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PERMANENT COURT OF ARBITRATION

In the proceeding

PCA Case No. 2016-74

ATTON BORO LTD.

(The Kingdom of Basheera)

(Claimant)

versus

THE REPUBLIC OF MERCURIA

(Respondent)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

ARGUMENTS ON THE MERITS

TABLE OF ABBREVIATIONS

Abbreviation	Full citation
Atton Boro	Atton Boro Limited
Award	The award rendered by the Tribunal seated in Reef in favor of the Claimant
Basheera	Kingdom of Basheera
BIT	Mercuria-Basheera Bilateral Investment Treaty
FDC	Fixed-dose combinations
Ibid.	Ibidem (in the same source)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
IP Law	The domestic IP law in Mercuria as it was amended by Law No. 8458/09
LTA	Long-Term Agreement between NHA and Atton Boro
Mercuria	Republic of Mercuria
Mercurian Patent	Mercurian Patent No. 0187204 granted on 21 February 1998
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
NHA	National Health Authority
No.	Number
p.	Page

pp.	Pages
OECD	Organization for Economic Co-operation and Development
R&D	Research and Development
Reef	Republic of Reef
UNCTAD	United Nations Conference on Trade and Development
TRIPs Agreement	Agreement on Trade Related Aspects on IP Rights, 1994
VCLT	Vienna Convention on the Law of Treaties, 1969

LIST OF AUTHORITIES

BOOKS

Abbreviation	Full citation
Dolzer - Schreuer	Rudolph Dolzer – Christoph Schreuer: Principles of International Investment Law, Oxford, 2008
International Investment Law	Bungenberg – Griebel – Hobe – Reinisch: International Investmen Law, Nomos, 2015
Jagusch - Sinclair	Stephen Jagusch and Anthony Sinclair, Denial of advantages under Article 17 (1) in Graham Coop and Clarisse Ribeio (eds), Investment Protection and the Energy Charter Treaty

OTHER AUTHORITIES

Abbreviation	Full citation
DASR	International Law Commission's Draft Articles on State Responsibility
Núñez-Lagos	Carmen Núñez-Lagos, 'The invocation of "denial of benefits clauses": when and how?', Kluwer Arbitration Blog, February 17 2014, http://kluwerarbitrationblog.com/2014/02/17/the-invocation-of-denial-of-benefits-clauses-when-and-how-2/
Schreuer	C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' The Journal of World Investment & Trade 6 (2005) 357, 373–4.

JUDGEMENTS AND AWARDS

International arbitral awards

Abbreviation	Full citation
AMTO	Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela ICSID Case No. ARB(AF)/11/2
El Paso	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15
GAI-Rurelec	Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17
Generation Ukraine	Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9
Hulley	Hulley Enterprises Limited (Cyprus) v. The Russian Federation,

	UNCITRAL, PCA Case No. AA 226
Impregilo	Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3
Joy Mining	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11
Mondev	Mondev International Ltd. v United States (ICSID Case No. ARB (AJ)/99/2, Award of 11 October 2002)
Plama	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24
Sempra	Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16
SGS v. Pakistan	SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13
SGS v. Philippines	SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction
Sicula	Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), International Court of Justice, Judgement on 20 July 1989
Tecmed	Técnicas Medioambientales Tecmed SA v. United Mexican States (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003)
Vivendi	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)

STATEMENT OF FACTS

Relevant persons in the case

1. **The Claimant**, Atton Boro Limited is a company incorporated in Basheera. It is a leading pharmaceutical manufacturer, and a service provider and patent holder for Atton Boro Group.
2. **The Respondent**, is the Republic of Mercuria. Via a state organ (NHA), Respondent invited Atton Boro to invest in its territories. Respondent owns 50% of the join-venture HG-Pharma, the company which was granted the compulsory license by the High Court of Mercuria.
3. **Court**: The High Court of Mercuria.
4. **NHA**: The National Health Authority of Mercuria. It concludes commercial contracts alongside with its actions, which are state functions in nature.

The investment activities of Atton Boro

5. **21 February 1998**: The Mercurian Patent No. 0187204 for the compound Valtervite was granted.
6. **5 April 1998**: Atton Boro Limited was incorporated in Basheera.
7. **15 April 1998**: The Mercurian Patent for Valtervite was assigned to Claimant in exchange for shares.
8. **20 July 2004**: The NHA entered into a Long-Term Agreement with the Claimant in order to promote a faster and more efficient health care to those poorest working-age citizens, who suffer from the devastating disease greyscale.
9. **In 2008***:* The LTA was concluded based on premature study about the health condition of the working-age population. These premature estimations turned out to be totally wrong, as the NHA needed to supply twice as many citizens, as the premature study designated the estimated number of greyscale cases. A national health crisis was on the threshold. The NHA requested Claimant to endorse an additional 40% discount on Sanior. The Claimant refused to accept the NHA's offer.
10. **10 June 2008**: The NHA was compelled to terminate the LTA.
11. **In January 2009**: A Tribunal seated in Reef passed an award (the "Award") in favour of the Claimant.
12. **3 March 2009**: Atton Boro filed enforcement proceedings before the High Court of Mercuria. The Mercurian Judiciary is overburdened. The NHA requested the Court to decline enforcement of the Award on the ground that it was contrary to public policy.
13. **10 October 2009**: The President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09), which enabled the use of patented inventions without the authorization of the owner.
14. **In November 2009**: HG-Pharma filed an application before the High Court seeking grant of a licence to manufacture Valtervite.
15. **17 April of 2010**: HG-Pharma was granted the non-voluntary licence to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria.

16. **10 January 2012**: The Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters.

17. **15 April 2013**: Claimant requested the Court to list a hearing within a short period of time. The Court arranged a hearing within a month.

18. **In September 2013**: By virtue of the clarification established by the Supreme Court, all enforcement matters were returned to be heard before regular benches of the Court.

SUMMARY OF ARGUMENTS

ARGUMENTS ON JURISDICTION

19. **Issue 1:** The present Arbitral Tribunal does not have jurisdiction over the claims in relation to Award under Article 8 of the BIT because the Award does not qualify as an investment under Article 1 of the BIT.

20. **Issue 2**: Claimant must be denied the benefits of the BIT by virtue of the Respondent's invocation of Article 2 of the BIT, because Respondent exercised its right in a proper and timely fashion, and complied with the burden of proof requirement, and the substantial requirement under Article 2 are met, since Claimant does not have substantial business activities in the territory of the Contracting Party in which it is organized.

ARGUMENTS ON THE MERITS

21. **Issue 3**: Respondent acted in line with its BIT and other international obligations when amended its IP law, because it faced an extraordinary situation and the amendment of the IP law did not interfere with Claimant's legitimate expectations.

22. **Issue 4**: Respondent acted in line with the FET Standard of the BIT when a non-voluntary license was granted to HG-Pharma because the courts conduct fit Claimant's legitimate expectations.

23. **Issue 5**: Respondent cannot be held liable for the duration of the enforcement proceedings because the conduct of the Court is not attributable to Respondent, and the proceedings ran in line with Claimant's legitimate expectations.

24. **Issue 6:** The termination of the LTA by NHA does not amount to a violation of Article 3(3) of the BIT because, Respondent's actions concerning the LTA were always in line with Article 3 (3) of the BIT.

ARGUMENTS ON JURISDICTION

I. The Arbitral Tribunal has no jurisdiction over the claims in relation to the Award

25. The Tribunal has jurisdiction over matters within the scope of the BIT. The Award is not within the scope of the BIT, since it is not an investment, therefore, the Tribunal has no jurisdiction over the claims in relation to the Award.

A. The Award is not an investment under the BIT

26. The Award is not an investment, since it does not fit in any of the categories of investments listed by Article 1(1) of the BIT (I. A.1.), and neither can it be considered an investment under the general concept provided by Article 1(1) of the BIT (I.A.2.).

1. The Award does not fit in any investment category under Article 1(1) of the BIT

27. The Award does not fit in a single investment category provided by Article 1(1) of the BIT. The notion of 'foreign arbitral award' is not mentioned among others under Article 1(1) of the BIT (I.A.1.a.). The Award is specifically not a claim to money (I.A.1.b.), and the BIT cannot be interpreted broadly (I.A.1.c.).

a. Award is not mentioned on the list established under Article 1(1) of the BIT

28. The Award is not an investment, as it is not mentioned on the list established under Article 1(1) of the BIT, which enumerates the type of rights and facts, which are to be considered investments by virtue of the BIT.

29. The BIT was concluded between Mercuria and Basheera. If the two country would have intended to recognize foreign arbitral awards as investments, the easiest way to express their intention would have been to include the notion 'foreign arbitral award' or something similar in the list.

30. However, since the parties did not incorporate such a concept, they unequivocally did not find it important enough to mention it as an investment, or they did omit the division for foreign arbitral award intentionally, which is presumably a more satisfying theory.

31. If the parties omitted the concept of the foreign arbitral award from the list enumerating investments under the BIT intentionally, the Award cannot accepted as an investment, thus the claims in relation to it are inadmissible.

b. The Award is not a claim to money

32. The Award does not fit within the meaning of claim to money mentioned in Article 1 Section 1(c) of the BIT. It would be claim to money, if nothing would deprive Claimant of its right to demand the amount of money rendered by the tribunal seated in Reef.

33. However, it is not so in the present case. In the present situation, Claimantis in the middle of a procedure aiming to recognize and enforce its rendered Award by the Court. Nevertheless, NHA's defense states, that the Award is contrary to the public policy of Mercuria, therefore it cannot be enforced in the Country.

34. However, if the Award is unenforceable, it loses the rest of its character as a claim to money, and so it cannot qualify as an investment under Article 1 Section 1(c) of the BIT.

35. Since the fate of the Award is unforeseeable, it cannot be considered as a claim to money.

c. The extensive interpretation of the BIT is unacceptable

36. The term foreign arbitral award is not mentioned in the list provided by Article 1(1) of the BIT.

37. The Award cannot be interpreted within any category, thus ignoring the fact that it is omitted from the enumeration, because it would constitute an extensive interpretation of the BIT. The extensive interpretation of the BIT is forbidden under international law, because it would overwrite the intention of the parties, which concluded the BIT.

38. In the present case, the extensive interpretation would mean, that Claimant would interpret the enumeration established by Article 1(1) of the BIT, as if the Award would constitute an investment under one of those classes.

39. This however would have contravene the requirement of the proper interpretation of an international treaty, therefore it is inadmissible.

2. The Award does not fit the general concept of an investment under Article 1 Section 1. of the BIT

40. The Award does not fit the general concept of the investment pursuant to Article 1(1) of the BIT, as it is not an asset (I.A.2.a.), and it is just a simple presumption, that the Court would decide that it is enforceable (I.A.2.b.).

a. The Award is not an asset

41. The general definition of investments is provided by Article 1(1) of the BIT. Accordingly, the term investment means

42. *"any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws".*

43. Pursuant to the definition, the Award should be an asset to enable it to be considered as an investment. However, it cannot be considered an asset. According to the generally accepted view on what is to be considered an asset, it must be a useful or valuable quality, or something valuable belonging to a person or organization. The Award does not carry a value, since it's enforceability is not a sure thing, it is simply hope on the side of Claimant.

b. The Court could decide to enforce the Award, however it is just a presumption

44. The enforcement proceeding aiming to enforce the Award is still an ongoing procedure. It means that it is not a determined issue, whether the Award has a value or not.

45. If the Court decides that it is an enforceable foreign arbitral award, then it gains a value, thus it will constitute an investment under the BIT. Nevertheless, if the Court decides, that it would be contrary to public policy (see argument below at V.C.2.), and therefore denies the enforceability of the Award, it will lose even its presumed value.

46. The point is that Claimant cannot rely on a pure presumption regarding the valuableness of the Award. Claimant cannot claim relying on presumptions, it is frivolous.

47. After the Court decides on the enforceability of the Award, Claimant may initiate arbitration against Respondent bringing claims relying on the enforceable Award. Until then, the claims brought before the Tribunal relying on the Award shall be inadmissible.

B. The Arbitral Tribunal does not have jurisdiction regarding the Award

48. Considering the above presented arguments, the Tribunal shall ascertain, that it does not have jurisdiction over claims in relation to the Award, as it does not constitute an investment under Article 1(1) of the BIT.

49. **Conclusion on Issue 1**: The present Arbitral Tribunal does not have jurisdiction over the claims in relation to Award under Article 8 of the BIT because the Award does not qualify as an investment under Article 1 of the BIT.

II. Claimant must be denied the benefits of the Mercuria-Basheera BIT by virtue of Respondent's invocation of Article 2 of the BIT

50. Respondent invoked Article 2 in a proper and timely manner (A.) and complied with the burden of proof requirement (B.) The requirements under Article 2 (1) are met (C.)

A. Respondent invoked Article 2 in a proper and timely manner

51. The denial of benefits clause can be invoked against prima facie investors of the BIT (1.) and Respondent invoked Article 2 at the proper time of the procedure (2.)

1. The denial of benefits clause can be invoked against prima facie investors of the BIT

52. Although the denial of benefits clauses originate from the period immediately subsequent to the Second World War, "case law involving denial of benefits clauses and their application in concrete circumstances is still scant."[1]

53. As a kind of "safeguard against free riders"[2] the denial of benefits clause seeks to prevent third parties from claiming the benefits of a treaty without assuming the obligations.[3] By doing so it provides a "method to counteract nationality planning"[4] and so-called treaty-shopping i.e. "the structuring of an investment in such a way so as to ensure that it will be covered by the scope of the BIT."[5]

[1] Anne K. Hoffman in International Investment Law p. 613.
[2] Herman Walker Jr. provisions on companies in the united states treaties 1956 50 AJIL 373,388
[3] Anne K. Hoffman in International Investment Law p. 601
[4] Dolzer-Schreuer p. 55.
[5] Ibid.

54. When a BIT includes a denial of benefits clause the Host State agrees to arbitration with the condition that it may deny it, "provided that some objective requirements concerning the investor are fulfilled."[6]

55. The reservation of the right of denial of benefits contained in the dispute resolution clause therefore operates on the Contracting Parties' "offer of consent to arbitration as much as every other benefit conferred by the BIT."[7]

56. When accepting the offer by the Host State to arbitrate, "investors simultaneously accept the risk envisaged"[8] in the denial of benefits clause. Therefore, since it is the reasonable expectation of Respondent, that Claimant was aware of the legal environment when it entered the market of a foreign country, none of Claimant's legitimate expectations were affected by the denial of benefits.

57. As Claimant was aware of the provisions of the BIT, i.a. the denial of benefits clause, it could have acted in a way that prevents Respondent from being able to invoke that clause.[9] However this did not happen.

58. To conclude, Respondent can deny the benefits of the BIT to Atton Boro under Article 2 (1).

2. Respondent invoked Article 2 at the proper time of the procedure

59. The purpose of Article 2 (1) is to "give respondent the possibility of withdrawing the benefits granted under the BIT"[10] to prima facie investors who are trying to invoke those benefits without complying with the obligations.

60. Therefore, the assessment of the requirements can only be made when an investor decides to invoke the benefits of the BIT. Only then will Respondent analyse whether the objective conditions for the denial are met and, exercise its right to deny those benefits, "up to the submission of its statement of defence"[11].

61. Mercuria as a developing country does not have the necessary means to conduct that analysis during the incorporation process of each entity.[12] Furthermore, it would be seen as "an unfriendly and groundless act"[13], and also contrary to the promotion of foreign investments, if

[6] GAI-Rurelec para. 372.
[7] Ibid. para. 373.
[8] Núñez-Lagos
[9] GAI-Rurelec para. 375.
[10] Núñez-Lagos
[11] GAI-Rurelec para. 378.
[12] Case file line 511.
[13] GAI-Rurelec para. 379.

it examined the investors with whom it has no dispute, and notified them of the denial of benefits.

62. It is also to be taken into account that the fulfilment of the requirements "is not static and can change from one day to the next"[14]. Therefore, the State can only assess whether they are met at the time of the invocation of the protection of the BIT by the investor.

63. As a conclusion, during the present dispute Respondent expressed its will to deny the benefits to Claimant at the earlies stage possible, in its response to the notice of arbitration, Respondent's invocation of its right was in a timely manner.

B. Respondent complied with the burden of proof requirement

64. It is more difficult for Respondent to gain access to the data of the Other Contracting party, which would be necessary in order to be able to establish the third-party ownership and control, and the lack of substantive business activity. This is especially true when ownership or control might involve a number of entities in different jurisdictions, as it is the case in the present dispute.[15]

65. Respondent can only establish that according to the information available, Claimant is owned and controlled by third-party nationals, and Claimant's scope of activities, as known by Respondent, does not reach the level of a substantive business activity in the territory of Basheera.

66. As established case law supports, the wording of Article 2 (1) "is expressed in a neutral manner in respect of the burden of proof"[16], therefore sharing it between the parties.

1. Respondent substantiated that the invocation of Article 2 of the BIT is justified

67. As it will be elaborated below, to a level allowed by the available information, Respondent established that the requirements under Article 2 (1) are met (C.) Further substantiation of both the foreign ownership and the lack of substantive business activity would require Respondent to access data on Claimant that are at this moment inaccessible.

2. The burden of proof rests with Claimant regarding its defence against the invocation of the denial of benefits clause

[14] Ibid.
[15] Case file 1570-1572.
[16] AMTO para. 63.

68. Claimant knows exactly the structure of its ownership and its business activities in particular areas, and can easily present the evidence to establish those activities.[17] As stated above, this is not accessible to Respondent.

69. Therefore, Respondent, relying on the accessible information, can only present sufficient base for a prima facie assessment, but it is Claimant with whom the burden of proof rests concerning its defence against the invocation of the denial of benefits clause.

C. The requirements under Article 2 (1) are met

70. Based on the statement of facts, Claimant is owned and controlled by third-party nationals (1.) and has no substantial business activity in the territory of Basheera (2.)

1. Claimant is owned and controlled by third party nationals

71. Atton Boro is the wholly owned subsidiary of Atton Boro Group. Atton Boro Group's primary holding company is Atton Boro and Company, who eventually funded the activities of Atton Boro in the territory of Mercuria.[18] Therefore, it can be assumed that Atton Boro's ownership is decisively concentrated in the hands of shareholders of Atton Boro and Company.

72. According to the statement of facts, Atton Boro and Company shares are held by a mix of private entities and private individuals "of a wide variety of nationalities"[19].

73. The control of the company is conducted by a board of directors coming from "several different countries, including Basheera and Mercuria" [20]. This suggests that the majority of the directors are third-state nationals, having a direct influence on the control of the Atton Boro.

2. Claimant has no substantial business activity in the territory of Basheera

74. The other requirement of invoking the denial of benefits under Article 2 (1) is the substantiation of the lack of substantive business activity in the territory of the country of origin. The purpose of the criterion is to "ensure that the benefits of treaty protection are accorded to those companies who contribute in a meaningful way to the country in which they are organised".[21]

[17] Ibid. para 65.
[18] Case file lines 1572-1573.
[19] Ibid. 1570-1571.
[20] Ibid. 1571-1572.
[21] Anne K. Hoffman in International Investment Law p. 613.

75. Since consequently the objective is also to deny the protection of the treaty to "mere shell companies"[22], "substantial in this context means of substance and not merely of form"[23].

76. As a sign of carrying out business activities in the territory of the state of origin, beyond the normal activities required by merely the corporate existence, it can be assumed that the entity "will be engaged in buying, selling and contracting in that territory"[24].

77. Aside from renting an office space and hiring employees, there is no record of Atton Boro being involved in any kinds of substantial transactions in the territory of Basheera. More specifically, as far as available data suggests, Atton Boro never purchased or sold any types of goods, and never procured any inputs for its business locally, which in fact could also be the sign of contribution to the economy of the country of origin.[25]

78. As a conclusion of the second issue, according to the facts of the case, Claimant must be denied the benefits of the Mercuria-Basheera BIT.

79. **Conclusion on Issue 2**: Claimant cannot be denied the benefits of the BIT by virtue of the Respondent's invocation of Article 2 of the BIT, because Respondent did not try do it so in a proper and timely fashion, did not comply with the burden of proof requirement, and the substantial requirement under Article 2 is not met either, since Claimant has substantial business activities in the territory of the Contracting Party in which it is organized.

[22] Ibid. p. 612.
[23] AMTO para. 69.
[24] Jagusch-Sinclair p. 20.
[25] Ibid.

ARGUMENTS ON THE MERITS

III. Respondent acted in line with its BIT and other international obligations when amended its IP law

80. International IP conventions indicate that each country have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses of the exclusive rights conferred by the patents.[26] These IP conventions also set up the framework and criteria granting such a compulsory licence.

81. Respondent complied with its obligations deriving from the BIT and other international obligations, when it amended its Intellectual Property Law. Respondent had to amend its IP Law in order to prevent a deeper national health crisis (I.A.). Respondent's actions were in line with the FET standard prescribed by the BIT. Respondent exercised its regulatory powers complying with Claimant's legitimate expectations (I.B.). The present arbitral tribunal does not have the authority to apply and interpret directly the TRIPs Agreement (I.D.).

A. Respondent faced an emergency situation, so it had to amend its IP law

82. The NHA entered into a Long-Term Agreement with the Claimant in order to promote a faster and more efficient health care to those poorest working-age citizens, who suffer from the devastating disease named greyscale.

83. The LTA was concluded based on preliminary study about the health condition of the working-age population.

1. Respondent faced an extraordinary situation

84. Even at a 25% discounted rate, a single FDC pill (Sanior) costs USD 27, and the annual cost of FDC medicine per patient nearly USD 10,000. As of 2005, 10,012 out of the total number of greyscale patients depended solely on public health schemes to obtain medicines for treatment.

85. Four years after the LTA was concluded, the premature estimations turned out to be totally wrong, as the NHA needed to supply twice as many citizens, as the premature study designated the estimated number of greyscale cases.

[26] Case file lines 1497-1499.

86. The number of such patients is estimated to have risen to 100,000 in 2006. At prices stipulated at the outset of the LTA, it would have cost 1 billion USD, or nearly a third of the overall health budget and 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000. Those costs would have been only for the first year.

87. The rise of the costs of the greyscale treatment was unforeseeable and extraordinary.

88. Therefore, the NHA requested the Claimant to endorse an additional 40% discount on Sanior. If Claimant would have endorsed the additionally 40% discount on Sanior, Respondent would have had to expand its greyscale budget. Hence it did not require Claimant to make a sacrifice by itself, it just requested Claimant to recognize the cumbersome situation of Respondent, and to enable a feasible way to proceed along the LTA. The Claimant refused to accept the NHA's offer, thus the NHA was compelled to terminate the LTA.

89. After the NHA terminated the LTA, there was no efficient greyscale treatment medicine in the market, which the poorer working-age population could have afford.

90. The chain of events indicate, that the Respondent was facing an exceptionally extreme situation.

2. Respondent amended its IP Law in order to solve the emergency situation

91. Respondent in order to be able to cater to its population with the required greyscale medicine, it promulgated an amendment of its IP Law, which enabled the use of a patented invention without the authorization of its owner, provided that the competent authority grants the requested non-voluntary licence.

92. If Respondent would not have amended its IP Law, it would have been unable to cater to its population with the needed medicine, and it would have caused a wider national health crisis, which would have spiraled into a national economic crisis.

93. After the Claimant was unable to offer its medicine at an acceptable price, which the Respondent could endorse, it had no other choice, but to terminate the commercial agreement and to adjust its legal framework in order to obtain the efficient greyscale medicine.

94. Hence it is obvious, that Respondent in order to avoid a more extreme national health crisis needed to promulgate the amendment of its IP Law.

B. Respondent did not interfere with Claimant's legitimate expectations

95. Respondent's actions fit in Claimant's legitimate expectations. Pursuant to the case law the requirement of respecting the investor's legitimate expectations is included within the meaning of the FET standard. Since the BIT requires Respondent to act in line with the FET standard regarding Claimant's investments. BIT requires Respondent, that it has to act under the FET standard in line with the Claimant's legitimate expectations, it has to acknowledge and respect Claimant's legitimate expectations as well. Respondent's action, particularly when it amended it IP Law, fit in Claimant's legitimate expectations.

96. Claimant's legitimate expectations derive from the International IP conventions as well.

97. Claimant should have reasonably anticipate the amendment of the IP Law, thus it could not contravene with it's legitimate expectations. Respondent enacted the amendment of the IP Law complying with its obligations deriving from the BIT (I.C.1.). Respondent acted in line with the FET standard laid down by Article 3 (2) of the BIT (I.C.3).

1. Respondent exercised its regulatory powers in line with the BIT

98. If Mercuria and Basheera would have intended to stipulate that they would not change their legal framework regarding, which would affect the BIT, they would have incorporated a stabilization clause in the BIT. Since there is no stabilization clause in the BIT, Mercuria and Basheera did not agree on not to change the legal framework. As they did not agree on the freeze of the legal framework, Claimant should have legitimately expect, that in case of a national emergency, Respondent's action to enact an amendment of the IP Law would not be unlawful.

2. Respondent's actions with regard to the enactment of the IP Law did not interfere with Claimant's legitimate expectations

99. The legitimate expectations of the Claimant include the expectation that the host state would respect the international obligations it entered into, specifically with regard to investments. The Paris Convention is a convention, to which Respondent is a party, sets out fundamental international obligations for its member states.

100. Article 5 Section A (2) of the Paris Convention reserves the right for each country of the Union to

101. "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, for example, failure to work."

102. In the present case, the beneficiary of the exclusive rights conferred by the patent, namely the Claimant failed to make its patent-protected product, Valtervite work for the reasonable proportion of the public.

103. As Claimant was unable to make its patented product work, the promulgation of the amendment of the IP Law shall be considered as an action of the Respondent, which was advocated by international law.

104. Respondent's actions complying with international conventions cannot contravene with the reasonable legitimate expectations of Claimant.

3. The Respondent acted in line with the Fair and Equitable Treatment standard prescribed by Article 3 (2) of the BIT

105. The BIT provides for a Fair and Equitable Treatment clause. Since the BIT does not provide for the exact content of the FET standard, its interpretation shall be rooted in international law (I.C.2.a.). Respondent amended its IP Law transparently (I.C.2.b.), and more importantly in a non-discriminatory manner (I.C.2.c.). Respondent was forced to amend its IP Law in order to tackle a national health crisis (I.C.2.d.).

a. International law governs the interpretation of the FET standard

106. The FET clause is established in Article 3 Section 2 of the BIT. As an exact definition of it is not provided therein, the meaning of it shall be determined by the relevant international law.

107. Mercuria is a party to the Vienna Convention on the law of treaties, which means, that complying with its provisions would fit Claimant's legitimate expectations. Pursuant to Article 31. Section 3 (c) of the VCLT when interpreting a treaty, the relevant rules of international law are applicable. This tenet is also confirmed by the first procedural order.

108. The relevant international law set out basic principles, such as protection of the investor's legitimate expectations, transparency, procedural propriety and due process, and good faith.[27]

The decision on what is fair and equitable "must depend on the facts of the particular case",[28] and it "requires an assessment of all the facts, context and circumstances".[29]

[27] C. Schreuer, 'FET in Arbitral Practice' The Journal of World Investment & Trade 6 (2005) 357, 373–4.

b. Mercuria amended its IP Law transparently

109. The FET standard of the BIT requires Respondent to act transparently. The regulatory environment and its change must be transparent at all times, it is also a legitimate expectation of Claimant. Respondent acted in line with the requirements of transparency, when it amended its IP Law.

110. The amendment of the IP Law was construed in line with the procedural rules of mercuria, and it was disclosed publicly in order to enable the population to ken its content.

111. As nobody argued, that the amendment of the IP Law would not have been transparent in any way, it shall be deemed as being transparent.

c. Respondent amended its IP law in a non-discriminatory manner

112. The FET clause of the BIT requires Respondent to act in a non-discriminatory manner towards inter alia the Claimant.

113. The amendment could and can result in the grant of a non-voluntary license in other cases as well, since it is not limited in any way to the extent of the Claimant's patent-protected investment.

114. If the patent-protected product is unavailable at a reasonably affordable price, a non-voluntary license to manufacture the particular product may be granted, provided that the remaining terms prescribed by Section 23 C of the Law No. 8458/09 indicate its necessity.

115. Therefore, the actions of the Respondent regarding the promulgation of the new IP Law was non-discriminatory in its nature, thus Respondent complied with its obligation deriving from the FET standard.

d. The Respondent was forced to amend its IP Law in order to tackle a national health and economic crisis

116. The BIT in the Preamble refers to the public health as an important value. It means that the contracting state has an obligation to promote the protect the public health, when it faces a national health issue.

117. Therefor the national law of Mercuria shall be applied in order to enable efficient protection of the public health in the country. Hence the amendment of the IP Law was a simple tool to

[28] Tecmed para. 118.
[29] Crystallex para. 543.

prevent the country from a wider national crisis, which could have spiralled into a national economic crisis, which would have affected the global economy as well.

118. Thus no reasonable investor could fairly expect that Mercuria would not reform its legal framework in legitimate exercise of its regulatory powers when faced with a serious public health crisis.

119. The legitimate expectations of Claimant include the expectation, that Respondent would utilize every legitimate opportunity in order to tackle a national crisis. Claimant knew, that Respondent was unable to cover the costs of the medicine even with a 35% discount. Claimant also knew, that it held the patent for the only efficient greyscale medicine in the country, thus Respondent could conduct this very business with anyone else. Claimant could thus foresee that if Respondent cannot cover the costs of the medicines offered by Claimant, it would be compelled to seek for another solution, as Respondent has an international obligation to maintain a certain level regarding the public health, and to tackle national health crisis.

120. Therefore, Claimant legitimately expected that Respondent would find another way to obtain the needed medicine. Respondent found the only reasonable and feasible way to do so, when it enacted the amendment of its IP Law.

121. In conclusion, Respondent's action was in line with the FET standard prescribed by Article 3 (2) of the BIT, as Claimant could legitimately expect that Respondent would amend its IP Law.

IV. Respondent acted in line with the FET standard of the BIT when a non-voluntary licence was granted to HG-pharma

122. Initially the patent for Valtervite (with the Mercurian Patent No. 0187204) was granted on 21 February 1998 for the Claimant, HG-Pharma was granted the non-voluntary license on 1 April 2010 to manufacture and market the drug containing Valtervite.

123. On 1 April 2010 the High Court granted the non-voluntary licence.

124. It derives from the tenet of the separation of powers, that the judiciary of Mercuria shall be regarded sovereign, regarding its conduct, as it is highly separated from the government itself (II.A.). When the court in Mercuria granted the non-voluntary licence to HG-Pharma exercised its residual discretionary powers, and interfered the FET standard of the BIT (II.B.).

A. The Mercurian Judiciary is to be regarded sovereign considering its conduct

125. Respondent is not liable for the grant of a license for HG-Pharma to manufacture the compound Valtervite, this action of the Court granted its licence within its power regarding the administration of justice, and so as the judiciary of Mercuria is highly separated from the central government itself, it is to be considered sovereign regarding its judiciary conduct.

126. The Court granted the compulsory licence to HG-Pharma after a proper procedure. The licence granted to manufacture the compound Valtervite was based on the lawful conduct of the judiciary's discretionary power followed by a judicial decision.

127. The legal framework could substantiate the liability of the Respondent for the conduct of the Court in case it would eventuate in denial of justice. The test for establishing the denial of justice requires the demonstration of "a particularly serious shortcoming and egregious conduct that shocks"[30] the judicial propriety.

128. The Court proceeding did not suffer from any shortcomings, since it was conducted in line with procedural and substantive rules. The following arguments indicate that the actions of the Court cannot be considered egregiously arbitrary or discriminatory, hence Respondent shall not be held liable for the conduct of the Court.

[30] Mondev para. 127., Sicula para. 128

B. The Court's conduct when granted a non-voluntary licence to HG-Pharma fit Claimant's legitimate expectations

129. The conducted procedure regarding the grant of the non-voluntary licence was prompt (B.2.) and it was conducted by the proper forum (B.1.). Furthermore, the grant of the compulsory licence had a proper substantive law basis (B.3.)

1. The procedure was conducted by the proper forum

130. Section 23 C subsection 1) requires the High Court to conduct the procedure of the grant of a non-voluntary licence on a patent. Since the Court conducted the granting procedure[31], the procedure was conducted by the forum required by the Law.

2. The forum conducted a proper procedure

131. Claimant could legitimately expect, that the grant of the compulsory licence would be conducted via a proper procedure. The procedure was proper from several perspectives.

132. First, Claimant was invited as a party before the High Court of Mercuria in the matter of granting the non-voluntary licence to HG-Pharma. Therefore, it could represent its interests before the Court, which granted the licence to HG-Pharma. [32]

133. Second, Claimant was provided to question the validity of the granted non-voluntary licence by the mercurian law.[33] Nevertheless, Claimant did not exercised its right to question the validity of the compulsory licence.

134. Third, no provisions of the procedural law of Mercuria was violated. If it would have been violated, Claimant would have questioned the validity of the non-voluntary licence granted to HG-Pharma.

135. In conclusion, the Court conducted the procedure of the grant of the compulsory licence properly, hence it was in line with Claimant's legitimate expectations.

3. The grant of the non-voluntary licence had a proper substantive law basis

136. The reasonable requirements of the public were not satisfied by Claimant's Sanior, and it's price happened to be unaffordable as well (II.B.3.a.). The preconditions to grant the non-voluntary licence (II.B.3.b.) and to conduct the procedure (II.B.3.c.) were both satisfied. The Court set the measure of the royalty properly (II.B.3.d.)

[31] Case file line 949.
[32] Ibid. 1576.
[33] Ibid. 1578.

a. The reasonable requirements of the public and the unaffordable price of Claimant's Sanior necessitated the grant of the compulsory licence

137. The Claimant did not satisfy the reasonable requirements of the public with respect to its patented invention and to offer it at a reasonably affordable price. The patented invention is an essential treatment medicine compound for the chronic epidemic called greyscale. Claimant offered Sanior at such a high price to the public, that the lower-class was absolutely unable to cover the costs of the medicine, even the middle class was struggling to cover the costs of the treatment.

138. As the NHA's annual health report of 2006 assessed, a majority of patients in Mercuria have successfully transitioned from the multiple-pill therapy to the Fixed-dose Combination (FDC) treatment.

139. However, even at a 25% discounted rate, a single FDC pill costs USD 27, and the annual cost of FDC medicine per patient nearly USD 10,000. As of 2005, 10,012 out of the total number of greyscale patients depended solely on public health schemes to obtain medicines for treatment. The number of such patients is estimated to have risen to 100,000 in 2006. At prices stipulated at the outset of the LTA, it would have cost 1 billion USD, or nearly a third of the overall health budget and 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000. Those costs would be for the first year.

140. Assuming that these therapies cannot cure the greyscale, these just uphold a satisfactory level of health. However, if patient cannot be cured, they must be subsidized in the following years as well. As the number of subsidized patients would have grown, the burden on the government would have risen, until it could have threatened Mercuria with bankruptcy. To keep the country from the above described consequences, Respondent requested a further 40% discount on Sanior from Claimant, which could have prevented the escalation of the public health crisis. As it denied to endorse such a discount, Respondent had no choice, but to find another way to give the same treatment to the subsidized patients at a lower cost.

141. The amendment of the Intellectual Property Law was needed, and the grant of the compulsory licence was needed, since the CLAIMANT held a monopoly regarding the efficient treatment medicine for greyscale, which it was unable to offer at a reasonably affordable price.

142. Not only the poorest class of the population was absolutely unable to cover the costs of the greyscale treatment, even the middle class struggled seriously covering the costs of the treatment.

143. As the NHA's Annual Report of 2006 designates, the annual cost of FDC medicine per patient amounted nearly USD 10,000, even with a 25% discount on Sanior. USD 10,000 is an enormous amount of money to treat one single person one epidemic for one year in a developing country. Even that price was over the line of reasonability. Notwithstanding, Respondent complied with its obligations under the contract.

144. As of 2005, 10,012 out of the total number of greyscale patients depended solely on public health schemes to obtain medicines for treatment. The number of such patients was estimated to have risen to 100,000 in 2006. On the 25% discounted rates, it would have cost 1 billion USD, nearly a third of the overall health budget and 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000.

145. If the Respondent would not have sought for a cheaper solution to treat greyscale patients, it would have run out of resources in few years, or it would have been unable to mitigate the effect of greyscale in the country, and it would have caused a national crisis anyway. Another solution would have been to let the greyscale treatment by itself consume the third of the overall health budget, eventuating in the withdrawal of resources from hospital maintenance, and other crucial parts of the health care system.

146. Considering the above presented chain of events, the price of the Sanior shall be deemed unreasonably high, which served as a legitimate ground for the Court to grant the non-voluntary licence to HG-Pharma.

b. The preconditions to grant the non-voluntary licence were fulfilled

147. The Court granted the compulsory licence to HG-Pharma rightfully, considering Section 23 C sub-section 4) supported by the following arguments. Based on sub-section 4) in considering the application filed under this section, inter alia the ability of the applicant to work the invention to the public advantage. The applicant was obviously reckoned as being able to work the invention to the public advantage, as HG-Pharma is known as a reliable generic drug manufacturer.

148. Section 23 C subsection 4) (a) of the IP Law requires the Court to take into account the nature of the invention, the time, which elapsed since the sealing of the patent, and the measures, which Claimant already took to make full use of its invention. In the present case, Sanior is an essential pharmaceutical product, from which Claimant was unable to make full use. This was the very ground, which enabled the possibility for the non-voluntary licence to be granted.

149. Furthermore, the Court shall take into account the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application was granted. As a generic drug manufacturer, HG-Pharma was obviously regarded as a competent company to undertake the risk in providing capital and working the invention, if the application was granted. This presumed ability of HG-Pharma turned out to be true, as it started to distribute a medicine with the compound Valtervite successfully.

150. However, Section 23 C also assesses, that Section 23 C sub-section 4) shall not be applicable in case of national emergency or other circumstances of extreme urgency […], but shall not be required to take into account matters subsequent to the making of the application.

151. Thus the Court as of exercising its discretionary powers, may have disregarded rightfully Section 23 C sub-section 4), as the grant of a licence to manufacture the compound Valtervite aims to combat greyscale in Mercuria efficiently. As greyscale is a chronic epidemic, it poses a threat to the country's economic and public health condition, thus the national emergency or as the law determines it, "other circumstances of extreme urgency" is imminent. Without the grant of that non-voluntary licence, the country could have drifted into an immeasured national crisis.

c. The preconditions to conduct the procedure were satisfied

152. The Court, which granted the licence for HG-Pharma to manufacture Claimant's patent-protected product, assessed the plea with the necessary use of its legitimate discretionary powers. As the promulgated amendment of the IP Law prescribes, by virtue of Section 23 C sub-section 1) at any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the High Court of Mercuria for grant of a non-voluntary licence on the patent on any of the following grounds, namely that the reasonable requirements of the public with respect to the patented invention have not been satisfied; or that the patented invention is not available to the public at a reasonably affordable price; or that the patented invention is not worked in the territory of Mercuria. As Respondent witnessed it, Claimant offered two reasons for a potential non-voluntary licence applicant to grant such a licence, as it was unable to satisfy the reasonable requirements of the public with respect to its patented invention, and it could not offer its patented invention to the public at a reasonably affordable price.

d. The measure of the royalty set by the Court was proper

153. The Court ordered the 1% royalty. Pursuant to Section 23 C sub-section 3) the "Court […] may grant a licence upon such terms as it may deem fit". Hence the measure of the royalty depends on the discretionary power of the judiciary.

154. Royalty is not determined by the TRIPs Agreement, since it shall be established by the national legal system. According to the TRIPs Agreement national legislation, or the courts have the authority to set the rate of the royalty.

155. At the time, when the non-voluntary licence to HG-Pharma was granted in 2009-2010, royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases, like greyscale ranged from 0.5% to 3% of revenue. Thus the 1% revenue, which HG-Pharma was ordered to pay to Claimant falls within the regular scope of the royalty rates set by the Court in the relevant period of time.

156. When deciding the rate of royalty, the Court obviously examined the amount of money the right holder invested in Mercuria, and the expenditure required to invent the patented product. Considering these facts, the Court decided to set the royalty to 1% of HG-Pharma's total revenues.

157. It shall be asserted that as far as the FET standard required by the BIT is concerned, the Mercurian judiciary treated the Claimant with its regular generosity, since it ordered HG-Pharma to pay 1% royalty of its total revenues to the Claimant as a remuneration.

158. In conclusion, the Mercurian Court did not violate the FET standard required by the BIT.

159. **Conclusion on Issue 4**: Respondent violated Article 3 (2) of the BIT by allowing the improper conduct of its judiciary in relation to the circumstantial enforcement proceedings.

V. RESPONDENT CAN NOT BE HELD LIABLE FOR THE DURATION OF THE ENFORCEMENT PROCEEDING

160. The Respondent shall not be held liable for the conduct of the Mercurian Judiciary, particularly for the duration of the enforcement proceeding (III.A.). The enforcement proceeding run in line with Claimant's legitimate expectations and the Fair and Equitable Treatment standard of the BIT (III.B.).

161. Respondent complied with its international obligations deriving from the New York Convention in order to protect its population (III.C.). The duration of the enforcement proceeding shall be examined taking into account the circumstances of the case (III.D.).

162. The enforcement procedure is not attributable to the state.

A. The enforcement proceeding taking place before the judiciary is not attributable to Respondent

163. Court functions separately from the government itself. Not denying, that in some cases the state is to be held liable for the conduct of its judiciary, the obligation may be ascertained only, if the actions of the judiciary result in a denial of justice.

164. In case of an egregiously arbitrary conduct, the mercurian judiciary's conduct would be attributable to the state, however if such an egregious shortcoming is not present, the actions of the Court are not attributable to the state.

B. The enforcement proceeding run in line with Claimant's legitimate expectations and the FET standard of the BIT

1. The Court acted in line with the requirements of the FET standard

165. The FET clause is established in Article 3 Section 2 of the BIT. As an exact definition of it is not provided therein, the meaning of it shall be determined by the relevant international law.

166. Mercuria is a party to the Vienna Convention on the law of treaties, which means, that complying with its provisions would fit Claimant's legitimate expectations. Pursuant to Article 31. Section 3 (c) of the VCLT when interpreting a treaty, the relevant rules of international law are applicable. This tenet is also confirmed by the first procedural order.

167. The relevant international law set out a test for being able to assess, whether a particular conduct of a court amounts to a breach of the FET standard or not. The test, is not whether the judicial decision is surprising, rather whether

168. "the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome".

169. As the Court did not serve for a reason to shock or surprise an impartial tribunal, and to question its judicial propriety, the Court acted in line with the requirements of the FET standard.

2. The enforcement proceeding was in line with Claimant's legitimate expectations

170. Claimant's legitimate expectations regarding the enforcement proceeding were that the judiciary will be conducting the proceeding in an unbiased manner, and that the NHA would exercise its rights to prove that the Award cannot be enforced.

171. In this case, the enforcement proceedings ran in line with Claimant's legitimate expections.

172. The conduct of the judiciary was unbiased, as it did not privilege any of the parties. The Court might have overlooked the mistakes made by the NHA regarding the compliance with the procedural rules, nevertheless it might have done it for the Claimant as well. Furthermore, when Claimant requested a hearing within a short time, the Court ordered the matter to be listed within 1 month.[34]

173. Respondent's invocation of the public policy defence is not contrary with Claimant's legitimate expectations, as the New York Convention provides for the right to deny the enforcement of a foreign arbitral award, if it is contrary to public policy.

174. Furthermore, Claimant's legitimate expectation could have been inter alia the fair judicial proceeding, respecting the provisions of the substantive law. Since the judicial conduct is sovereign, unbiased, and it respected the parties as equal entities before the Court, the legitimate expectations of Claimant was met.

175. Moreover, Claimant could legitimately expect, that the conduct of the judicial proceedings would be governed by the rule of law. As the rule of law governed the enforcement proceeding, Claimant's legitimate expectations were fulfilled.

[34] Case file line 279-281.

C. Respondent acted in line with the New York Convention in order to protect its population

176. Respondent acted in line with Article III. of the New York Convention, when it invoked Article V. Section 2 (b) of the NYC (III.C.1.). Furthermore, Respondent invoked national public policy rightfully under Article V. Section 2 (b) of the NYC (III.C.2.).

1. The Court acted in line with Article III of the New York Convention when it invoked Article V. Section 2 (b) NYC

177. Article III. of the New York Convention states that 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, in the present case, Mercuria.

178. Article V. Section 2 (b) of the New York Convention assesses that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

2. The NHA acted in line with Article V. Section 2 (b) NYC when invoked national public policy

179. Claimant intends to enforce the Award against the NHA.

180. Respondent invoked national public policy in order to protect and enhance the availability and effectiveness of the public health care system for everyone, which shall be deemed a legitimate national public policy (III.C.2.a.). The enforcement of the Award would contravene the legitimate national public policy of Mercuria (III.C.2.b.).

181. Therefore, the NHA's action requesting the Court to deny the enforcement of the Award is in line with Respondent's international obligations, as the New York Convention provides for an excuse based on public policy.

a. Protecting and enhancing the availability of the public health care system for everyone is a legitimate public policy

182. The Respondent submits that the enforcement of the foreign arbitral award as being adverse with its public policy, more precisely with the universal tenet of promoting public health condition.

183. When the public policy is examined, reference must be made to the

184. "international public policy, being a 'body of universal principles shared by nationals of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions'." [35]

185. Considering the effect of the termination of the LTA, it served the protection of fundamental human rights, more precisely, the public health of the mercurian citizenry.

186. Furthermore, Respondent was obliged to do so under its international obligations. As Mercuria is a party to the International Covenant on Economic, Social and Cultural Rights, it has to act in line with its requirements. Respondent actions in line with its international obligations cannot interfere with Claimant's legitimate expectations.

187. Article 12 Section 1 of the ICESCR necessitates the parties to the convention to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." In order to achieve the full realization of this right, Article 12 Section 2 (c), (d) of the ICESCR authorizes parties to take steps necessary for the "treatment and control of epidemic", and for the "creation of conditions which would assure to all medical service and medical attention in the event of sickness".

188. Public health is a public policy, on which the NHA could legitimately rely on. Therefore, public health is a legitimate ground, which enables the NHA to rely on Article V. Section 2 (b) of the New York Convention.

b. The enforcement of the Award would be contrary to the national public policy of Mercuria

189. The public policy excuse invoked by the NHA is not an unsubstantiated, dilatory tactic. The enforcement of the Award would contravene the public policy of Mercuria, as it would be contrary to the protection of the public health in Mercuria, which is a fundamental right. However, if the enforcement of an award is contrary to a fundamental right, the enforcement may be denied based on Article V. Section 2 (b) of the New York Convention.

[35] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, Dispute Settlement, International Commercial Arbitration, 5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention, 2003, p. 39.

VI. The termination of the LTA by NHA does not amount to a violation of Article 3 (3) of the BIT

190. The present Tribunal's jurisdiction is from Article 8 of the BIT. The objective of Article 8 is to provide for an effective dispute resolution mechanism for claims deriving from the BIT under the BIT.

191. Therefore, the Tribunal does not have jurisdiction over the claims arising out of the LTA (A). Should the Tribunal find that it has jurisdiction, Respondent submits that the NHA's actions concerning the LTA did not interfere with Article 3 (3) of the BIT (B).

A. The Tribunal does not have jurisdiction to hear the claims regarding the LTA

192. Under Article 8 the Tribunal only has jurisdiction over the claims in relation to the violations of the BIT. In case of extraordinary circumstances, Article 3 (3) extends this Tribunal's jurisdiction to other kinds of claims. However, in the present case this cannot happen (1.) and Mercuria cannot be held liable for the conduct of the NHA (2.)

1. According to Article 8 the Tribunal has jurisdiction over the claims arising out of the BIT

193. Article 8 of the BIT is a dispute resolution clause, according to which the Tribunal has jurisdiction over claims arising out of the BIT[36] (a.) However in case of extraordinary circumstances the Tribunal's jurisdiction might be extended to other claims, but this is not the case (b.)

a. The Tribunal only has jurisdiction to decide Treaty claims

194. Article 8 (1) provides that "[a]ny dispute between an investor of one Contracting Party and the other Contracting Party arising out of or in relation to this Agreement, […] shall be settled by arbitration."[37] Therefore, whenever a Host State breaches a substantive provision of the BIT, the investor of the other Contracting Party has the right to refer the claim to any of the different types of arbitral proceedings enlisted in Article 8 (2).

b. There are no extraordinary circumstances present in this case that would extend the Tribunal's jurisdiction to other claims

[36] BIT Article 8 (1)
[37] Case File lines 1143-1145.

195. Article 3 (3) of the BIT provides that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

196. This clause can extend the jurisdiction of the Tribunal to some claims not directly based on the BIT provisions.

197. For example, when a State annuls a contract either with an administrative act, or by passing new regulations to dispose of its obligations, the treaty protection might be invoked. However, as it will be elaborated below, this is not the case in the present dispute.

2. The Republic of Mercuria cannot be held liable for the conduct of the NHA regarding the LTA

198. Article 3 (3) does not cover commercial contracts concluded by private parties (a.). The LTA was concluded between two private parties (b.) on the one hand Atton Boro and on the other hand the NHA acting within its commercial capacity.

a. Article 3 (3) does not cover commercial contracts concluded by private parties

199. A clause like Article 3 (3) can elevate certain obligations to the level of Treaty claims. However, Article 3 (3) cannot in fact transform all disputes into investment disputes under the Treaty, "unless of course there would be a clear violation of the Treaty rights and obligations".[38] It is especially the case concerning contract claims. This is because if Article 3 (3) elevated all contract claims to the status of treaty claims, it would result in an effect that all claims based on any commitments based on acts of the states or one of its subdivisions were to be considered as treaty claims.[39]

200. When deciding whether a claim is a treaty claim, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved.[40]

201. The present dispute is about the termination of a commercial contract, the LTA. Since the claim only concerns the commercial aspects of a dispute, the contractual claim cannot be transformed into a treaty claim.

[38] Joy Mining para. 81.
[39] El paso Para. 71,77
[40] Joy Mining 72.

202. Based on the interpretation followed by the case law, the wording of Article 3 (3) suggests that the application of this clause "should be limited to conduct on the part of the host state that is governmental in nature."[41]

203. In light of the earlier mentioned, it can be said that ordinary commercial breaches of a contract are not the same as Treaty breaches, otherwise the scope of the application of the article would be indefinitely and unjustifiably extended[42], which would jeopardize the balance of interest of investors and the Host State.

204. To conclude, Article 3 (3) only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the BIT.[43] However, since no provision of the BIT is effected by the termination. this is not the case in the present dispute. When there is no such behaviour on the side of the State, the scope of the Tribunal's jurisdiction cannot be extended.

b. The LTA is a commercial contract between private parties

205. The LTA is a purely commercial contract. The NHA acting as a purchaser and Claimant acting as a supplier both undertook several obligations. Throughout the conclusion of this contract NHA always acted as an ordinary business party, it never used its regulatory or administrative power.

i. Atton Boro is a private party

206. Atton Boro Limited is a company operating in the form an Ltd. in the private sector. It was set up by its mother-company Atton Boro Group, which was incorporated and is operating mainly in Reef.

ii. NHA in the context of the activities concerning the LTA is to be considered a private party

207. The NHA is an entity constructed under Mercurian law. It was set up in 1998. In the context of its commercial activity, including the conclusion of the LTA, the NHA

[41] Int. Inv. Law p. 922
[42] Sempra 310
[43] Impregilo 260

operates independently. The respective decisions are made by its own management.[44] There is no record of Mercurian officials' involvement during the negotiations of the LTA.[45]

208. NHA's activities include particularly the operation and maintenance of the healthcare system and the conclusion of contracts within its commercial capacity. Latter activity of course can relate to some extent to the operation of the healthcare system. However, the pure fact that these activities are interrelated "does not change the nature" of the commercial contracts that the NHA enters into.[46] Concerning the NHA's activity related to this contract the state of Mercuria cannot be held responsible.

209. When the NHA concluded and later terminated the LTA, these actions did not involve the use of the State's sovereign authority. The NHA acted as its reasonable business rational required, and in a way that any reasonable business person of the same kind in the same circumstances would have acted.

210. Therefore, Mercuria cannot be held liable for the NHA's termination of the LTA, since the NHA acted in its commercial capacity.

3. Article 3 (3) cannot overwrite the dispute settlement mechanism of LTA

211. One of the advantages provided for the investors under the BIT is the accessibility of an effective dispute resolution mechanism (a.) When there is no effective dispute resolution mechanism available Article 3 (3) of the BIT might be a solution (b.)

a. One of the advantages provided for the investors under the BIT is the accessibility of an effective dispute resolution mechanism

212. Under Article 3 (3) the dispute resolution mechanism of the BIT might be utilized to solve disputes arising out of certain contractual obligations.[47] (MERTHOGY) Article 3 (3) of the BIT allows the investors to initiate arbitral proceedings instead of state proceedings, in case of a dispute with the Host State. (MERTHOGY) It is because in the absence of the clause all disputes arising out of the contracts concluded between a state and an investor would be brought before domestic state courts.

b. When there is no effective dispute resolution mechanism available Article 3 (3) of the BIT might be a solution

[44] Case file lines 1591-1592.
[45] Case file lines 1594-1595.
[46] Joy Mining
[47] Judge Schwebel in International Arbitration: Three Salient Problems, 1987, p. 111.

213. When there is no effective dispute resolution mechanism regarding the particular contractual claim, under Article 3 (3) the Treaty dispute resolution mechanism might be invoked.

214. The governing law of the contract gives the right to the parties to settle the disputes arising out of the violation of the agreement in front of a Commercial Arbitration Tribunal.

c. Claimant and the NHA agreed on an effective dispute resolution clause in the LTA

215. According to the dispute resolution clause of the contract the Parties have the right to bring claims before a Commercial Arbitral Tribunal, which is an effective means of dispute resolution (i.) After Claimant filed the claim the arbitral procedure before the tribunal in Reef was effective (ii.)

i. Commercial arbitration is an effective dispute resolution mechanism

216. Atton Boro and the NHA agreed on commercial arbitration as the dispute resolution mechanism in the contract.

217. It is a common consensus that international commercial arbitration is an effective dispute resolution mechanism in terms of costs, time, flexibility, neutrality of the forum and reliability, and in many cases, can be more efficient than litigation.

ii. The Arbitral procedure before the tribunal in Reef was effective

218. In the present case, Claimant initiated arbitration against NHA invoking the dispute resolution clause of the LTA. The fact that the arbitral tribunal properly adjudicated the matter and rendered a valid award in less than nine months[48], making it res iudicata, supports that the dispute resolution clause was effective.

d. Because of the effective dispute resolution clause embodied in the contract, Article 3 (3) cannot be invoked regarding claims arising out of the LTA

219. Where a claim is based on an alleged breach of contract, the investment tribunals should "give effect to any valid choice of forum clause [i.e. arbitration] in the contract" unless the

[48] Case files line 125

investment treaty provides otherwise.[49] This is especially true when the forum is proven to be effective.

220. In the present case, there is not only an effective dispute resolution clause in the contract, but also the respective LTA dispute has been adjudicated by a commercial arbitral tribunal and is now res iudicata. Therefore, if the present tribunal decided the claim again, that would in fact be the unbalanced overprotection of the investor under the BIT.

221. The possibility of this second evaluation of the claim would only be present on the side of Claimant There is no circumstance in the present case that could justify such a distinction between the interests of Claimant and the interests of Respondent.

B. Respondent's actions concerning the LTA were always in line with Article 3 (3) of the BIT

222. Where the Tribunal finds that it has jurisdiction to decide Claimant's claim regarding Article 3 (3), Respondent submits that its actions concerning the LTA were always in line with article 3 (3) of the BIT because first, NHA observed its obligation deriving from the dispute resolution clause of the LTA (1.), and second, the NHA's conduct regarding the LTA was in line with Article 3 (3).

1. NHA observed its obligation deriving from the dispute resolution clause of the LTA

223. The LTA provided for Commercial Arbitration as the dispute resolution mechanism (a.) NHA participated in the arbitration proceedings (b.) and never filed for setting aside the Award (c.).

a. The LTA provided for Commercial Arbitration as the dispute resolution mechanism

224. Under the LTA the parties had a right to invoke commercial arbitration in case of any claims arising out contract.

b. NHA participated in commercial arbitral proceedings

225. After the failure of negotiations Claimant invoked arbitration against NHA. The NHA properly participated in the proceedings, accepted and never tried to jeopardize the decision.

c. NHA never fought for setting aside the Award

[49] Vivendi v. Argentina para. 98.

226. The arbitral tribunal decided the matter in favour of Claimant. However, regardless the outcome, NHA never questioned the validity of the Award. Since NHA complied with the dispute resolution clause of the LTA, and respected the validity of the Award, it observed its LTA obligations in line with Article 3 (3) of the BIT.

2. NHA complied with all other substantive obligations under Article 3 (3) concerning the LTA

227. NHA's withdrawal from the LTA is not a violation of Article 3 (3) (a.) It cannot be assumed that NHA breached the contract under Article 3 (3) in any other ways (b.)

a. NHA's withdrawal from the LTA is not a violation of Article 3 (3)

228. Where the tribunal finds that a clause like Article 3 (3) elevates contractual claims to a treaty level, the claim will be assessed under the Treaty Standard.

229. In the present case Claimant's legitimate expectations was that the NHA would not terminate the LTA under ordinary circumstances. However, on the other hand in extraordinary circumstances it was foreseeable for Claimant that Respondent would try to renegotiate the contract.

230. Mercuria was facing a public health crisis.[50] The number of patients grew dramatically, the treatment costs skyrocketed to 500% requiring one-third of a developing country's health budget to be spent battling only one illness. It could not have been Claimant's legitimate expectation that under such circumstances Mercuria would have been able to comply with the original terms of the contract designed for ordinary circumstances.

231. Claimant could have foreseen that in such a demanding situation NHA would request for the adjustment of the contract terms to the changed possibilities. Since such requests were not accommodated by Atton Boro NHA had no other option under Article 3 (3).

232. However, whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims should be determined by reference to its applicable law. In the case of the BIT the applicable law is international law, while in the case of the contract it is the proper law of the contract.[51]

b. It cannot be assumed that NHA breached the contract in any other ways under Article 3 (3)

[50] Case file lines 1338-1340.
[51] Draft Articles on Responsibility of States for internationally wrongful acts, Article 3.

233. Claimant based its Article 3 (3) claims only on the termination of the LTA. Since there is no other claim arising out of the contract it cannot be assumed that the NHA breached the LTA in any other ways.

234. As a conclusion of issue 5, NHA's LTA related actions never interfered with Respondent's obligations and Atton Boro's rights under Article 3 (3) of the BIT.

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PRAYERS FOR RELIEF

For the foregoing reasons, Respondent respectfully requests the Tribunal to find that:

1) the Arbitral tribunal has no jurisdiction over the claims in relation to the Award;

2) Claimant shall be denied the benefits of the BIT;

3) the enactment of the amendment of the IP Law was in line with the FET standard;

4) the grant of a non-voluntary licence for the Claimant's invention was in line with the FET standard;

5) the conduct of Court was in line with the FET standard in regarding the enforcement proceeding;

6) the termination of the LTA did not interfere with Article 3(3) of the BIT.