promotes the exclusivity of WTO jurisdiction.[70] Consequently, WTO disputes cannot be brought to *"any other adjudicatory body"*[71] except WTO dispute settlement bodies because otherwise *"the security and predictability of the WTO legal*

[68] UNCTAD-ICTSD, p.13; see also: *Stoll*, in: Stoll/Busche/Arend, Introduction I, ¶17.
[69] See Art. 64 (1) TRIPS.
[70] *Mexico-Soft Drinks*, ¶56; see also: *Davey/Sapir*, pp.14-16; *Van den Bossche/Prévost*, p.266.
[71] *Van den Bossche/Prévost*, p.266.

*system would be undermined.*"[72] However, according to the recent *EC-Bananas III* decision, Parties can waive rights granted by the DSU if both Parties agree on such measures.[73] This approach was interpreted more restrictively by the Appellate Body in *Peru-Agricultural Products*. In that case, the Appellate Body stated that the disputed waiver clause in the Peru-Guatemala FTA was not sufficient to provide *"a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system"*.[74] The waiver clause in question stated that if a dispute arises out of an FTA or the WTO agreement "*the complaining Party may choose the forum for settling the dispute*".[75]

92. In the case at hand, the Contracting Parties never agreed to include a waiver that would require TRIPS-related issues to be decided in investment tribunals rather than at the WTO. Consequently, by the WTO's own 'clear stipulation of relinquishment' standard, the Tribunal should find that in the present case the exclusivity of WTO jurisdiction cannot be abrogated. Therefore, this Tribunal cannot decide over claims concerning TRIPS.

**cc) Respondent did not breach any obligations of TRIPS**

93. Even if the Tribunal approved the application of TRIPS, Respondent did not breach its obligations under this agreement. In particular, Respondent did not breach Art. 31(b) TRIPS (**aaa**) or Art. 31(h) TRIPS (**bbb**).

**aaa) No breach of Art. 31(b) TRIPS**

94. Respondent did not violate Art. 31(b) TRIPS because the spread of greyscale constitutes a national emergency. Art. 31(b) TRIPS governs the requirements for obtaining a compulsory licence. This requires that "*the proposed user has made efforts to obtain authorization from the right holder.*"

95. Accordingly, HG-Pharma should have made an effort to obtain authorisation from Claimant for Valtervite. However, Art. 31(b) TRIPS goes on, stating that:

[72] *Lin*, p.91.
[73] *EC-Bananas III*, ¶217.
[74] *Peru-Agricultural Products*, ¶5.28.
[75] *Ibid.*, ¶5.27.

> "*This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use."*

96. The Doha Declaration provides references to define a national emergency.[76] The Doha Declaration, which WTO Members unanimously adopted in 2001, indicates the common understanding of WTO member states.[77] According to Art. 5(c) Doha Declaration, a national emergency includes "*public health crises"*, and indeed, greyscale is a public health crisis, as demonstrated above.[78] Consequently, greyscale constitutes a national emergency. Therefore, there was no need for Respondent to make 'an effort' under Art. 31(b) TRIPS.

**bbb) No violation of Art. 31(h) TRIPS**

97. Respondent did not breach Art. 31(h) TRIPS. According to this provision:

> *"the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization"*

98. The Court granted the compulsory licence to HG-Pharma and fixed the royalty to be paid to Atton Boro at 1% of total earnings. Therefore, it directed HG-Pharma to pay an adequate remuneration to Claimant.

99. In light of Art. 4 Doha Declaration, a state shall have the right to access essential medicine. It reads:

> "[*W]e affirm that the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all*."

100. As the WHO-endorsed "*Remuneration Guidelines*" found, it is common state practice to consider a country's status 'as a whole' when determining appropriate remuneration.[79] Although, the WHO assessment of a state is not binding upon the Parties to this dispute, the "*Remuneration Guidelines"* determined that it is *inter alia* acceptable to pay 1% or less compensation for licences.[80] And indeed, in 2009-2010,

[76] *Malbon/Lawson/Davison*, ¶31.09.
[77] *Doha WTO Ministerial*, p.2.
[78] See Memorial, ¶¶69-71.
[79] *Remuneration Guidelines*, pp.81-82.
[80] *Ibid.*, p.82.

the remuneration rates in Mercuria for drugs treating incurable, non-fatal diseases ranged from 0.5% to 3% of revenue.[81]

101. Pursuant to the Mercurian Constitution and Art. 4 Doha Declaration, Respondent's goal is to promote access to medicines for all, but the challenges presented by this goal are cascading. Since 2007, the number of greyscale patients has grown significantly, and therefore, the order value for Sanior doubled with each quarter. Because of these dramatic circumstances, Respondent was not able to follow the upper bound of its remuneration goal, and as a result, the Court granted HG-Pharma the licence to produce generic forms of Sanior in return for a 1% compensation to Claimant. As an incurable, non-fatal disease, greyscale falls within the WHO's guidelines for acceptable royalty rates, and given the totality of the circumstances, Respondent set compensation congruent with those rates.

102. Consequently, 1% compensation for HG-Pharma's licence constitutes an adequate remuneration for Claimant according to Art. 31(h) TRIPS. Hence, Respondent did not breach TRIPS.

**III. Respondent did not create unfavourable conditions for Claimant**

103. Respondent did not create unfavourable conditions for Claimant by enacting the Law. Art. 3.1 BIT reads:

> "*Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and, [...] shall admit such investments.*"

104. Previous Tribunals have agreed that the wording 'to make investments' and 'shall admit such investments' makes perfectly clear that this provision refers only to the admission of investments and does not give rise to substantive rights.[82]

105. Since the present dispute only concerns already established 'investments', Art. 3.1 BIT cannot apply.

[81] Case, ll.1589-1590.
[82] *Frontier*, ¶245; see also: *Dolzer/Schreuer*, pp.130-133; *White Industries*, ¶9.2.12; *McLachlan/Shore/Weiniger*, ¶2.20.

## B. Non-enforcement of the Award does not constitute a breach of the FET Standard

106. The enforcement proceeding did not breach provisions of the BIT because it did not constitute a Denial of Justice (**I**). Furthermore, Respondent did not frustrate Claimant's legitimate expectations under the New York Convention (**II**). And finally, Respondent is not liable for the actions taken by its Court (**III**).

### I. There was no Denial of Justice towards Claimant

107. The enforcement proceeding does not constitute a Denial of Justice because the Court's action did not amount to a serious shortcoming (**1**) nor does the pending proceeding constitute an undue delay (**2**).

#### 1. There was no serious shortcoming

108. The Court's conduct during the enforcement of the Award did not amount to a 'serious shortcoming'.

109. As the Tribunal in *Chevron* stated, a Denial of Justice requires *"a particularly serious shortcoming"* and an *"egregious conduct that shocks, or at least surprises, a sense of judicial propriety"*.[83] Indeed, other Tribunals applied a similar approach.[84] In *White Industries*, the Indian courts needed over nine years to enforce Claimant's Award. The Tribunal found that this was not sufficient to constitute a 'particularly serious shortcoming' or a shocking or surprising egregious conduct.[85]

110. Like the Tribunal in *White Industries*, which dealt with an enforcement issue lasting for more than seven years but nevertheless found no 'shortcoming' or 'shocking' conduct, this Tribunal should find that the mere fact that a proceeding in a developing country could take substantially more time than a developed country cannot 'shock' or 'surprise' an investor. Rather, such delays are one of the many predictable challenges that are sometimes associated with a lack of governmental resources. Hence, there is no serious shortcoming in the current enforcement proceeding.

[83] *Chevron*, ¶244.
[84] *Mondev*, ¶127; see also: *White Industries*, ¶¶10.4.6-10.4.7.
[85] *White Industries*, ¶10.4.12.

**2. There was no undue delay**

111. Nevertheless, Claimant may state that the Award enforcement proceeding before the Court constitutes an undue delay because of the proceeding's length of seven years. Several Tribunals stated that a Denial of Justice can be pleaded *inter alia* if the Court subjects the claim to an undue delay.[86] However, a seven-year non-enforcement period cannot be seen as an undue delay because, in the case at hand, there was no need for swiftness (**a**) and Respondent's judiciary was overburdened (**b**).

**a) There was no need for swiftness**

112. The Tribunal in *White Industries* emphasised the importance of flexible time limits for enforcing Awards, stating that *"public international law does not provide fixed time limits*",[87] and hence, it does not define a period of time in which "*certain classes of cases must be resolved"*.[88] The Tribunal further stated that a distinction must be drawn between criminal proceedings and commercial matters when it comes to assessing a given case's 'need for swiftness'.[89] Under this aspect, the Tribunal found that the need for celerity is less compelling if the Award also contained an order for the payment of interest.[90] The court reasoned that human rights and criminal issues often require faster resolution than financial interests, and arguments that depend upon the urgency of financial claims carry less weight.[91]

113. The proceeding in *White Industries*, which involved a purely financial claim, lasted over nine years - two years longer than in the present case. Nevertheless, the Tribunal quickly and easily found that this duration did not constitute an undue delay, and hence, could not be considered a Denial of Justice.[92] Like the Award in *White Industries*, the Award in the present case contains an order for payment and did not allege criminal behavior. Consequently, by all accounts, the need for swiftness is less compelling, and therefore this Tribunal cannot penalise the Court for taking the time it needs to work toward a swift resolution.

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[86] *Azinian*, ¶102; see also: *Chevron*, ¶¶250-251; *Jan de Nul*, ¶204.
[87] *White Industries*, ¶10.4.9.
[88] *Ibid.*
[89] *Ibid.*, ¶10.4.14.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*, ¶10.4.22.

114. Accordingly, the seven year duration of the enforcement proceeding is not an undue delay, and therefore, is not a Denial of Justice.

**b) Respondent has an overburdened judiciary**

115. Furthermore, the length of the enforcement proceedings does not constitute an undue delay due to Respondent's overburdened judiciary. The Tribunal in *White Industries*, in rejecting a claim to undue delay, found it pertinent to consider that "*India is a developing country [...] with a seriously overstretched judiciary.*"[93]

116. In the case at hand, Respondent is a developing country with an overburdened judiciary struggling to cater to a population of 67 million people.[94] Indeed, the Court was forced to postpone hearings several times because of lengthy arguments in several other pressing cases.[95] The Court's hectic docket includes diverse matters of great importance, and the fact that it must sometimes reschedule less important cases, such as mere claims to money, is demonstrative of the fact that Mercuria's judiciary is overburdened.

117. Moreover, the enforcement proceeding of the Award was accompanied by complex changes in the judicial system of Mercuria, for example the Commercial Courts Act passed by the Parliament of Mercuria on January 10, 2012.[96] The Commercial Courts Act directed the Court to constitute special benches that could expeditiously dispose of commercial matters.[97] The effort to constitute those benches was high because all commercial matters and enforcement proceedings had to be transferred to this bench. Additionally, in September 2013 the Supreme Court of Mercuria ruled that benches constituted under the Commercial Courts Act had jurisdiction only to hear original commercial suits and not enforcement proceedings.[98] Thus, all enforcement matters were returned to the regular benches of the Court.[99] This was another complex task for the Court and led to a constraint of the judiciary. Accordingly, in May 2014 the Court had an overwhelming caseload because it had to transfer all enforcement

[93] *White Industries*, ¶10.4.18.
[94] Case, ll.510-512.
[95] Case, ll.217-218; 243; 269; 282; 343.
[96] Case, ll.938-940.
[97] Case, ll.938-940.
[98] Case, ll.940-942.
[99] Case, ll.942-943.

applications.[100] All of these aspects taken together led to an overextension of the Mercurian judiciary, and therefore, to the seven year duration of the Award enforcement process.

118. Taking into account all of the circumstances described above, it was not possible for the Court to enforce the Award at an earlier stage. Accordingly, the seven year duration cannot be considered an undue delay. In sum, there is no undue delay in the present case, and consequently, there is no Denial of Justice deriving from the Award's non-enforcement.

## II. There was no frustration of Claimant's legitimate expectations

119. Claimant erroneously relies on Art. 3 New York Convention regarding its legitimate expectations. However, Respondent did not frustrate Claimant's legitimate expectations under the New York Convention because Art. 3 sets no time limit for enforcement proceedings (**1**) and the Court would be entitled to refuse the Award's enforcement under Art. 5.2(b) of the Convention (**2**).

### 1. The New York Convention does not set a time limit

120. Respondent did not breach Claimant's legitimate expectations deriving from Art. 3 New York Convention. That Article reads:

> "*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*".

121. The Convention is silent on time limits.[101] Therefore, Claimant's suggestion that Respondent breached a provision which is not even defined in the New York Convention is genuinely absurd. Indeed, Respondent always observed its obligations under Art. 3 New York Convention because the 'rules of procedure' of Mercuria were always followed. Moreover, the enforcement proceeding is still pending, so any claim brought under Art. 3 is *prima facie* premature, and hence, the enforcement provision cannot have been breached. Thus, because the fact that the case is still pending cannot be considered a breach of legitimate expectations, Respondent has not breached

[100] Case, ll.317-319.
[101] *Börner*, in: Kronke/Nacimiento/Otto/Port, pp.127-128.

Claimant's legitimate expectations through the timeframe of its pending enforcement proceedings.

**2. Respondent is entitled to refuse the Award's enforcement under Art. 5.2(b) New York Convention**

122. Because Respondent could refuse to enforce the Award if the Award is contrary to Respondent's 'public policy', Claimant cannot have legitimate expectations arising out of Art. 3 New York Convention. While relying on Art. 3 New York Convention for its legitimate expectations, Claimant disregards the relevance of Art. 5.2(b) New York Convention, which states that:

> *"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *[...]*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country."*

123. Regarding a determination of 'public policy' in relation to Art. 5.2(b), it is well established that an international 'public policy' approach rather than a domestic one should be drawn.[102]

124. However, due to the absence of a definition for international 'public policy' in the New York Convention, in several cases, state courts have attempted to define this notion, emphasising the need to protect state interests.[103] For example, the *Supreme Court of India* found that if an Award's enforcement opposes the state's interests, the enforcement may be refused due to 'public policy'.[104] Comparably, the *Lagos Court of Appeal* specified that public policy applies *inter alia* to state matters of public health.[105] Similarly, the *Supreme Court of Arbitration of the Russian Federation* enforced an Award after concluding that the enforcement would not be contrary to the citizens' life and health,[106] therefore implying that citizens' life and health should be considered when establishing a contradiction with international 'public policy'.

[102] *Ryabinin*, p.4; *Oliveira/Miranda*, p.50.
[103] *IBA*, p.3
[104] *Renusagar*, ¶66.
[105] *Ufot*, p.1.
[106] *Ansell*, p.2.

125. Although signatories to the New York Convention are not bound by the decisions of other signatories' courts, signatories should consider past decisions that dealt with similar circumstances when applying the Convention.[107] Therefore, Mercuria's Court is likely to consider the underlying public health objectives of a measure when defining 'public policy'.

126. Because Mercuria is a developing country, and because it suffers from a public health epidemic, there is an extreme urgency for cheap and accessible medicine. Mercuria's legislation and Court actions related to Sanior fall within legitimate 'public policy' objectives concerning the protection of public health. Mercuria already faces costs beyond its budgetary capacities in combating greyscale, and the financial burdens of this battle are more than likely to continue to increase in the future, possibly by billions of USD. Furthermore, any expectation that Respondent would subjugate the health of its public to the payment of an Award would be contrary to international standards, namely the UNGA's general understanding that universal access to health-care constitutes a part of human dignity as affirmed by a recent HRC draft resolution.[108] Therefore, it is possible, perhaps even likely, that the Court may decline to pay out USD 40 million to Claimant, invoking Art. 5.2(b) New York Convention, because Respondent may need every dollar available to contribute to the insurmountable costs of its public health crisis. Indeed, these circumstances were known to Claimant when the Award was issued in 2009. Thus, because any legitimate expectations Claimant had in 2009 arising out of Art. 3 New York Convention would have required Claimant to ignore the 'public policy' exception excusing the enforcement of Awards in Art. 5.2(b) New York Convention, Claimant does not have legitimate expectations arising out of Art. 3.

**III. Claimant enjoyed Full Protection and Security over the seven years**

127. The non-enforcement of the Award does not fall under the scope of the Full Protection and Security Standard of Art. 3.2 BIT, which states that "*investments and returns of investors of each Contracting Party [...] shall enjoy full protection and security.*"

128. Many Tribunals have decided that the standard should only apply to physical

[107] *Scherer/Moss*, p.18.
[108] *General Assembly*, p.2.

protection.[109] In particular, the Tribunal in *Saluka* stated that only protection against the "*interference by use of force*" rather than any negative impact on an investor's investment falls within the scope of the standard.[110] Moreover, applying the standard to merely physical protection does not signify a restrictive approach, since the duty to protect *inter alia* against rioters and demonstrators makes the Full Protection and Security Standard an "*onerous standard*", especially for developing countries.[111]

129. Consequently, Respondent requests this Tribunal to find that the Full Protection and Security Standard only applies to protection against physical violence and that legal measures therefore do not fall within its scope.

130. Even if the Tribunal finds that the Full Protection and Security Standard entails protection against legal measures, Respondent did not violate that standard by taking seven years to decide on whether and how to enforce Claimant's Award. The Tribunal in *Frontier* found that, in addition to providing a legal framework, the duty of Full Protection and Security also encompasses "*appropriate procedures that enable investors to vindicate their rights*."[112]

131. Respondent made a legal framework available to Claimant in which Claimant had the opportunity to vindicate its rights; specifically, the Court heard the matter of Atton Boro's Award enforcement. Moreover, those procedures were 'appropriate' because throughout the proceedings, the Court did everything in its power to ensure that Claimant had access to fair and impartial process, as evidenced by its willingness to allow *ex parte* hearings if the NHA's absence continued,[113] and its acknowledgment of Claimant's due process quibbles.[114] The fact that the NHA was absent on a few occasions was beyond the Court's power and can therefore not result in a finding that its procedures were 'inappropriate'. Accordingly, Claimant was able to vindicate its right, and hence, Respondent always ensured Claimant's Full Protection and Security as required by the BIT.

[109] *Rumeli*, ¶668, *Saluka*, ¶¶483-484, *BG Group*, ¶324, *Eastern Sugar*, ¶203.
[110] *Saluka*, ¶¶483-484.
[111] *Malik*, p.6.
[112] *Frontier*, ¶263.
[113] Case, ll.207-208.
[114] Case, ll. 220-221; 247-249; 257-259; 271-274.

**IV. Respondent is not liable for its judicial conduct**

132. The actions of the Court cannot be attributed to Respondent. A state cannot *ipso facto* be held liable for the decisions made by its courts. As the Tribunal in *Loewen* found:

> "*[T]he State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort.*"[115]

133. This indicates that a state only becomes liable after a judicial decision is rendered. Moreover, as the Tribunal in *Azinian,* citing the former ICJ president *Eduardo Jiménez de Aréchaga* found that a state cannot be held liable for its judicial conduct simply because a court renders a decision that violates a treaty.[116] Indeed, the Tribunal found, that additionally, "*the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end*".[117]

134. None of the elements required for Respondent to be held internationally liable for its judicial conduct are met. First, no decision has been rendered, so no international treaty has been breached. Second, no decision has been rendered, so no decision has reached the find court of appeal. Third, as demonstrated above, Respondent's judicial conduct cannot amount to a Denial of Justice because there is no urgent need for swiftness and no undue delay. And finally, the judicial proceedings cannot be considered a 'pretence of form to achieve an internationally unlawful end', because as demonstrated above, the mere fact that proceedings have taken seven years cannot constitute an 'internationally unlawful end', and no other unlawful end is plausible, especially in light of the fact that no decision has yet been rendered. Therefore, Respondent is not liable for its judicial conduct.

**C. Respondent observed its obligation under Art. 3.3 BIT when the NHA terminated the LTA**

135. Claimant alleged that Respondent breached the Umbrella Clause in Art. 3.3 BIT. Claimant is mistaken. Art. 3.3 BIT states:

> "*Each Contracting Party shall observe any obligation it may have entered into*

[115] *Loewen*, ¶143.
[116] *Azinian*, ¶98.
[117] *Ibid.*, ¶99.

*with regard to investments of investors of the other Contracting Party*."

136. Respondent observed this provision when the NHA terminated the LTA. First, the LTA was a mere 'sales contract' and therefore does not fall within the scope of Art. 3.3 BIT (**I**). Second, the Tribunal should find that the NHA in fact had the right to terminate the LTA (**II**). Finally, the NHA acted only as a private purchaser, and hence, there is no liability for the Respondent (**III**).

**I. The LTA does not fall within the scope of Art. 3.3 BIT**

137. The LTA's provisions are not part of Art. 3.3 BIT because a 'sales contract' does not fall under the scope of the article. The Umbrella Clause in Art. 3.3 BIT requires Contracting Parties to "*observe any obligation*" either Party entered into with respect to an 'investment' of an investor of the other Contracting Party. A Tribunal in *El Paso* stated that, should the term 'obligation' be interpreted broadly to include, for example, 'sales contracts', the whole treaty would be completely useless because any legal obligation would constitute a violation of the BIT, "*whatever the source of the obligation and whatever the seriousness of the breach*."[118] Moreover, in *SGS*, the Tribunal underlined the need for restrictive interpretation of Umbrella Clauses, noting that broad interpretations would produce absurd results, specifically, "*any alleged violation of those contracts and other instruments would be treated as a breach of the BIT*."[119] These tribunals, along with the *Noble Venture* case discussed above,[120] draw a distinction between 'investment contracts' on the one hand and other contracts on the other. Indeed, an overly broad interpretation of Art. 3.3 BIT in the present case would allow unlimited exploitation of all kinds of contracts under the BIT.

138. As demonstrated above,[121] the LTA is a mere 'sales contract', and not an 'investment contract' between Claimant and the NHA. Consequently, there is no 'obligation' arising out of the provisions of the LTA for which Respondent can be held liable. Thus, the LTA does not fall within the scope of Art.3.3 BIT.

[118] *El Paso*, ¶76; see also: *Pan America*, ¶¶101-103.
[119] *SGS*, ¶168.
[120] See Memorial, ¶22.
[121] See Memorial, ¶23.

## II. The NHA observed its obligations under the LTA

139. Even if the Tribunal disagrees that the LTA does not fall within the scope of the Umbrella Clause, the NHA was entitled to terminate the LTA, and hence, because the LTA was never breached, Respondent observed its 'obligations' under the Umbrella Clause.

140. The NHA terminated the LTA on June 10, 2008 because of Claimant's unsatisfactory performance.[122] Clause 6 of the LTA related to the "*Validity of the Agreement*" and read:

> "*This Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance*."[123]

141. Even though Claimant did not violate any contractual obligations under the LTA, it failed to promote the human right to health as established under Art. 12 ICESCR, which constitutes an unsatisfactory performance (**1**). Moreover, Claimant violated the concept of "*Corporate Social Responsibility*" ("**CSR**") (**2**).

### 1. Violation of Art. 12 ICESCR

142. In *Urbaser*, the Tribunal indicated that investors could incur liability for "*activity aimed at destroying [human] rights*", such as those contained in the ICESCR.[124] Art. 12 ICESCR recognises "*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". The provisions of the ICESCR are applicable in the case at hand because Mercuria as well as Basheera is a Party to this Covenant.[125] Art. 12 ICESCR includes the access to "*essential medication*" under affordable conditions for everyone.[126] Those conditions are defined as "*those that satisfy the priority healthcare needs of the population*".[127]

143. Sanior satisfies the population's healthcare needs since it is an effective component to treat greyscale successfully, and hence, Sanior is an 'essential medication'. Therefore, the Mercurian people have the right to access it at an affordable rate. However, due to

[122] Case, l.930.
[123] Case, ll.897-898.
[124] *Urbaser*, ¶1199.
[125] Case, ll.1565-1566.
[126] *General Comment*, ¶12.
[127] Essential drugs and medicines policy.

Claimant's denial of further discounts under the LTA, medication to treat greyscale was not affordable to most of Respondent's population. Consequently, Claimant engaged in 'activity aimed at destroying' the Mercurian people's right to access essential medicines, and hence, the right to health under Art. 12 ICESCR.

**2. Claimant is liable under the CSR principle**

144. Claimant may assert that the ICESCR is only applicable to states and that international investors have no obligations under this Covenant. However, the Tribunal should find that the ICESCR also imposes obligations on investors.

145. As the Tribunal in *Urbaser* found, respect for international human rights treaties is of "*crucial importance*" if a company is working internationally.[128] Relying on the ICJ's *Reparations* case, which found that an organisation's 'purpose and function' determine the extent to which it is subject to international law,[129] the *Urbaser* Tribunal established that a company's actions and CSR standards can affect the degree of liability it incurs under the ICESCR and other human rights treaties.[130]

146. In the case at hand, Claimant is an internationally operating company with a 'purpose and function' that should incur liability to international treaties, such as health-related services in South America and Africa, and therefore, it can be held liable for its violation of the human right to health, listed in Art. 12 ICESCR.

147. Moreover, Claimant is a subsidiary of a billion dollar company, Atton Boro Group, a leading drug discovery and development enterprise.[131] Atton Boro Group always worked in the area of critical epidemic diseases that threaten populations in the developing world, including greyscale.[132] Moreover, Claimant sold Sanior to Respondent so that Respondent could treat its population suffering from greyscale. Obviously, the contribution of Sanior is closely related to the human right to health and affordable medication pursuant to Art. 12 ICESCR.

148. Therefore, Claimant exhibits characteristics that incur liability under international law,

[128] *Urbaser*, ¶1195.
[129] *Reparations*, p.179.
[130] *Urbaser*, ¶1195.
[131] Case, l.847.
[132] Case, ll.850-852.

and was therefore obligated not to engage in the above-established human rights violation. This violation constitutes an unsatisfactory performance, justifying the termination of the LTA. Thus, the NHA did not violate any obligations under the LTA. It has been established that Claimant performed unsatisfactorily. Thus, the NHA's earlier termination of the LTA was legitimate, hence no breach of Art. 3.3 BIT.

**III. Respondent is not liable for the NHA's actions**

149. Respondent did not breach the BIT because it is not liable for the NHA's actions under Art. 4 or 5 ILC Articles. It is recognised that the rules of state liability, which are summarised in the ILC Articles, are part of customary international law.[133] Although the ILC Articles are not binding, various investment Tribunals applied them.[134]

150. Art. 4 ILC Articles states:

> "*1. The conduct of any State organ shall be considered an act of that State under international law [...] 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*"

151. More precisely, the term 'state organ' includes *"all the individual or collective entities which make up the organization of the State and act on its behalf".*[135]

152. The NHA is independent of the Mercurian Government.[136] Respondent did not participate in the LTA negotiations and thus did nothing to contribute to its conclusion.[137] Moreover, the NHA is funded by both public taxation and private contributions,[138] and indeed, is built upon an independent trust.[139] None of the facts indicate that the NHA functioned as an 'organ' of Respondent but merely as a Contracting Party to the LTA.

[133] *Noble Ventures*, ¶¶69-70; *Hobér*, in Muchlinski/Ortino/Schreuer, p.550; *Baumgartner*, p.28.
[134] *Noble Ventures*, ¶¶69-70; *Total*, ¶220; *Aguas del Aconquija*, ¶¶95-97; *Kardassopoulos*, ¶254.
[135] *ILC Articles*, p.40.
[136] Case, ll.1591-1592.
[137] Case, ll.1594-1595.
[138] Case, ll.1591-1592.
[139] Case, ll.1592-1594.

153. Art. 5 ILC Articles states:

> "*The conduct of a person or* ***entity which is not an organ of the State*** *[...] but which is empowered by the law of that State to exercise elements of the* ***governmental authority*** *shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*"

154. This rule prescribes that an entity's behaviour is only attributable to a state if it relates to the governmental obligation or legal power designated for the 'entity'.

155. Respondent's understanding of Art. 5 of the ILC Articles is supported by the commentary on Art. 5 ILC, which declares that the conduct of the entity "*must accordingly concern governmental activity and not other private or commercial activity*" in order to be attributable to the state.[140] This view finds support in *Maffezini*, where the Tribunal stated that it must be considered whether the entity's behaviour is of a governmental rather than a commercial nature.[141]

156. Since the NHA merely acted as a purchaser, its conduct can only be regarded as commercial in nature. Moreover, its behaviour did not relate to any legal power vested by the government in the NHA. Accordingly, because the NHA neither acted as a government purchaser nor had the legal authority to purchase on behalf of the Government, the NHA's commercial activities cannot be attributed to Respondent. Therefore, Respondent is not liable for the NHA's behaviour.

## D. Conclusion

157. In conclusion, this Tribunal must find that the enactment of the Law and the granting of the compulsory licence to HG-Pharma neither constitute an indirect expropriation nor a breach of the FET Standard. Furthermore, the non-enforcement of the Award did not breach Respondent's obligations under the BIT. And finally, Respondent observed its obligation under Art. 3.3 BIT.

[140] *ILC Articles*, p.43 (5).
[141] *Maffezini*, ¶52.

## PART THREE: REMEDIES

158. Having in mind all of the aforementioned factors, it must be found that Claimant is not entitled to compensation because Respondent has not violated any of the provisions of the relevant BIT. Therefore, Respondent asks the Tribunal to dismiss all of Claimant's objections and deny its entire claim for compensation in the amount of USD 1,540,000,000.

159. Moreover, the Tribunal should impose all costs associated with the proceedings upon Claimant according to Art. 42(1) PCA Rules which states:

> "*The costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable*".

160. It is Respondent's position that there are no circumstances given that would lead the Tribunal to an apportionment of the costs of arbitration. Therefore, Respondent respectfully requests that this Tribunal hold Claimant responsible for all costs arising out of this arbitration.

## PRAYER FOR RELIEF

161. Mercuria hereby respectfully requests the Tribunal to find that:

(1) It lacks jurisdiction.

162. However, should the Tribunal find that it has and should exercise jurisdiction, Respondent requests it to find that:

(2) No substantive protections of the BIT were violated by Mercuria.

163. Furthermore, Respondent asks the Tribunal to find that:

(3) Mercuria is entitled to restitution by Claimant of all costs related to these proceedings; and

(4) It is appropriate to grant such further relief as counsel may advise and that the Tribunal deems appropriate.

Respectfully Submitted on September 25, 2017
For and on behalf of Respondent
The Republic of Mercuria