COUR PERMANENTE D'ARBITRAGE  PERMANENT COURT OF ARBITRATION

MEMORIAL FOR RESPONDENT

TEAM CAMARA

ATTON BORO LIMITED		REPUBLIC OF MERCURIA
22 Faraway Str Basheera	*vs.*	LPB Building 50, ABC Avenue Stoica 03035 Mercuria
- CLAIMANT -		- RESPONDENT -

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL CITATION
¶	Paragraph
Art.	Article
BIT	Bilateral Investment Treaty
CLAIMANT	Atton Boro Limited
Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards – New York Convention
DSU	Dispute Settlement Understanding
FET	Fair and Equitable Treatment
ILC Articles	The ILC Articles on the Responsibility of States for Internationally Wrongful Acts
ISDS	Investor-State Dispute Settlement
IP	Intellectual Property
LTA	Long Term Agreement
Ltd.	Limited
NHA	National Health Authority
no.	Number
p.	Page
pp.	pages
para.	Paragraph
RESPONDENT	*Republic of Mercuria*
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
v.	*Versus*

Vol.	Volume
WTO	World Trade Organization

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STATEMENT OF FACTS

INVOLVED PARTIES:

1. CLAIMANT: Atton Boro Limited
2. RESPONDENT: Republic of Mercuria

Transaction Summary:

3. In the early 1980s, several countries started to report the appearance of a new chronic disease. The disease was later described as chronic, non-fatal and incurable, and was named *Greyscale.*
4. The critical incidence of Greyscale occurred mainly in the developing world. Once Mercuria is a developing country, the number of individuals infected is constantly growing.
5. On 11 January of 1998, the Republic of Mercuria and the Kingdom of Basheera concluded an agreement for the Promotion and Reciprocal Protection of Investments (the BIT).
6. The Mercurian Patent No. 0187204 was granted on 21 February 1998 and in April of the same year Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited ("Atton Boro").
7. Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef ("Reef") and acts as the primary holding company for Atton Boro Group. Claimant is a company controlled by the Atton Boro Group and has no commercial activity in the territory of Basheera.
8. In 2002 Mercuria witnessed an upsurge in prevalence of Greyscale. For that reason, the government started a campaign to diminish the number of patients and stop the contamination of the disease.
9. In 2004, RESPONDENT's NHA wrote an invitation to CLAIMANT to make an offer for supplying its FDC medicine to treat Greyscale. After negotiations and evaluation of

other offers, CLAIMANT and RESPONDENT's NHA entered into a Long-Term Agreement. The NHA would purchase the drug at a 25% discount rate.

10. Despite the increase in the number of individuals getting themselves tested, the number of confirmed cases of greyscale also increased.
11. In light of this, the NHA demanded further discounts to purchase Sanior, CLAIMANT's FDC drug. Claimant refused the NHA proposal, thus the NHA terminated the LTA between them.
12. CLAIMANT initiated arbitration proceedings against the termination, obtaining an award in its favor.
13. In the meantime, RESPONDENT promulgated a new legislation to allow the use of patented inventions without the authorization of the owner.
14. With the health crisis in Mercuria, a generic drug manufacturer filed an application before the High Court of Mercuria for grant of a license to manufacture Valtervite, Claimant's patented active ingredient.
15. The use of generic drugs to treat Greyscale reduced costs of purchasing medicines by 80%.

ARGUMENTS ON JURISDICTION

RESPONDENT sustains that the Tribunal has no power to decide on the merits of the present claim because (i) the Tribunal has no jurisdiction over the claims in relation to the enforcement of the commercial Arbitral Award and (ii) the Denial of Benefits clause provided in article 2 of the Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Mercuria and the Kingdom of Basheera (hereinafter BIT) shall be applied to CLAIMANT. Also, RESPONDENT submits that (iii) RESPONDENT complied with all the obligations provided in the BIT, including Fair and Equitable Treatment.

I. THE TRIBUNAL HAS NO JURISDICTION OVER THE CLAIMS IN RELATION TO THE ENFORCEMENT OF THE COMMERCIAL ARBITRAL AWARD

1. The definition of investment is stipulated under article 1 of the BIT, stating that it is any kind of asset held or invested through an investor and enumerating five forms of that it could be found in the host state [Case, Annex no 1, p. 32]. Those are: (i) property rights, (ii) participation in companies, (iii) contracts having financial value, (iv) intellectual property rights, and (v) rights conferred to undertake economic or commercial activity.

2. CLAIMANTs request does not qualify in any of those situations, considering that the Award rendered in commercial arbitration between Atton Boro and National Health Authority is not suited in the BIT. Therefore, it could not be brought to this arbitration, considering the lack of jurisdiction of this Arbitral Tribunal.

3. In this sense, CLAIMANT does not qualify as an investor, thus it is not entitled to bring the claim to arbitration, it is a condition of eligibility[1]. That is due to the fact that the Award rendered in commercial arbitration does not bind the present Tribunal and does not create any rights in the scope of the investment for Atton Boro, as it is going to be further demonstrated.

[1] Yannaca-Small, p.10

(i) The Commercial Award is not Entitled as an Investment in the Definition Provided in the BIT

4. Article 1 of the BIT does not give an open scope of possibilities regarding the term investment. Thus, the Tribunal could not contradict the definition provided in the Treaty and widen its notion in order to CLAIMANT to have access to arbitration proceedings.

5. An award is a legal instrument which provides for the disposition of rights and obligations arising out of an agreement[2]. Therefore, the Tribunal must acknowledge that the Agreement at hand in this arbitration is the BIT, and not the LTA, signed between CLAIMANT and NHA.

6. In this sense, the Agreement that originated the Award has no direct relation with the BIT, but only a connection, considering that the main object of it is the investment Atton Boro claims to be doing in Mercuria. However, even if the Agreement was directly related to the Treaty that is object of this arbitration or even characterized as an investment itself, that does not mean that the Award rendered upon rights and obligations arising out of the investment qualifies as an investment itself[3].

7. This is the position of the Tribunal in *GEA Group Aktiengesellschaft v. Ukraine*, where it was decided that, opposing what CLAIMANT sustained, there could not be stated that it has made an investment according to the Bilateral Investment Treaty existing between the parties[4].

8. Also, in *Patrick Mitchell v. Congo* annulment proceedings the Tribunal decided that an investment treaty could not open the jurisdiction to any operation that may be arbitrarily qualified as investment[5]. In this sense, since the BIT narrowed the scope of definition of what is admitted as investments, CLAIMANT could not impose the enforceability of its award in investment arbitration

[2] GEA Group Aktiengesellschaft v. Ukraine, p. 47, para 162
[3] GEA Group Aktiengesellschaft v. Ukraine, p. 47 para 161.
[4] GEA Group Aktiengesellschaft v. Ukraine, p.48, para 164.
[5] Patrick Mitchell v. Congo annulment proceedings, pg. 13, para 31.

9. In *Romak v. Uzbekistan* the Tribunal contended that the mere crystallization of rights in an arbitral award cannot transform it as an investment, even stating that the term investment in the BIT is wide and not exhaustive[6].

10. The arbitral Tribunal at *Phoenix Action Ltd. v. The Czech Republic* summarized the requirements to characterize a protected investment, and those are: a contribution in money or other assets, a certain duration, an element of risk, an operation made in order to develop an economic activity in the host State, assets invested in accordance with the laws of the host State and assets invested bona fide[7].

11. In this sense, if the tribunal analyses those requirements, the award rendered in commercial arbitration do not fulfill not one of those characteristics. It is a document with no duration and has nothing to do with the implementation of the Atton Boro Group in Mercuria and has no economic value to RESPONDENT, and therefore, it has nothing to do with the investment under the BIT

(ii) The Commercial Award Was Granted in Mercuria And Its Enforcement Proceedings Are Still Open in The High Court of Mercuria

12. It is important to notice that the majority of cases that investment tribunals have accepted to discuss the matter of commercial awards in the scope of arbitration are when the state Court denied to enforce the award for some reason.

13. In the case at hand the enforcement proceedings are still open in the High Court of Mercuria, thus, there is no saying that RESPONDENT neglected any of CLAIMANT's rights, and the Award remains nothing but a document with no economic value that could be enforced in state courts, which does not come near characterizing as an investment.

14. In this regard, if CLAIMANT was sure that the enforcement proceedings under the High Court are not being properly conducted, it could easily terminate those proceedings and initiate new enforcement proceeding in any other country, including Basheera, according

[6] *Romak v. Uzbekistan*, p.54-55 paras 211-212
[7] Phoenix Action Ltd. v. The Czech Republic, p. 45, para 114.

to the New York Convention[8].

15. Therefore, the Tribunal should acknowledge that CLAIMANT has no grounds to defend that ordinary amount of time of the proceedings could give any reason to bring the enforcement of a commercial award to investment arbitration. That, alongside the fact that the award is not an investment, gives enough reason for the Tribunal to understand that it has no jurisdiction when it comes to the Award rendered in favour of CLAIMANT

(iii) Conclusion

16. In this sense, the Tribunal should recognize that the award has no economic value to RESPONDENT and it is not even directly related to CLAIMANT's investments. Thus, it does not characterize as an investment and could not be brought to investment arbitration, considering the lack of jurisdiction of the Tribunal.

17. Also, article 1 of the BIT has a narrow scope of consent determining the five possibilities of characterizing an investment, not being possible to CLAIMANT to randomly set that the award rendered in a commercial arbitration between Atton Boro and NHA should be brought to arbitration, stating that it is an investment.

18. Furthermore, the enforcement proceedings are still on course in the HIgh Court of Mercuria and no denial was made. Thus, CLAIMANT is trying to bring this to arbitration without even knowing if the outcome of the proceedings is going to be on its favour.

19. In light of this, the amount of time of the proceedings is no reason to characterize it as a subject within the jurisdiction of the Tribunal, neither characterizes it as an investment. Therefore, the Tribunal should deny its jurisdiction on the matter of the enforcement of the commercial Award rendered in the proceedings against NHA.

[8] Convention on the recognition and enforcement of foreign arbitral awards, art. 1.1

II. THE DENIAL OF BENEFITS CLAUSE PROVIDED IN ARTICLE 2 OF THE AGREEMENT FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF MERCURIA AND THE KINGDOM OF BASHEERA APPLIES TO CLAIMANT

20. Article 2.1 of the BIT provides that the host state has the right to deny the advantages of the Agreement to entities that are owned or controlled by citizens or nationals of a third state and have no substantial business activities in the state. In the present case, this is exactly the situation of CLAIMANT. Thus, the Denial of Benefits clause should apply.

21. The tribunal must acknowledge that Atton Boro is a mailbox company set up in Basheera by investors of The People's Republic of Reef. This is because CLAIMANT is a company controlled by the Atton Boro Group and has no commercial activity in the territory of Basheera [Case, Response to the Notice to Arbitration, p.16, para.5], not characterizing as a proper investor under article 1.2 of the BIT.

(i) CLAIMANT is a Mailbox Company, Thus, the Denial of Benefits (DOB) Clause is Applicable to the Present Case

22. Even though the BIT at hand requires the investor to be incorporated in accordance with the law of the Country whose protection it seeks - therefore applying the incorporation criteria - such argument alone does not suffice to assert CLAIMANT's qualification as a covered investor.

23. The Denial of Benefits Clause provided in article 2 demands a genuine link with the Country of incorporation, which means, essentially, that CLAIMANT cannot be owned or controlled by a private entity or person from a third state, as well as must have a substantial business in Basheera, in order to be granted the protection of the BIT.

24. As it will be demonstrated, there is a significant lack of genuine link between CLAIMANT and Basheera in the present case, reason why RESPONDENT has the right to deny the benefits of the BIT.

25. Firstly, CLAIMANT is a wholly owned subsidiary of Atton Boro Group [Case, Statement of Uncontested Facts, p.28 para 4], whose primary holding company is Atton Boro and

Company, a corporation organized under the laws of the People's Republic of Reef. Therefore, CLAIMANT is controlled by a national of a non-contracting state.

26. Furthermore, CLAIMANT never had any activities that didn't regard its parent company. Never developed businesses of its own. Moreover, as aforementioned, CLAIMANT was incorporated in Basheera with the exclusive intention of seeking the protection of the BIT between Basheera and Mercuria to its increasingly number of patents.

27. Such fact can be seen by analyzing the temporality of Atton Boro Groups actions. The BIT was concluded in 11 January 1998, the Mercurian patent for Valtervite was granted to Atton Boro Group in 21 February 1998, while CLAIMANT was incorporated by its owner in April of the same year [Case, Statement of Uncontested Facts, p.28, paras 1-4].

28. In *Guarachi America, INC v. Bolivia* it was decided that there was not enough proof that CLAIMANT had substantial business in the host State, and therefore, it could be considered as insufficient business. Also, it was their contention that the company was controlled by nationals of a third country, which is reason to apply the Denial of Benefits clause provided in the BIT[9].

29. The Tribunal should acknowledge that it is unfair to RESPONDENT if CLAIMANT is considered an investor, considering the principle of reciprocity. This is because there was a BIT signed between Basheera and Mercuria, not between Mercuria and The People's Republic of Reef. Thus, Atton Boro is a company from The People's Republic of Reef and is benefitting from the BIT, however, on the other hand, if a Mercurian investor chooses to invest in The People's Republic of Reef, its investment will not be granted the protection as sought by Atton Boro in the present situation[10].

30. In this sense, by choosing to adopt the Denial of Benefits clause, it is evident that the contracting parties chose to avoid those situations and stop investors from third countries to benefit from the BIT. This is also demonstrated by the fact that some BIT's that chose by not inserting the DOB clause in its treaty have accepted third state parties incorporated

[9] *Guarachi America, INC v. Bolivia,* para 370.
[10] Nikièma, p. 6.

through the treaty[11]. This is the case of *Saluka v. Czech Republic* and *Tokios Tokelės v. Ukraine*, for example.

31. That said, in the light of article 31 of the Vienna Convention on the Law of the Treaties a Treaty shall be interpreted in accordance with its context and in the the light of its object and purpose. In this sense, the Tribunal should apply the Denial of Benefits Clause, considering that CLAIMANT is owned and controlled by an entity of a third state and has no substantial business, complying to what is provided in article 1.2 of the BIT.

(ii) There is no time limit to apply the Denial of Benefits Clause, it shall apply retroactively

32. Notwithstanding, it is important to demonstrate that RESPONDENT has timely argued the Denial of Benefits, since the objection was made before the constitution of the Tribunal, that is, within thirty days after the appointment of the second arbitrator [Case, PCA Rules 2012 Letter Re Constitution of Tribunal, p.21, para 1]. However, there is not even a exact time limit to present the objection.

33. In this vein, the Tribunal in *Ulysseas v. Ecuador* stated that nothing excludes the right to deny the benefits in the moment that the advantages of the BIT are sought by the investor through the request for arbitration[12]. Also, the Tribunal defends that there is no reason to deny that the effects apply retrospectively, since it is nothing but RESPONDENT exercising its rights[13].

34. In *Guarachi America, INC v. Bolivia* the Tribunal contended that the consent by the Host State to arbitration is conditional, and thus the benefits can be denied when providing that the requirements are fulfilled. Also, it was the Tribunal's understanding that all investors are previously aware of the possibility of having its benefits denied, therefore, it does not characterize as frustration of legitimate expectations[14]. In this sense, their conclusion was that the clause could be brought whenever the investor decides to, because it is its right[15].

[11] Behlman, p. 399.
[12] Ulysseas, Inc v. The Republic of Ecuador, p.59, para 172.
[13] Ibid, p.60, para 173.
[14] Guaracachi America, Inc., and Rurelec Plc. v. Plurinational State of Bolivia, pg. 141, para 372.
[15] Ibid, pg. 142, para 378.

35. Also, in *Pac Rim Cayman LLC v. The Republic of El Salvador* the Tribunal stated that the question about the denial of benefits is most likely to uprise after a dispute is settled, considering that this is the moment when the host state has the opportunity to evaluate the nationality of the investor[16].

36. In this sense, one may say that it is not reasonable to expect the host State to analyze whether the conditions of the Denial of Benefits are met in relation to an investor with whom there is no dispute. The host State only turns its attention to the requirements of DOB if there is enough reason to do so, which happened in the present case in the moment CLAIMANT initiated arbitration proceedings against RESPONDENT.

37. Therefore, it is not reasonable to understand that the Denial of Benefits Clause could not be brought after the dispute has arisen, considering that RESPONDENT only analyzed CLAIMANT's investment situation and its implications after it decided to seek the protection provided by the BIT by initiating arbitration proceedings.

(iii) Conclusion

38. In this sense, considering that CLAIMANT failed to demonstrate it has substantial business in Basheera, as well as is a wholly owned subsidiary of Atton Boro Group, it is RESPONDENT's contention that CLAIMANT should be denied the benefits of the BIT, according to article 2.1 of the Treaty.

39. Furthermore, there is no time limit to apply the Denial of Benefits clause, since it is not reasonable to infer that RESPONDENT should have known about the situation of CLAIMANT's investment before any dispute arise, and its effects should be applied retroactively.

40. That said, the Tribunal should understand that the Denial of Benefits clause is applicable in the present case, since CLAIMANT fulfills all the requirements provided in article 2.1, thus, it should not be considered a protected investor within the BIT.

[16] *Pac Rim Cayman LLC v. The Republic of El Salvador, page 6 para 4.18*

III. RESPONDENT COMPLIED WITH ALL THE OBLIGATIONS PROVIDED IN THE BIT, INCLUDING FAIR AND EQUITABLE TREATMENT

41. CLAIMANT argues that RESPONDENT violates the Fair and Equitable Treatment as provided in the BIT. However, as it is going to be demonstrated, CLAIMANT is using the clause as a mere litigation strategy with no factual ground, since RESPONDENT complied with the standard of treatment provided in the Treaty of the present case.

42. The Fair and Equitable Treatment clause is a standard that is present in almost every bilateral investment treaty[17], which means which leads to it becoming a generic standard that is always going to be brought by CLAIMANTs in order to obtain benefits from the host State.

43. In this sense, there is a broad concept of the FET clause, and, consequently, a lack of predictability of its interpretation[18]. The result of this, favours the investor's interests and overrides legitimate regulations in the public interest, considering that the decisions are only based in previous awards, without an interpretative guidance to prevent the lack of predictability in the decision-making process[19]. Thus, one may say that by this vagueness, the FET obligation lacks legitimacy as a legal norm[20].

44. The tribunal must recognize that there is a thin boundary that have to be observed between the genuine mistreatment of foreign investments that should be protected by the standard and measures taken in pursuance of legitimate policies that cannot be held against the host State as a violation of FET[21]

(i) The Actions Taken by Mercuria are Legitimate, Legal, and No Expectations Were Violated

45. In the case at hand, the actions taken by RESPONDENT are clearly legitimate policies that are legal under the BIT and the laws and agreements signed between the parties, as it is

[17] Bronfman, p.619
[18] UNCTAD, 2012, p.11
[19] Ibid
[20] Ibid, p. 12
[21] Ibid, p. 15

going to be further approached in the arguments of the merits.

46. Also, Mercuria is a developing country [Case, Response to the Notice to Arbitration, p.17 para 2]. Atton Boro could not demand a developing country to have a treatment that overcome its possibilities. The level of development of the country certainly influences on the efficiency and conduct of the State organs and authorities[22]. Therefore, the commitment of the State to provide Fair and Equitable Treatment shall not trespass the measures that are available to the country in the specific situation.

47. Moreover, CLAIMANT may also say the the FET obligation was violated when it comes to the delay of the proceedings in the matter of the enforceability of the Award, which is also not true.

48. Mercuria never assured CLAIMANT that it would have its award enforced within a certain period of time. Also, as stated previously, Mercuria is a developing country and it is expected that it has an overburdened judiciary. Therefore, the time to enforce the award from CLAIMANT is uncertain and there are no actions that RESPONDENT could have taken to change this fact.

49. It is not reasonable to expect that a State, faced with an epidemic disease that threatens the well-being of its population would not reform its legal framework and take measures to prevent the spreading of the public health crisis [Case, Response to Notice of Arbitration, p. 16 para 6]. In this sense, all the measures taken by Mercuria were legal and provided in the Agreements between the parties.

50. In this sense, the Tribunal should acknowledge that any of the actions taken by RESPONDENT were illegal or characterized unfair treatment. Thus, RESPONDENT could not be penalized by CLAIMANT's unfounded allegations and its expectations on the enforcement of the proceedings in state courts

(ii) The Denial of Justice Standard is Not Suited in the Present Arbitration

51. That being said, if the Tribunal analyses the FET clause in the BIT, it will notice that of

[22] UNCTAD, 2012, p.34

CLAIMANTs allegations do not characterize a lack of FET, within any possible interpretation that could exist.

52. CLAIMANT might sustain that the Fair and Equitable Treatment was harmed taking into premise the Effective Means. However, this should not apply, considering that it is not even a clause within the BIT, it appears only on the preamble of the treaty, not characterizing an applicable provision.

53. This clause was originally established when there was the need to assure that the customary international law provided adequate protection. However, by the moment that the FET was consolidated, the effective means clause lost its purpose and it was moved to the preamble of the BIT's, considering that there was no need to assure adequate protection[23].

54. In this regard, considering that this clause is in the preamble and do not qualify as an provision chosen by the contracting parties, it should not be considered as a clause worth to take into consideration together with the Treaty. Notwithstanding, even if it were taken into consideration together with the FET clause, CLAIMANT has no grounds to sustain that there was any kind of violations.

55. On the other hand, if the Tribunal still understands that there is the need to analyse the Fair and Equitable Treatment clause according to the standard provided by the BIT, it should acknowledge that the clause in the BIT at hand has an unqualified formulation[24], which means that the contracting parties when drafting the Treaty did not choose to refer to the minimum standard of protection.

56. Thus, one may say that the parties intended to conserve only matters within the scope of protection of the Denial of Justice standard. Despite, that is far from being the case here, considering the requirements provided by the standard.

57. The Fair and Equitable Treatment in the scope of the Denial of Justice standard is considered present only in extreme situations, since it demands a system failure and exhaustion of local remedies, which means that there should be a balancing of a number of

[23] Shearman & Sterling, p.333
[24] UNCTAD, 2012, p.20

complex situations[25]. In the case at hand the Tribunal could notice at the first sight that none of those are barely existent, not being reasonable to understand the lack of FET.

58. In *United Stated v. Mexico* a claim was brought before the General Claims Commission alleging violation of due diligence. In that case the tribunal stated that to characterize Denial of Justice there should be an amount to an outrage, to bad faith, neglect of duty or insufficiency of governmental action[26], which clearly did not happen in the present situation.

59. In this sense, it is not reasonable to understand that Mercuria, by trying to take all legal measures during an epidemic situation or by the enforcement of an award within a normal and predictable amount of time would characterize Denial of Justice. No actions or omissions were made by RESPONDENT to deliberately try to harm CLAIMANT.

60. Lastly BIT at hand, by its writing, refers to the full protection and security standard, which also does not apply in the present case. This is because, the full protection and security standard is about protecting exclusively the physical integrity of the investment from adverse effects, such as private parties and state organs[27]. In this sense, considering that the investment under discussion in this agreement is intellectual property, there is no saying that the FET provision is applicable.

61. The Tribunal at the *Saluka v Czech Republic* case contended that this standard applies essentially when the investment is affected by civil strife and physical violence, not just any kind of impairment of an investor's investment[28]. This is also the understanding in *Eastern Sugar v. Czech Republic*, where it was stated that the protection and security standard is when a state fails to act to prevent actions by third parties[29].

[25] Paulsson, p. 2
[26] LFH Neer and Pauline Neer v Mexico (US v Mexico) (1926) 4 RIAA 60, pp. 61-62
[27] Schreuer, pg. 2, 2010.
[28] Saluka Investments BV (The Netherlands) v The Czech Republic, paras 483, 484.
[29] Eastern Sugar v. Czech Republic para 203

(iii) Conclusion

62. Considering that all RESPONDENT's actions were legal and supported by legislation, the Tribunal must acknowledge that what CLAIMANT is trying to impose is a litigation strategy based in a standard that aims to protect investors against real danger of harming its investments, which had nothing to do with the present situation.

63. The delay of the proceedings is nothing but the normal amount of time that an overburdened system could take to enforce an Award and the acts about the patent given to CLAIMANT were normal and soft measures that any state could take facing the situation that RESPONDENT has faced.

64. In that sense, neither the denial of justice nor the effective means clause could apply to RESPONDENT, since it did nothing but legitimate policies, that are expected in a developing country facing an epidemic.

ARGUMENTS ON THE MERITS

I. THE TIME ELAPSED TO ENFORCE THE AWARD IS NOT A VIOLATION TO THE BIT

65. CLAIMANT sustains that RESPONDENT should be considered liable for the conduct of its judiciary, however considering the above mentioned, solely the amount of time to enforce an award is not enough to characterize a violation to the fair and equitable treatment standard of denial of justice

66. In light of this, the tribunal should not recognize that Mercuria's judiciary is unfair or inequitable towards CLAIMANT nor that RESPONDENT breached CLAIMANT's legitimate expectations with the delay.

(i) The Conducts of The Court of Mercuria Were Impartial and Reasonable

67. In 2009, CLAIMANT filed enforcement proceedings regarding the Award. Even though the enforcement is still pending, the Tribunal should not understand that it indicates that the treatment was unfair or inequitable, thus a violation the FET clause.

68. To acknowledge that Mercuria's judiciary actions constitute a denial of justice, it is necessary to test the legal system as a whole and local remedies must be exhausted[30]. Once CLAIMANT could not demonstrate that RESPONDENT's system has failed, RESPONDENT cannot be liable for a denial of justice. If the court decision can be challenged through the judicial process, a denial of justice is not identified[31].

69. The necessity to exhaust local remedies is necessary to prove that a denial of justice occurred at a international level by not providing a fair and efficient system of justice[32]. The possibility to challenge the decision is essential to guarantee that the State will not be responsible for a breach of international law without the opportunity of redressing the matter through its legal system[33]. Considering that the enforcement of the Award is still

[30] Chevron Corporation v. The Republic of Ecuador, Opinion of Jan Paulsson, p. 23, para. 62; Flughafen v. Venezuela, paras. 713-714.
[31] Loewen v. United States of America, para. 151
[32] Ibid, para. 153.
[33] Ibid, para. 155.

pending, CLAIMANT made use of no local remedy yet, thus it is not irrefutable that a denial of justice is present.

70. Moreover, the conducts of Mercuria's judiciary cannot be interpreted as a denial of justice since CLAIMANT does not have any indication that it was against the procedural law of Mercuria and that the Court was voluntarily harming CLAIMANT by not enforcing the Award. In fact, the actions of the Court were not *ex officio*, but due to parties' requests or due to lengthy arguments in other cases - which in no way can be declared as the Court deliberately delaying the enforcement of the Award [Timeline of the Proceedings in Enforcement Application No.873/2009, p. 7-12].

71. Considering that both Atton Boro and NHA sought, at some point, more time to file a response [Timeline of the Proceedings in Enforcement Application No.873/2009, paras. 7,8, 10, 11, 12, 16, 37, 42, 43] and that it was necessary to reassigned the application to the proper bench of the High Court of Mercuria [Timeline of the Proceedings in Enforcement Application No.873/2009, para. 28], the argument that a denial of justice occurred is not reasonable. The adjournments of the proceedings were not discretionary decisions of the High Court of Mercuria, but a result of the requests of the parties and a consequence of the complexity of the case.

72. Taking into account that in 2012 CLAIMANT's application for enforcement was transferred to a Commercial Bench of the Court, the delay of the proceedings cannot be qualified as unreasonable enough to be considered as a violation of the BIT[34]. Once the enforcement of the Award involves a certain level of judicial consideration and is there is a justification for the times passed, the Tribunal should not understand that Mercuria's judiciary purpose is to harm CLAIMANT[35].

73. As it was held in the ELSI case, an arbitrary conduct of the judiciary is a "*wilful disregard of due process of law, an act which shocks, or at leasts surprises, a sense or juridical propriety*". Not being the case, the Tribunal should not conclude, in light of the circumstances of the enforcement proceedings of the Award, that Mercuria's judiciary was

[34] Draguiev, p. 585.
[35] Ibid, p. 603.

intentionally discriminatory towards CLAIMANT[36].

(ii) RESPONDENT Did Not Violate CLAIMANT's Legitimate Expectations Regarding the Enforcement

74. CLAIMANT sustains that Mercuria is not following the New York Convention provisions by taking such amount of time to enforce its Award. The binding effect of the New York Convention should not be sufficient to consider that RESPONDENT violated CLAIMANT's legitimate expectations when it filed the enforcement proceedings.

75. It is noteworthy that Mercuria never gave the impression that the enforcement of an award would occur in a particular manner or timeframe, thus CLAIMANT could not have the legitimate expectation about a certain amount of time to enforce the Award[37].

76. There is no evidence in the present case that indicates that CLAIMANT could assume that Mercuria's judiciary was in a different situation than it actually is. Since Mercuria is a developing country, it is known and expected that it has an overburdened judiciary [Response to the Notice of Arbitration, p. 17, para. 9]. CLAIMANT cannot sustain that it was an undue delay without evidence that this amount of time is unusual in Mercuria. There is no violation to CLAIMANT's legitimate expectations if the expectations were not reasonable in the context it is inserted.

77. The tribunal has no elements that allows the interpretation that RESPONDENT breached the fair and equitable treatment and lacked transparency in regard of the proceedings to enforce an arbitral award, thus it is not reasonable to assume that RESPONDENT should be liable for a situation - a violation to the FET - that it could not know the existence.

78. In light of the above, CLAIMANT also cannot allege that RESPONDENT did not follow the obligations of the New York Convention. Once the proceedings is still pending, there is no grounds to assume that RESPONDENT's judiciary willingly decided to not recognize and enforce the Award. Until the present moment, RESPONDENT did not violate Article V of the New York Convention and CLAIMANT was not deprived of relief granted by the arbitral

[36] Redfern, p. 493
[37] White Industries v. India, p. 96, para 10.3.15

tribunal.

(iii) Conclusion

79. With all the circumstances of the present case, the time elapsed for the enforcement of the Award should not be considered as inappropriate or a misconduct of Mercuria's judiciary. Since RESPONDENT has an overburdened judiciary, it is expected that the proceedings to enforce an award is not as fast as CLAIMANT expected. Moreover, considering that the competence to decide about the enforcement of arbitral awards was modified after the proceedings were already filed, the acts of the Court does not amount to a breach of the fair and equitable treatment and Mercuria did not violate the denial of justice standard.

II. THE ENACTMENT OF LAW NO. 8.458/09 IS CONSISTENT WITH THE BIT AND DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT

(i) Mercuria's Regulatory Powers Allows the Enactment of a New Legislation to Protect Its Public Health

80. In its Article 3.2, the Mercuria-Basheera BIT provides that "Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party". By analyzing that clause, the Tribunal should recognize that the current situation of Mercuria gives no room to allegations of discriminatory measures towards CLAIMANT's investment by the enactment of a provision allowing a compulsory license.

81. Should one take into consideration the epidemic crisis that Mercuria has been in [Case, Response to the Notice of Arbitration, p. 16, para. 6], it is expected that RESPONDENT would take measures to control it.

82. Despite the NHA heavy campaign to prevent Greyscale in the country and the fact that in 2006 nearly 50% of all adults were getting tested every six months - a great increase compared to the only 17% in 2003 -, the incidence and prevalence of Greyscale exceed every estimate projected by the NHA [Case, Statement of Uncontested Facts, p. 29, para

14]. With that report, it became clear to RESPONDENT that more rigorous measures were necessary to a more effective action against the epidemic.

83. The BIT, in its article 6, establishes that the investments shall not be subject to any measure that limit permanently or temporarily the rights of ownership, and also provides that the investment shall not be directly or indirectly expropriated or be subject to any measure having a similar effect. However, the BIT also creates some exceptions to the mentioned rights.

84. Article 6.4 of the BIT expressly provides that actions to protect legitimate public welfare objectives such as public health do not constitute an indirect expropriation under the BIT. That being said, RESPONDENT's action to control an epidemic crisis cannot be subject to the consequences of article 6.3. The BIT itself is clear that the host State may take necessary measures to protect the public interest, being unreasonable to consider CLAIMANT's investment as more important than a disease that has already affected more than 266,298 people and it is estimated that more than 578,390 persons were also infected [Case, Chapter VII - Greyscale, Progress Highlights, p. 42].

85. Considering the high prices of the treatment in Mercuria, it became impractical for the patients to pay for the pills and for RESPONDENT to provide under its universal healthcare. With the number of patients constantly raising and considering that a considerable number of them depended only on public health schemes to obtain the treatment, RESPONDENT needed to diminish the problem. Once every covenant allows the grant of a license without the authorization of the owner and a public health concern is a justification for a different treatment of an investment under the BIT, it is undeniable that Mercuria would modify its intellectual property legislation since it was not in accordance with the reality of the State anymore.

86. In similar cases, other countries proposed amendments to its legislations to allow compulsory licenses, demonstrating that the enactment of a specific legislation regarding Intellectual Property and, consequently, a provision about the use without the authorization of the owner does not go against international practice.

87. By examining other countries actions to manage a health crisis, it is possible to take its

conducts as examples. In a similar situation, Brazil enacted a law that permits compulsory license[38]. Continuing in this line, Germany and France also have provisions in its national laws that specify the circumstances to issue a compulsory license to protect the public interest[39], being clear that allowing non-voluntary license is the prevalent understanding in analogous circumstances.

88. Therefore, the enactment of a new provision about compulsory license is a method that States can resort to guarantee more effectiveness to intellectual property rights. As it was already mentioned, the purpose of the TRIPS Agreement is not to be an uniform law, but to serve as minimum standards that the State Members should follow[40]. To achieve the standards, the States, by applying its regulatory powers, may enact legislations that are compatible with the reality it is inserted.

89. The Tribunal should not acknowledge that the issuance of a legislation is a violation of the fair and equitable treatment. Besides being a flexibility allowed under the TRIPS Agreement since 1996 - even before the CLAIMANT's patent in Mercuria -, Greyscale is a disease that threats Mercuria's population at least for 15 years [Case, Chapter VII - Greyscale, p. 41], therefore a provision regarding non-voluntary license is not a matter that could not be foreseen by CLAIMANT.

(ii) Conclusion

90. Therefore, RESPONDENT acted in conformity with the BIT by utilizing its regulatory powers and deciding to amend its intellectual property law to admit a court to grant a license without the authorization of the owner.

91. In light of this, analyzing the aforementioned and the necessity to protect Mercuria's public health, it is unreasonable to assume that CLAIMANT could have a legitimate expectation that goes against RESPONDENT's actions. Consequently, the acts of RESPONDENT regarding a provision permitting compulsory license should not amount to a breach of the BIT.

[38] Fisher, p. 12.
[39] Germany Patent Act, Section 24; French Code of Intellectual Property, Article L613-16
[40] Avafia, p. 10.

III. CLAIMANT CANNOT RELY ON OBLIGATIONS CONTAINED IN THE TRIPS AGREEMENT

92. CLAIMANT sustains that RESPONDENT breached its obligations towards its investment by not complying with the TRIPS Agreement by enacting a legislation allowing non-voluntary licenses. However, the TRIPS obligations only exist inter states and may only be decided in the dispute settlement of the World Trade Organization (hereinafter "WTO"), not being the competence of this arbitral tribunal to decide about the compliance of a TRIPS obligation by a State Member.

(i) Only a State Can Invoke Responsibilities Contained in the TRIPS

93. CLAIMANT sustains that RESPONDENT violated international covenants, mentioning obligations from the TRIPS Agreement. However, the TRIPS only create obligations between the Member States - Mercuria and Basheera - making it impossible to CLAIMANT to argue that RESPONDENT violated the international covenant.

94. Despite the fact that the TRIPS Agreement is a treaty that allows the State Members to legislate under standards of protection, it cannot be analyzed as an uniform law[41]. That is clear in Article 1 of the TRIPS Agreement, which states that "*Members shall give effect to the provisions of this Agreement*", addressing its articles to the signatories States when elaborating its own Intellectual Property legislations. Therefore, the TRIPS Agreement is directed to the State Members and it is not up to a private party of another State Member to declare that the obligations are not being satisfied[42].

95. In the same line, the European Court held that the provision of the TRIPS does not create rights susceptible to be claimed by individuals before courts and tribunals[43]. Therefore, once CLAIMANT alleges that RESPONDENT disregarded the TRIPS Agreement, the World Trade Organization's Dispute Settlement Understanding (hereinafter "DSU") provides the mechanism to resolve state-to-state disputes for the compliance with the obligations of the covenant[44].

[41] Correa, p. 35.
[42] Ibid.
[43] Parfums Christian Dior SA v TUK Consultancy
[44] Gibson, p., 403.

(ii) Disputes Concerning Obligations Under the TRIPS Agreement Are Subject to the World Trade Organization's Dispute Settlement Understanding

96. Considering that only State Members can sustain that other State disrespected the obligations contained on the TRIPS Agreement, it is also important to notice that the TRIPS Agreement has its own mechanism for the settlement of disputes concerning the compliance of the obligations relating to intellectual property rights: the World Trate Organization for the Settlement of Disputes[45]. The settlement system is compulsory, consequently every WTO Member is subject to it[46].

97. Beyond being compulsory, only Member governments can participate in the proceeding. It is already an indication that the necessity to follow the TRIPS obligations can only be claimed by a State Member, not by its private parties, since the individuals must rely on their government to intervene and initiate proceedings in the dispute settlement procedure[47].

98. Therefore, considering that CLAIMANT does not agree on how the compulsory license was granted and its substantive terms, it depends on its government willingness to bring a claim regarding a violation of the TRIPS Agreement on the DSU[48].

(iii) Conclusion

99. The Tribunal should not decide upon alleged breaches of obligations contained in the TRIPS Agreement. To invoke such agreement, it is necessary that Basheera agrees with CLAIMANT that a violation occurred, since only State members, not its private parties, may sustain that another Member had not complied with the obligations.

100. Furthermore, the WTO has its own dispute settlement body. Every dispute regarding the agreement of the WTO shall fall within the exclusive domain of the DSU, thus a matter regarding the TRIPS Agreement is not under the competence of a tribunal deciding about

[45] WTO, p. 1.
[46] WTO, p. 8.
[47] Taubman, p. 158.
[48] Gibson, 403.

an investment dispute.

III. SUBSIDIARILY, THE COMPULSORY LICENSING IS LAWFUL UNDER THE TRIPS AGREEMENT AND UNDER MERCURIA'S DOMESTIC LAW

101. CLAIMANT sustains that the issuance of Valtervite license for a Mercuria generic drug manufacturer not only violate its expectations, but also disregards international covenants such as the TRIPS Agreement. However CLAIMANT ignores the context in which Mercuria is inserted and the conditions for a non-voluntary license be issued. As it is going to be demonstrated, RESPONDENT's acts do not violate any international Agreement and the compulsory license is completely justifiable under the circumstances of Greyscale in Mercuria.

(i) The TRIPS Agreement Permits the Use of the Patent Without the Authorization of Its Owner

102. Once Mercuria is a party to the TRIPS Agreement and to the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter "Doha Declaration") [Procedural Order No. 2, p. 48, Applicable Treaties], Mercuria must follow the minimum intellectual property standards[49]. Among all the established protections, the TRIPS Agreement has some flexibilities as well, one being the permission to issue a compulsory license under some circumstances.

103. The introduction of a compulsory license cannot be seen as an unusual method to protect public health[50]. To explain that, it is important to have in mind that the TRIPS Agreement, in its article 31, establish the possibility of the use without authorization of the right holder. The WTO Members have a certain level of discretion for its patent laws, being that the reason why the TRIPS Agreement allows its Members to determine the grounds for the issuance of compulsory licenses[51].

104. Paragraph 5(b) of the Doha Declaration states that "*each Member has the right to grant*

[49] Pauwelyn, p. 639.
[50] Van Zimmeren, p. 24.
[51] Roffe, p. 26

compulsory licenses and the freedom to determine the grounds upon which such licenses are granted", allowing the State to issue its own legislation regarding the matter.

105. Furthermore, Paragraph 5 also explains the term "national emergency" contained in Article 31(b) of the TRIPS Agreement. The TRIPS Agreement is silent about the definition of the term, thus the Doha Declaration affirms that the State Member "*has the right to determine what constitutes a national emergency or other circumstances of extreme urgency*", specifying that *"public health crisis, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics"* shall be considered as national emergencies. Once it is a country's interest and responsibility to protect its public health, the Doha Declaration reaffirmed the flexibilities[52], making clear that the Agreement can be interpreted in such a degree to balance the access to medicines and research[53].

106. Apart from being a party to the TRIPS Agreement and to the Doha Declaration, Mercuria is also a party to the Paris Convention [Case, Procedural Order No. 2, p. 48, Applicable Treaties]. Under that convention, Mercuria has "*the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent*"[54]. That being said, the enactment of Law 8458/09 is in conformity with all international covenants Mercuria is bound, not having any impediment to issue a new provision allowing non-voluntary licenses in circumstances of a health crisis as it is the Greyscale epidemic.

(ii) The Enactment of Law 8.458/09 Is In Accordance With International Covenants

107. Years after the issuance of the license to another party manufacture Valtervite, CLAIMANT sustains that it could not be granted, arguing that this violates international treaties, mentioning the TRIPS Agreement. It is noteworthy that CLAIMANT only brings this claim more than 6 years after Valtervite is being manufactured by HG-Pharma, demonstrating that it is not a matter that harmed CLAIMANT as it tries to argue. Moreover, considering the provisions mentioned above, it is clear that occasionally it may be necessary to promulgate a new legislation to promote the public interest regarding a health

[52] Doha Declaration, para. 4.
[53] Van Zimmeren, p. 25.
[54] Paris Convention, Article 5.A(2)

crisis[55].

108. The possibility of use of the patent without authorization of the owner should not be a surprise to CLAIMANT, since it is allowed under the TRIPS Agreement and also under the Doha Declaration, as it was mentioned above. In that sense, in 2009 the president of Mercuria amended the national legislation for Intellectual Property [Case, Statement of Uncontested Facts, p. 30, para. 20]. The new section 23C allows non-voluntary license, being in conformity with international covenants.

109. It is also important to take into consideration article 8 of the Agreement, which stipulates that "*members may adopt measures necessary to protect public health*", provided that they are compatible with the other provisions of the Agreement. Therefore, CLAIMANT has no reason to affirm that a compulsory license is a violation of international covenants. Once it is necessary to harmonize the obligations and protections of the TRIPS with the public health concern, the access to drugs must be in accordance with the reality of the country involved.

110. Despite the fact that greyscale was being treated by Sanior, CLAIMANT's FDC, the disease was still an emergency and a public health concern. It is true that the percentage of citizens being tested has increased, however, as it was noticed in the NHA annual report from 2006, the incidence of Greyscale remained as an alarming aspect in Mercuria's public health [Case, Statement of Uncontested Facts, p. 29, 905-910].

111. Considering that there was a substantially larger amount of Greyscale cases in Mercuria, that CLAIMANT did not agree to renegotiate the price of its product and that RESPONDENT's goal is to achieve universal free healthcare, it became unrealistic to pay nearly USD 10,000 per patient/year [Chapter VII – Greyscale, p. 42, para. 1370]. In these circumstances, a generic drug manufacturer filed an application to manufacture Valtervite, resulting in over 1.2 billion dollars savings annually [Case, Statement of Uncontested facts, p. 30, para. 22].

112. The Tribunal should acknowledge that in the actual circumstances it was necessary to amend its legislation and enable other drug manufacturers to utilize the compound. The

[55] Reichman, p. 11; Zimmeren, p. 21.

promulgation of a provision regarding compulsory license should only be interpreted as a State resorting to its regulatory powers for the wellbeing of its citizen. With that in mind, CLAIMANT's profit and the consequences of the new provision cannot surpass the necessity to regulate about a public health matter that for years has been affecting Mercuria.

113. The compulsory license is the action that the State may take to reduce the adverse effects of a patented medicine on price and availability to the population[56]. Once the people who do not fall within the poorest group also struggle with the costs of treatment of Greyscale [Case, Chapter VII - Greyscale, p. 43], the license to a third-party manufacturer Valtervite was essential to have an effective FDC at an affordable price[57].

(iii) Conclusion

114. Should the Tribunal understand that the present case may be subject to an investment arbitration, RESPONDENT complied with every international covenant it is bound. The compulsory license is permitted under the TRIPS Agreement, thus a generic version of Valtervite should be interpreted as a solution to the health crisis of Mercuria rather than a violation to CLAIMANT's investment.

IV. THE TERMINATION OF THE LTA DOES NOT AMOUNT TO A VIOLATION OF THE BIT

115. CLAIMANT sustains that Article 3.3 of the BIT, which provides that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party", should be applicable to the termination of the LTA

116. The termination of the LTA by the NHA cannot be interpreted as a violation of Article 3.3 of the BIT. That's because the protections provided in BITs do not make contractual breaches violations of the investment treaties[58].

117. For that reason, it is important to differentiate between a breach of contract and a breach

[56] Abbott, p. 17.
[57] Ibid.
[58] Salacuse, p. 390.

of a treaty obligation[59]. To verify if the breach is only contractual, it is important to analyze if the state has used its sovereign powers or if its conduct is entirely commercial[60]. The only way of a breach of the LTA be tantamount to a violation of article 3.3 of the BIT is if the conduct goes beyond the state role as a party of the contract[61], which is not the present case. The LTA was a commercial supply arrangement between CLAIMANT and NHA, and its decision to terminate the contract was not exercised by sovereign authority [Case, Response to the Notice of Arbitration, p. 16, para 8]. Once NHA tried to renegotiate the price for Sanior and CLAIMANT did not agree with the proposal, the termination of the LTA is a normal contract dispute. It is not the case of discretionary governmental powers, thus the BIT and the allegation of an umbrella clause should not be applied[62].

118. It is fundamental to interpret Article 3.3 of BIT and understand what the drafters of the clause intended. It is unreasonable to assume that their intention was to transform any contract claim into a treaty claim, since that would result in any commitment of the State regarding the investment be transformed into treaty claims[63].

119. Therefore, the Tribunal should not follow CLAIMANT's allegations that the conduct of NHA was a violation of the BIT. The purpose of an umbrella clause is not to turn every minor conflict concerning a contract performance into an issue that should be object of an investment arbitration[64].

(i) The LTA Was a Purely Commercial Arrangement, Thus It Is Not Under the Scope of Article 3.3 of the BIT

120. To apply Article 3.3 of the BIT to the termination of the LTA, it is necessary to establish a linkage between private undertakings and state's undertakings with regard to the investment. However, in the present case is not possible to reach that conclusion. Since the termination of the LTA was decided in an commercial arbitration rather than an investment arbitration, it is important to notice that CLAIMANT acknowledges that the transaction with

[59] Alexandrov, p. 24.
[60] Ibid, p. 37.
[61] Impregilo S.p.A. v. Islamic Republic of Pakistan, para. 278
[62] Walde, p. 8.
[63] Pan American Energy v. Argentina, para. 110
[64] Schreuer, p. 255.

the NHA cannot be considered an investment[65].

121. In that sense, the existence of Article 3.3 cannot be interpreted alone and transform the contract into an investment without being analyzed its terms. As it happened in Joy Mining v. Egypt, the terms of the LTA were entirely normal commercial terms and there is no indication of steps taken to qualify the LTA as an investment[66]. Likewise, the parties never gave the impression that they were willingly to transform any contract in a treaty obligation. For that reason, the distinction between an ordinary contract and an investment is important to be made, otherwise any sales contract involving a Mercuria's agency would be qualified as an investment and consequently under the scope of article 3.3 of the BIT[67].

122. Should the Article 3.3 be applicable to every contract regarding CLAIMANT's investment, the language used should be more specific in order to be possible a broad interpretation[68]. It is necessary to have a clear and convincing evidence that the States involved shared the will to elevate contractual claims to international treaty law[69]. Consequently, by the expansive meaning of the wording of Article 3.3, the Tribunal should not interpret it as an umbrella clause. As it was held in SGS v. Pakistan, the appropriate approach to Article 3.3 is *in dubio mitius,* since it is extremely unlikely - without any apparent sign - that Mercuria and Basheera would have wished to treat a breach of a simple commercial contract as a violation to the BIT[70]

123. A contract signed between an investor and a government agency for the supply of a medicine is a merely commercial arrangement[71], therefore it cannot be subject to the same consequences as a breach to the BIT. In light of this, it is necessary to highlight that CLAIMANT had a relationship with several distributors [Case, Procedural Order No. 3, p. 30, para. 24], hence the Tribunal should not understand that the LTA is closely linked to CLAIMANT's investment since it could continue to sell the medicine to other parties[72]. The LTA was a contract with no particular focus on CLAIMANT's compound as an investment,

[65] Shihata, p. 308.
[66] Joy Mining Machinery Limited v. The Arab Republic of Egypt, Award on Jurisdiction, para. 56.
[67] Ibid, para. 58.
[68] Sasson, p. 180.
[69] SGS v. Pakistan, Decision of the Tribunal on Objections to Jurisdiction, para 167
[70] Ibid, 171
[71] Naniwadekar, para. f.
[72] Ibid.

therefore it is not under the scope of Article 3.3 of the BIT.

(ii) The NHA Was Acting as a Private Party

124. Apart from the LTA being a purely commercial commitment, the NHA was solely acting as any ordinary contracting party would act when it is not satisfied with the performance of counterparty. For that reason, the Tribunal should observe the acts of the NHA as substantially commercial rather than governmental in nature[73], reaching the conclusion that RESPONDENT cannot be considered liable for a breach of a commercial arrangement.

125. In that sense, for a breach of contract be considered a violation of the BIT, the conduct must be different from what an ordinary contract party could adopt. In the situation in discussion, NHA performed as any contracting party not satisfied with the settlement would act[74], and commercial acts from NHA cannot be attributed to Mercuria. The National Health Authority is a separate legal person, being distinct from Mercuria, and it is incontestable that it was NHA which exercised its rights under the contract allegedly in breach of the BIT. For that reason, RESPONDENT cannot be liable for that conduct under Article 4 and 5 of the ILC Articles on State Responsibility (hereinafter ILC Articles).

126. Firstly, it is necessary to highlight that even though there may be a connection between NHA and a section of the government of Mercuria, it is not sufficient to consider that they are not distinct[75]. There is no indication that NHA's conducts were decisions made by government officials, without the National Health Authority being able to make its own choices by its own representatives. For that reason, once NHA is a separate legal entity and it behaved as a party to the Contract, there are no grounds for Article 4 of ILC Articles[76].

127. In that sense, the Tribunal should interpret the term "Party" in Article 3.3 of the BIT as any situation where the Party is acting *qua* State[77]. The breach of contracts and obligations to investors is not invariably a breach of international law[78], being possible to breach a

[73] Maffezini v. Spain, para. 52
[74] Impregilo S.p.A v. Pakistan, para. 260
[75] Bayindir v. Pakistan, para. 119
[76] Ibid.
[77] Bosh International INC v. Ukraine, para. 246
[78] Salacuse, p. 300

contract without breaching a treaty[79]. Even though the NHA is politically accountable to the government of the State, it operates independently [Case, Procedural Order No. 3, p. 50], thus the NHA was not deliberately exercising its sovereignty[80].

128. Although it is not always easy to distinguish between an ordinary commercial action and a conduct that only a sovereign State may perform, in the present case it is undeniable that the breach was a decision that any contracting party could make. The NHA proposed terms that CLAIMANT did not accept, making it impractical to maintain the LTA. As any ordinary party would act, the NHA decided to put an end to the contract. No sovereign act was needed, but a simple analysis of the economic situation and the number of Greyscale cases in Mercuria [Case, Statement of Uncontested Facts, p. 29, para. 15]

(iii) Conclusion

129. An umbrella clause is a provision of a BIT to elevate every contractual claim to a treaty claim subject to international law. However, the clause 3.3 should not be interpreted as such.

130. Besides the fact that the LTA was a purely commercial arrangement between CLAIMANT and the NHA, the NHA acted as an ordinary party. Although the NHA is politically accountable to the government of Mercuria, no sovereign act was involved in the decision to terminate the LTA.

131. For that reason, the Tribunal should not consider that a simple decision to discontinue the contract should amount to a violation of Article 3.3 of the BIT.

[79] Vivendi v. Argentine Republic, paras. 95-96.
[80] Wang, p. 316

RELIEF SOUGHT

132. For all reasons above, RESPONDENT hereby requests, without prejudice to further claims or arguments, that the Arbitral Tribunal make the following award against CLAIMANT:

133. To declare that the Tribunal has no jurisdiction over the claims in relation to the enforcement of the commercial Arbitral Award, since it does not characterize an investment within the BIT,

134. To apply the Denial of Benefits clause provided in article 2.1 of the BIT and therefore to declare that CLAIMANT is not a protected investor.

135. To declare that RESPONDENT complied with all its obligations and consequently, there was no violation of Fair and Equitable Treatment towards CLAIMANT.

136. To declare that Respondent is not liable for the conducts of its judiciary.

137. To declare that the enactment of the Law No. 8.458/09 does not amount to a violation to the BIT.

138. To declare that disputes arising from obligations contained in the TRIPS Agreement cannot be subject to an investment arbitral.

139. Should the Tribunal understand that it has the powers to decide about the intellectual property matter, Respondent requests the Tribunal to declare that the compulsory license is in accordance with international covenants.

140. To declare that the termination of a commercial arrangement such as the Long-Term Agreement does not amount to a violation to Article 3.3 of the BIT.

COUNSELS FOR THE RESPONDENT

TEAM CAMARA

25 SEPTEMBER 2017.