Team Castro

THE FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT, 2017

ATTON BORO LIMITED

Claimant

v.

THE REPUBLIC OF MERCURIA

Respondent

Memorial for Respondent

Contents

List of Abbreviations

Abbreviation	Explanation
Atton Boro	Atton Boro Limited
Basheera	Kingdom of Basheera
BIT	Bilateral Investment Treaty
DOB	Denial of Benefits
DSU	Dispute Settlement Understanding
ELR	Exhaustion of Local Remedies
FDC	Fixed-dose combination
FET	Fair and Equitable Treatment
HCCH	Hague Conference on Private International Law
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IISD	The International Institute for Sustainable Development
ILC-DARSIWA	International Law Comission – Draft articles on Responsibility of States for International Wrongful Acts
LTA	Long Term Agreement
Mercuria	Republic of Mercuria

NHA	Mercuria National Health Authority
OECD	Organisation for Economic Co-operation and Development
p.	Page
para.	Paragraph
PCA	Permanent Court of Arbitration
Reef	Republic of Reef
TRIPS	Trade-related Aspects of Intellectual Property Rights Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
Uncontested facts	Statement of Uncontested Facts
UNCTAD	United Nations Conference on Trade and Development
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties, 1969
WTO	World Trade Organization

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TRIPS Agreement	The Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994
VCLT	United Nations Convention on the Law of Treaties signed at Vienna, (May 23, 1969).
WTO-DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]

Statement of Facts

1. On 1998 Mercuria and Basheera concluded a BIT, in line with Basheera's economic policy, tending to promote market openness.

2. On 5 April 1998, Atton Boro Limited was incorporated in the Kingdom of Basheera to act as an administrative center for Atton Boro Group's operations in several pharmaceutical markets in South America and Africa. Since Atton Boro was a mailbox company essentially dedicated to the management of investment portfolios, it only had 6 employees.

3. On 15 April 1998, just five days after the Mercuria-Basheera BIT entered into force, Atton Boro Group assigned the Mercurian patent for Valtervite to its wholly owned subsidiary Atton Boro Limited, in Basheera.

4. In 2003, an outbreak of greyscale was detected in Mercuria. This disease not only is chronic and incurable, but also causes the progressive stiffening of muscles. The situation is absolutely critical considering that the vulnerable demographic for greyscale is the working age population, and that 37% of them are completely unable to afford medication.

5. After an open call made by the NHA, Atton Boro submitted its offer, which was selected to conclude a LTA for the supply of Valtervite, on 20 July 2004

6. The LTA was a supply agreement whose purpose consisted of the purchase of Sanior by the NHA from Atton Boro, by the placing of periodic orders, at a 25% discount rate. The parties agreed upon a validity term of ten (10) years, subject to Atton Boro's satisfactory performance.

7. The number of greyscale patients increased notably in 2007, to such extent that the order value for Sanior doubled with each quarter of the year.

8. In early 2008, the NHA reported to Atton Boro that a renegotiation of the price for Sanior was necessary, on the ground that it needed to supply twice the quantity of medicines by virtue of the increase in the population of greyscale patients.

9. On 10 June 2008, the NHA unilaterally terminated the LTA, alleging "unsatisfactory performance" by Atton Boro,. In response to this, Atton Boro invoked international commercial arbitration under the LTA, from which it obtained an Award in its favor. The commercial Award found that the NHA breached the LTA by unilaterally terminating it before its term elapsed.

10. On 3 March 2009, Atton Boro filed enforcement proceedings for The Award before the High Court of Mercuria, which are pending to the present date.

11. On 27 March 2012, During the enforcement proceeding, the NHA sought an Amendment Application of its written submissions, considering recent decisions of the Supreme Court of Mercuria. Atton Boro objected to the request, claiming prohibition to apply new decisions to pending proceedings. Both parties were able to file notes and present oral submissions setting out their positions on the issue.

12. On 30 April 2012, during the enforcement proceeding, Atton Boro requested the Court to transfer its application for enforcement along with the NHA's Amendment Application, to a Commercial Bench of the Court.

13. On 14 June 2012 the regular bench of the High Court, transferred the application for enforcement and the amendment application to the Commercial Bench of the Court.

14. On 17 September 2013, during the enforcement proceeding, the NHA objected the jurisdiction of the Commercial Bench to hear about the enforcement proceeding. Both parties were able to file notes and present oral submissions setting out their positions on the issue.

15. On 25 October 2013, during the enforcement proceeding, the High Court ruled that it had jurisdiction to hear enforcement application under the Commercial Courts Act 2012.

16. On 2 January 2014, Atton Boro´s application for enforcement and NHA´s amendment application, were retransferred to the regular Bench of the High Court due to a notification of the High Court website on 2 December 2013.

17. On 10 October 2009, in light of the national health emergency affecting Mercuria, the President amended the National Intellectual Property Law, regulating the use of non-voluntary licenses.

18. On 17 April of 2010, a compulsory license for Valtervite was granted to HG-Pharma through a process conducted by the High Court of Mercuria, in which Atton Boro was impleaded as a party. As a result, Atton Boro was recognized a royalty of 1% of total earnings. To the present date, the Claimant has refused to accept the payment of the royalties.

19. In 2013, Mercuria provide humanitarian aid to three more States, also affected by greyscale but unable to afford or manufacture the medicines.

20. In February 2015 Atton Boro publically announced that it would stop distributing Valtervite in Mercuria.

Part One: Jurisdiction

21. The respondent objects to the jurisdiction of the arbitral tribunal. (I) This tribunal does not have competence regarding the subject of the conflict, given that the award is not an investment; (II) the application of the denial of benefits clause makes the BIT inapplicable to the case; (III) Atton Boro is not an investor and (IV) The Tribunal lacks jurisdiction to decide on breaches related to the TRIPS agreement.

22. Regarding admissibility of the case (V) Atton Boro did not exhaust its Local Remedies as a Substantive Standard in Denial of Justice Claims.

I. THE TRIBUNAL DOES NOT HAVE RATIONAE MATERIALE COMPETENCE

23. The rationae materiale competence is provided given by article 1 which defines the term investment. It defines what is the subject matter of the agreement and what falls under the protection of the BIT. The claims made by Atton Boro rely upon the Award that between the Claimant and the NHA, by asserting that this Award is an investment. The Award cannot be considered as one, because (A) it does not comply with the definition of the BIT, (B) The Award cannot be considered as an investment under the elements of the ordinary economical meaning; (C) The LTA is not an investment.

A. The Award does not comply with the definition of investment of the BIT

24. The definition of Investment given by the BIT in Article 1(1) is: "*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*".[1] It contains a list of examples that can count as an investment.

25. Reviewing the list and the definition already given, an Award cannot be considered as an investment, because the LTA is a mere agreement between the NHA and Atton Boro. The

[1] Procedural Order No. 1, Annex 1, p. 32, §994

Award is just a consequence of that agreement, which cannot be included in any of the items on the BIT list. Neither is an "*asset held or invested*" in the territory of Mercuria.

26. Accordingly, it is necessary to analyze the term investment set out in the BIT in accordance with the stipulations of the VCLT in Article 31[2], that indicates that every treaty has to be interpreted according with its objective. This is found in the preamble of the BIT:

> "*Recognizing that agreement on the treatment to be accorded to such investment will stimulate the flow of private capital and the economic development of the Contracting Parties*".[3]

27. This part of the preamble is of assistance since it is a tool for the interpretation of the term investment provided by the BIT. It states that under "*economic development*" an investment made in one of the Contracting Parties has to have that implication, so as to collaborate with the State in which the amount of money is being spent. In reviewing the Award, it presents as a mere credit in the Claimant's favour and not as something which can be seen as, in any way, benefitting Mercuria.

28. In determining whether something is an "investment" assessing its contribution to the State is fundamental. In the case of GEA v. Ukraine[4] the Arbitral Tribunal stated that an Award could not be considered as an Investment. Due to the difference existing between the investment itself and the arbitral award, the award does not involve any contribution or relevant economic activity to the country.[5] The same happens with the Arbitral Award in this case. It provides no contribution to Mercuria.

B. The Award cannot be considered as an investment under the elements of the ordinary economic meaning

29. Case law has made a study of the term investment in which it has used the ordinary economic definition of the term to help interpret investment treaties. When a BIT does not have an exact definition of an investment it can be considered that it has an "inherent meaning" that comes

[2] VCLT, Article 31
[3] Procedural Order No. 1, Annex 1, p. 32, §980
[4] GEA v. Ukraine, para. 162
[5] Mistelis, Award as an Investment. The Value of an Arbitral Award or the Cost of Non-Enforcement, p. 18

with the rules that apply to this proceeding. This definition its formed by three elements: (1) contribution; (2) a certain duration; and (3) risk.[6]

1. Contribution

30. This element means a dedication of some assets to the realization of the investment.[7] An Award in no case can be considered as a commitment of assets. The Award is just a consequence of the LTA, but the Award itself does not generate any expenditure in the territory of the State.

2. A certain duration

31. "Duration" refers to the requirement that an investment must endure a certain length of time in terms of the development to which the assets were dedicated.[8] An award does not comply with this element given that an Award has no performance of any plan. The application of the Award just gives a right to claim money because of the breach of the LTA by NHA, but it does not have anything to do with the State.

3. Risk

32. When the Tribunal states that a certain risk is an element of an Investment it means that there is uncertainty in achieving benefits[9]. Regarding the Award, there is no risk in respect to the execution of such, given that in an Award a Tribunal has already decided and in this case, has decided that the NHA has breached the LTA. The Award involves no element of "risk". The application of the Award depends only in the internal procedure, in which there is no risk.

C. The LTA is not an investment

33. Case law indicates that Arbitral Tribunals consider that an Award can be seen as an investment when there is a transformation that happens to the original investment, such as a contract. But in this case the LTA is a mere supply contract. It is commercial by nature.

[6] Demirkol, The Notion of 'Investment' in International Investment Law, p. 49
[7] Ibid.
[8] Ibid.
[9] Ibid.

34. The application of the elements that come with the ordinary economic meaning, mean that the LTA is not an investment. The contribution exists because there is a dedication of assets to the fulfillment of the contract. Regarding the duration of the contract, there is a plan between Atton Boro and the NHA. But concerning the risk the LTA does not comply with this element; the idea of the risk means that it must have an uncertain return of money. This supply contract, however, has a Clause that provides a "*minimum guaranteed annual order-value*".[10] This means that it does not have uncertainty.

35. The Award in discussion cannot be considered as a transformation of the original investment because there is not an original investment. The LTA is just a supply contract whose nature is commercial, making them not an object of an investment.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE OF THE APPLICATION OF DENIAL OF BENEFITS CLAUSE

36. The application of the DOB clause implies that the Arbitral Tribunal does not have competence. The application of this clause occurs because (A) Atton Boro is controlled by a third state national; (B) Atton Boro does not have substantial business activities and (C) the exercise of this clause was performed according to the rules created by the jurisprudence and that apply by the rules of this procedure

A. A national of a third state controls Atton Boro

37. The DOB clause indicates that the control of the company making an investment cannot be by nationals of a third state according to Article 2(1) of BIT.[11] Atton Boro is controlled by Atton Boro Group affiliates, that are in the end controlled by Atton Boro and Company.[12] This company is national of a third State, Reef.

38. The DOB clause is a tool a State has against the nationality planning. This provision allows us to pierce the corporate veil, thereby allowing the possibility of reducing the scope of application of the BIT. This clause of the treaty provides for the verification that, behind a

[10] Uncontested facts §896
[11] Procedural Order No. 1, Annex 1, p. 32, §1030
[12] Procedural Order No. 3, §1570

company of a Contracting Party, there is no interest of a Third State national that is a non-signatory State.

39. In the case Plama v. Bulgaria the Tribunal there is an analysis of what consists as the control of a Company, that indicates what is expected to be considered as such:

> "*ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body*"[13]

40. The control of Atton Boro is exercised by Atton Boro and Company, making it necessary for the Respondent to apply the DOB clause. The benefits that the BIT creates are to be applied just to the legal entities that are nationals to one of the Contracting Parties of the BIT and are under the control of nationals of a Contracting Party. A State with this clause is seeking to avoid giving the benefits to companies whose returns are destined to a national of a third State.

B. Atton Boro has no substantial business activities in the territory of Basheera

41. The other characteristic of the denial of benefits clause regards the business activities that the legal entity has in the State. Atton Boro is a mailbox company that has no substantial economic activities. The application of the clause is therefore valid.

42. Atton Boro only has in Basheera from six employees implying that it does not have substantial business activities in this country. By doing a comparative analysis of the activities Atton Boro has in Mercuria and the activities that it has in Basheera it can be concluded what is considered as substantial. In Basheera its activities only consist of six people, the activities it has in Mercuria consists in a factory, land and machinery[14]. The activities exercised by Atton Boro in Basheera have nothing to do with its regular activities. It is just a mailbox company. The activities of Atton Boro is pharmaceutical production and sales.

[13] Plama v. Bulgaria, para. 170
[14] Uncontested Facts, p 29, §900, §917

43. Since both elements of the DOB clause apply, the Respondent may exercise this clause. Because of this the BIT does not apply. Therefore, this Arbitral Tribunal does not have jurisdiction.

C. The use of the clause by the Respondent was made on time for its application

44. Case law indicates that the clause must be invoked at the proper time. Respondent's exercise of this clause complies with this Tribunals rules of the proceeding by the exercise of the clause in the response of the notice Arbitration, it complies with the rules of the proceeding, specifically:

> "*A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off.*" [15]

45. This rule indicates that any claims or objections in the matter of jurisdiction must be made before the statement of defence. The Respondent has made this argument in a timely fashion, accordingly making the application of the clause valid.

46. According to this, in different cases such as EMELEC v. Ecuador,[16] Ulysseas v. Ecuador[17] and Rurelec v. Bolivia[18] the Tribunals indicated that the moment to exercise this clause must be between the objections of the jurisdiction or no later than the Statement of Defence, the need of explicitly state the application of this clause is because the Contracting Party has a right to exercise this clause and avoid treaty shopping that happens in this case.

III. ATTON BORO IS NOT AN INVESTOR

47. The definition included in the BIT Article 2(b) states: "*any corporation … incorporated or duly constituted in accordance with the applicable laws of that Contracting Party*".[19] This definition is a mere indication of who can be an investor. However, in this case Atton Boro is not an investor since the true corporation that is receiving the benefits of the contracts is Atton

[15] PCA Arbitration Rules 2012. Article 23 (2)
[16] EMELEC v. Ecuador, para. 71
[17] Ulysseas v. Ecuador, para. 172.
[18] Rurelec v. Bolivia, para. 376.
[19] Procedural Order No. 1, Annex 1, p. 32, §1014

Boro and Company. According to this in Saluka v. Czech Republic[20] the Tribunal specified that a shell company is incapable of being an investor under the BIT. As things go a subsidiary company for a mother corporation could not benefit from the BIT.[21]

48. With due regard to the subsection of the DOB clause, the idea is to prevent treaty shopping. The formalistic test that Article 2 suggests has disadvantages. This affects the States, because it denies the right of the State to control who is benefiting from the BIT.

49. Additionally, the relations Atton Boro has with NHA and Mercuria are of commercial nature. The LTA between Atton Boro and NHA was a supply contract that does not have any investment implication. Therefore, Atton Boro does not have activities that can be deemed to be an investment.

50. For the reasons explained above, Atton Boro could not be considered as an investor. In this sense, the BIT does not apply. And the Tribunal does not have *rationae personae* competence.

IV. THE TRIBUNAL LACKS JURISDICTION TO DECIDE ON BREACHES RELATED TO THE TRIPS AGREEMENT

51. According to article 23.1 of The WTO Dispute Settlement Understanding (DSU), States must not unilaterally decide whether or not there has been a breach of a WTO obligation.[22] On the contrary, the WTO DSU hold exclusive forum to decide on disputes between members, concerning, inter alia, the TRIPS agreement. [23]

52. Mercuria and Basheera, as the Sovereigns that concluded the BIT, are State parties to the TRIPS agreement, as well as to the Doha Agreement.[24] Consequently, since the exclusive forum clause is applicable to the present dispute, the Tribunal lacks jurisdiction over the TRIPS claims.

[20] Saluka v. Czech Republic, para 240
[21] OECD, Definition of Investor and Investment in International Investment Agreements, p 21
[22] Article 23, WTO DSU]
[23] Grosse, *Protecting intellectual property under bits, ftas, and trips: conflicting regimes or mutual coherence?,* p. 25
[24] Procedural Order No. 2, §1497

V. EXHAUSTION OF LOCAL REMEDIES AS A SUBSTANTIVE STANDARD IN DENIAL OF JUSTICE CLAIMS

53. The Exhaustion of Local Remedies (ELR) in International Investment Law is a principle of general international law supported by customary law[25], State practice, treaties and the writings of jurists.[26] As The International Institute for Sustainable Development (IISD) refers to this principle,

> ¨*The ELR rule requires that a foreign national allegedly harmed by a state must first seek to redress the alleged harm before the administrative and judicial system of that state, until a final decision has been rendered, before … initiating international proceedings directly against the state*¨.[27]

54. In this regard, The ELR should be expected whether the case is undertaken by an international court, arbitral tribunal or conciliation commission.[28] In the event of a denial of justice claim during arbitration, the claimant must fulfill the requirement of ELR in order to succeed.[29]

55. Customary law has shown that ELR requirement has been carried over specifically for denial of justice.[30] Thus, denial of justice does not arise until the unlawful conduct has been sought to be corrected inside the local system of a hierarchical organization of civil-law jurisdiction (first instance/ appeal/ cassation).[31]

56. As to Mercuria's hierarchical organization of civil-law jurisdiction, atop the High Court of Mercuria is situated the Supreme Court of Mercuria. In relation to Atton Boro's allegations regarding the High Court's acts, the claimant should have presented the claim to the Supreme Court. This jurisdictional entity may well have cooperated in the investigation and possible sanction of the High Court judges if it had found any unlawful act that was affecting Atton Boro's right. There is no evidence that Atton Boro itself has made use of the local remedies to shorten the procedural delays.

[25] Interhandel; ELSI CASE
[26] Draft Articles on Diplomatic Protection, art. 14, cmt. 1
[27] Dietrich, IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law, p. 2.
[28] Interhandel, p. 29
[29] Dietrich, IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law, p. 21
[30] ATA Construction v. Jordan, para. 107
[31] Pantechniki v. Albania, para. 96, p. 24, para. 97, p.25.

57. Thus, not giving Mercuria the possibility to redress Atton Boro's claim as to High Court acts before calling into question its international responsibility, the claimant loses its foundation for the denial of justice claim as it failed to bring its case to Mercuria's Supreme Court to review the performance of the lower courts.

Part Two: Merits

I. The Respondent contends that the enactment of Law No. 8458 and the compulsory license for Valtervite, are contrary neither to the BIT nor to any other international treaty obligation.

A. The Claimant was accorded Fair and Equitable Treatment

1. Atton Boro has been treated in accordance with the minimum customary law standard

58. Under customary international law, fair and equitable treatment is equated to the minimum standard.[32] Accordingly, a violation of the fair and equitable treatment clause requires more than the frustration of the investor's expectations.[33] Instead, only an egregious conduct by the host State attains the level of breach the FET obligation.[34]

59. Law No. 8458 is a national legislative measure, general and applicable to all rights holders within Mercuria.[35] Moreover, the non-voluntary license was granted with due regard to Mercurian law, allowing the patentee to be part of the application process.[36]

60. As a result, since the Respondent acted in accordance with law and its conduct is far from egregious, the enactment of law No.8458 and the granting of a compulsory license are not contrary to the FET clause.

2. Moreover, the Respondent's actions do not amount to a violation of Atton Boro's legitimate expectations

61. Although the Claimant may submit that the FET clause in the Mercuria-Basheera BIT is autonomous and includes legitimate expectations, this obligation is not unrestricted. On the one hand, legitimate expectations do not guarantee that a State's legal framework will remain frozen.[37] In this vein, investors must consider strategies to adapt to foreseeable legislative and

[32] Neer v. Mexico, Awards, 1926, 60–62
[33] Eli Lilly and Company v. Canada, para. 102
[34] Lemire v. Ukraine, para. 284.
[35] Procedural Order No. 1, Annex 4, §1381-§1382
[36] Procedural Order No. 3, §1576
[37] EDF v. Romania, para. 217

administrative changes,[38] particularly in extreme events such as national emergencies.[39] On the other hand, this standard of protection requires express promises to be directly made to the investor,[40] rather than merely a statement of general policy.[41]

62. At no moment did Mercuria expressly manifest to Atton Boro, that it would guarantee the immutability of its domestic legal framework. By contrast, after the unfortunate greyscale outbreak took place, the Minister of Health publicly declared that the welfare and health of all Mercurians was a priority for the government.[42] Likewise, since 2006 the NHA health report announced the necessity to reevaluate the economic strategy to address the greyscale crisis.[43] Besides, more than 100.000 patients were completely unable to afford Atton Boro's brand-name drug and the rest of them also faced economic difficulties.[44]

63. As a result, it was unreasonable for the Claimant to expect that Mercuria was not going to exercise its regulatory power to modify the legal framework under the circumstances described above.

3. In any case, the Respondent has acted in accordance with its obligations under the TRIPS Agreement

64. Should this tribunal find that it has jurisdiction to decide on TRIPS breaches and that the TRIPS is part of the legitimate expectations; the Respondent in any event submits that it has acted in accordance with its international obligations.

65. Article 1.1 of the TRIPS agreement provides that Members are entitled to select the method to adequately implement the Treaty as part of its national laws and practices.[45] In this vein, when enacting their domestic legislation, parties to the Doha Declaration on TRIPS and Public Health Mercuria are called to promote access to medicine for all.[46] Accordingly, under

[38] Thunderbird v. Mexico; Muchilinski *"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, p. 527-542
[39] Continental Casualty v. Argentina, para. 262
[40] Duke Energy Electroquil Partners v. Ecuador, para. 355-361
[41] PSEG Global v. Turkey, p. 242-243.
[42] Uncontested Facts, §910-§915
[43] Procedural Order No. 1, Annex 3, §1373
[44] Ibid. §1366
[45] Article 1.1, TRIPS Agreement
[46] Article 4, Doha Declaration

article 31, the domestic legislation of a member can authorize non-voluntary licenses for patents, subject to the fulfillment of certain criteria. With regard to Law No. 8458, contrary to what the Claimant asserts, Mercuria has met all the criteria set by article 31.

66. The first aspect to be mentioned is that the license for Valtervite was granted with due regard to preexisting national legislation. Second, the High Court of Mercuria individually evaluated HG-Pharma's application[47] and the authorization was limited to the treatment of greyscale as a public health crisis.[48] Moreover, the use is non-exclusive, since the license is open to any proponent.[49] Since in the case at bar, the requirements enshrined in paragraphs (b), (h), (i) and (j) entail a higher level of complexity, their assessment is included in the following subsections.

a. Article 31 (b)

67. Under this provision, prior to the issuance of a compulsory license, the proposed user must seek to obtain authorization from the rights holder on "reasonable commercial terms", within "a reasonable frame of time".[50] However, States can omit this requirement in times of "national emergencies".[51]

68. The Doha Declaration establishes that, particularly in the case of developing and least-developed countries,[52] a "national emergency" can include but is not limited to, public health crises caused by, *inter alia*, severe epidemics.[53] Notwithstanding the foregoing, it is the Members who are ultimately entitled to decide what constitutes national emergency,[54] insofar as they are not barred from taking measures to protect public health, neither by the TRIPS Agreement nor by the Doha Declaration.[55] Moreover, the WHO has characterized epidemics

[47] Article 31(a), TRIPS agreement
[48] Ibid., article 31(c)
[49] Procedural Order No. 1, Annex 4, §1392
[50] Article 31(b), TRIPS agreement
[51] Ibid.
[52] Article 1, Doha Declaration
[53] Ibid., Article 5 (c)
[54] Article 5 (c), Doha Declaration; article 1.1, TRIPS agreement
[55] Article 4, Doha Declaration

or outbreaks as a sudden increase in the regular number of people suffering a disease, in a determined time and place.[56]

69. Greyscale is a disease that has been present in Mercuria since 1985.[57] However, between 2003 and 2006 there was an increase of almost 1300% in the number of confirmed cases of infected patients; thus, Greyscale is clearly an epidemic.[58] Moreover, cracking and flaking of the skin along with progressively stiffening muscles as a result of greyscale,[59] are conditions that severely diminish the quality of life of a person. In this regard, a severe and chronic condition that has the potential to affect 71% of a country's population, which is also the total population of working age individuals,[60] clearly meets the threshold of a public health crisis.

70. Hence, the critical situation being experienced in Mercuria is more than sufficient to consider that there is a national emergency, allowing the Respondent to make use of the waiver enshrined in article 31(b).

b. Article 31 (h)

71. Article 31(h) provides that the patentee is entitled to receive an adequate remuneration according to the economic value of the authorization.[61] Firstly, higher royalties are usually accorded to voluntary licenses, compared to those that are compulsory.[62] Secondly, although there is not a universal method for fixing royalties, it has been understood that public interest factors should be taken into account when it comes to developing countries.[63] In this vein, the therapeutic value of pharmaceutical products, the ability of the population to pay for the patented product and crises such as epidemics affecting public health, are situations that determine the reasonableness of a royalty.[64]

[56] Brés, Public Health Action in Emergencies Caused by Epidemics A practical guide, p. 3
[57] Procedural Order No. 1, Annex 3, §1301
[58] Ibid. §1335
[59] Ibid. §1300-§1301
[60] Ibid. §1327, §1335
[61] Article 31(h), TRIPS agreement
[62] Love, Remuneration Guidelines for non-Voluntary use of a Patent on medical technologies, p. 33
[63] Ibid., p. 42
[64] Ibid., p. 43

72. As was previously mentioned, Mercuria is a developing country facing a public health crisis due to Greyscale.[65] So far, Valtervite is the most advanced treatment for greyscale available in Mercuria.[66] Moreover, 37% of the patients are receiving medical treatment under Mercuria's subsidized health program,[67] not to mention that a vast majority of the population still struggles to pay for the FDC pill.[68] Lastly, not only is the license for Valtervite is compulsory and non-voluntary but also the royalty of 1% is within Mercuria's estimated range of percentages (0.5% to 3%).[69]

73. Therefore, a royalty of 1% for Valtervite's compulsory license is a reasonable and adequate remuneration for a pharmaceutical product that is fundamental to tackle the crisis affecting Mercuria.

c. Articles (i) and (j)

74. As to these procedural requirements,[70] Mercurian laws provide the necessary mechanisms to access judicial review.[71] Nonetheless, it is important to clarify that under Article 44 (2) of the TRIPS agreement, States can limit these remedies insofar as the conditions set in paragraph (b) and (h) are met.[72]

75. Mercuria has complied with the aforementioned provisions, since it has been evidenced that it is facing a national health emergency. Therefore, any arguable limitation to the procedural guarantees enshrined in paragraphs (i) and (j) is not contrary to the Respondent's obligations under the TRIPS agreement.

76. On the basis of the foregoing, Mercuria adequately fulfilled all the requirements set by the TRIPS agreement with regard to Valtervite's compulsory license. Thus, the Respondent has

[65] Response to Notice of Arbitration, §511
[66] Uncontested Facts, §880
[67] Procedural Order No. 1, Annex 3, §1360
[68] Ibid., §1366
[69] Procedural Order No. 3, §1590
[70] Ibid., article 31(i),(j)
[71] Procedural Order No. 3, §1580
[72] Article 44(2), TRIPS agreement

complied with its obligation to grant fair and equitable treatment to Atton Boro, by meeting its legitimate expectations.

B. The grant of a non-voluntary license for Valtervite does not amount to an indirect expropriation

77. Article 6 of the BIT provides protection for investors against unlawful nationalization or expropriation. The Respondent will demonstrate that the enactment of Law No. 8458 and the grant of a non-voluntary license for Valtervite are in accordance with the standards provided by Article 6 of the BIT. In doing so, the Respondent submits that (1) It did not expropriate the Claimant from its property by granting HG-Pharma a non-voluntary license for Valtervite, and (2) In any event, should the Tribunal find that there was an indirect expropriation, it was not unlawful.

1. The Respondent submits that it did not expropriate the Claimant from its property by granting HG-Pharma a non-voluntary license for Valtervite

78. Expropriation has been defined by customary international law as the seizure of legal title of property[73], or as the taking of private property by the State. An indirect expropriation occurs when there is a complete or partial deprivation of an investment, but not by virtue of a transfer of property or a material seizure of the asset.[74] In the present case, it is clear that Respondent has not seized or taken the Claimant's property. Thus, the Claimant has not been directly expropriated from its property.

79. Doctrine has concluded that an indirect expropriation occurs when Claimant is substantially deprived of its property.[75] The Respondent submits that its actions do not amount to an indirect expropriation because (a) The Claimant was not substantially deprived of its property, (b) In any event, the grant of a non-voluntary license to HG-Pharma was specifically provided by law and by a decision of Mercuria's High Court in accordance with Article 6(1), and (c)

[73] OECD, "Indirect Expropriation" and the "Right to Regulate", p. 3
[74] UNCTAD, Expropriation: A Sequel, p. 6 - 7
[75] Dolzer and Schreuer, Principles of International Investment Law, p. 112

Law No. 8458 and the grant of a non-voluntary license were necessary measures taken to protect legitimate public welfare objectives, namely public health.

a. The Claimant was not substantially deprived of its property

80. Three things should happen in order to determine that a substantial deprivation of an investment has occurred[76]: total or near-total destruction of the investment's economic value, the investor has been deprived of control over the investment, and the host State's measure is permanent. If one of these conditions is not met, then there will not be a substantial deprivation. The Respondent submits that none of these have occurred.

81. The Claimant's investment did not lose its economic value as a result of the grant to HG-Pharma of a non-voluntary license for Valtervite. Claimant still has the possibility to actively participate in market dynamics, by lowering prices to more affordable ones. It still owns a manufacturing unit for mass production of Sanior. It still owns the patent for Valtervite. Claimant continues to have the capacity to exploit its investment. Also, Claimant's business is rather large, considering it includes several long-term public-private collaborations with Mercuria and the NHA[77]. Hence, it cannot be limited to the supply of Sanior solely.

82. The Arbitral Tribunal in the Chemtura v. Canada case found that the cancellation of registration of lindane did not amount to an expropriation because, among other reasons, Chemtura's sales of lindane only accounted for a small part of its total sales.[78] The Respondent requests this Tribunal to apply the same considerations the Chemtura Tribunal did, with regard to the alleged destruction of the economic value of Claimant's investment.

83. It is uncontested that Claimant was not deprived of its property over the patent for Valtervite, or of any other related asset. Mercuria has neither seized nor transferred Claimant's property rights over its investments. Moreover, a patent holder in Mercuria has a law-provided faculty to question the validity of a granted non-voluntary license and the established royalty, before

[76] UNCTAD, Expropriation: A Sequel, p. 65
[77] Uncontested Facts, para. 5
[78] Chemtura Corp v. Canada, para. 264

a two judge bench of the High Court.[79] This proves how patent holder's rights are recognized and respected in the context of granting a non-voluntary license.

84. Regarding the time extension of the non-voluntary license, it cannot be stated that it is permanent. The High Court established a time limit to the validity of said license, which is until greyscale is no longer a threat to public health.[80]

85. In light of the foregoing, the Respondent submits that the grant of a non-voluntary license for Valtervite to HG-Pharma does not amount to a substantial deprivation of the Claimant's property.

b. In any event, the grant of a non-voluntary license to HG-Pharma was specifically provided by law and by a decision of Mercuria's High Court in accordance with Article 6(1)

86. Article 6(1) of the BIT provides that investments shall not be subject to any measure that might limit the investor's rights of ownership, possession, control or enjoyment, except when "*specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction."*[81]

87. If the Tribunal deems that the grant of a compulsory license for Valtervite to HG-Pharma limited Claimant's rights, it should not conclude that such a measure amounts to a breach of the BIT. This measure was taken in accordance with Article 6(1), insofar it was a decision taken by the High Court of Mercuria by virtue of Law No. 8458.

88. The first numeral of Subsection 23 C, introduced by Law No. 8458, provides that *"any person interested may make an application to the High Court of Mercuria for grant of a non-voluntary license on the patent."*[82] It can be inferred from the aforementioned provision that the High Court has jurisdiction on the grant of compulsory licenses, jurisdiction which was

[79] Procedural Order No. 3, §1579-1580
[80] Uncontested Facts, para. 21
[81] Procedural Order No. 1, Annex 1, Article 6(1)
[82] Procedural Order No. 1, Annex 4, §1392-1393

conferred by Law. The measure was adopted in conformity with the exception provided in Article 6(1), thus, the Respondent did not violate the BIT.

c. Law No. 8458 and the grant of a non-voluntary license were necessary measures taken to protect legitimate public welfare objectives, namely public health

89. Article 6(4) of the BIT enshrines exceptions to indirect expropriation. It provides that non-discriminatory measures adopted with the purpose of safeguarding legitimate public welfare objectives do not constitute indirect expropriation.[83] This provision materializes the police power rule of international investment law in the text of the BIT.[84]

90. The police power rule consists of the consideration of the purposes and context underlying in a public measure that may affect an investment, in order to determine whether compensation is required.[85] Pondering police powers and the right to receive compensation, the Feldman v. Mexico Tribunal stated that:

> *"Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."*[86]

91. In particular, Article 6(4) expressly names public health as one legitimate public welfare objective that could exclude a measure from constituting an indirect expropriation.[87] Mercuria, as mentioned above, is undergoing a health crisis, due to the increasing spread of greyscale among its population. The government of Mercuria enacted Law No. 8458 and granted HG-Pharma a non-voluntary license for Valtervite to guarantee FDC drugs to treat greyscale at lower prices, and therefore provide treatment at a greater scale.

92. In the Methanex v. United States case, the Tribunal held that a non-discriminatory regulation enacted for a public purpose and in observance of due process cannot be deemed expropriatory nor compensable save when the host State expressly committed to abstain from adopting such measures. In the present case, there has been no such commitment by Mercuria.

[83] Procedural Order No. 1, Annex 1, Article 6(4)
[84] Viñuales, Sovereignty in Foreign Investment Law, p. 326-328
[85] Mostafa, The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law, p. 272-273
[86] Feldman v. Mexico, para. 103
[87] Procedural Order No. 1, Annex 1, Article 6(4)

Rather, Mercuria has been clear and emphatic in its intention to adopt all necessary measures to tackle the greyscale epidemic.[88]

93. Also in Chemtura v. Canada, the Tribunal analyzed whether the cancellation of the registration of lindane was expropriatory, and found that it was not. The Tribunal concluded that:

> *"As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"*[89]

94. The parties to the Mercuria-Basheera BIT effectively defined indirect expropriations out of existence in cases of public health crises. Hence, the Claimant cannot assert that an indirect expropriation has occurred, when the BIT expressly states otherwise.

95. On the basis of the foregoing, the Respondent submits that, in accordance with Article 6(4) of the BIT, the Claimant was not indirectly expropriated from its property. Thus, due to Article 6(4), this Tribunal cannot hold that there has been indirect expropriation in the case at hand.

2. In any event, if the Tribunal deems that there was an indirect expropriation, the Respondent submits that the alleged expropriation was not unlawful.

96. Even if the Tribunal finds that the grant of a compulsory license for Valtervite to HG-Pharma amounted to an indirect expropriation, the Respondent submits that such a measure was taken in observance of the four requisites to determine that an expropriation is lawful: for a public purpose, with adequate compensation, non-discriminatory and in conformity with all legal provisions and procedures.

97. Mercuria's population was gravely affected with a spread of greyscale. The budget destined for health matters was not enough before an ever-growing demand for an FDC drug to treat greyscale, which was been provided by Claimant at prices that the NHA could not afford.

[88] Uncontested Facts, para. 14
[89] Chemtura Corp v. Canada, para. 266

Greyscale patients in Mercuria were growing at an alarming rate, and the NHA's capacity to distribute treatment was falling short. Thus, urgent measures were needed in order to attend the health crisis, which is clearly a public purpose.

98. The High Court of Mercuria established that HG-Pharma had to recognize 1% of its total revenues to the Claimant as royalty for the non-voluntary license.[90] This represented a form to compensate Atton Boro for the grant of a license for the use of the patented Valtervite without its authorization. HG-Pharma, the responsible for the payment of royalties, requested the Claimant's bank information in order to pay the respective compensation. Nonetheless, Claimant never gave such information nor accepted the payment of the royalties.[91]

99. The grant of the aforementioned non-voluntary license is not a discriminatory measure. The High Court exercised its functions assigned by Law No. 8458, without regard to the Claimant's particularities. Law No. 8458 is a general regulation, applicable to all patent-holders in the territory of Mercuria, and the grant of a compulsory license for Valtervite simply materializes the law's provisions.

100. Lastly, the Respondent submits that the measure under study was adopted in conformity with all legal provisions and procedures. HG-Pharma filed an application before the High Court to obtain a license for the production and distribution of Valtervite.[92] The High Court impleaded the Claimant as a party in the matter, but Claimant did not appear. The process was heard without the intervention of the Claimant, who, as patent-holder, by law is entitled to oppose the grant of the license.[93] Consequently, it can be inferred that the grant of the non-voluntary license for Valtervite was a measure adopted in observance of due process.

101. For all of the reasons above mentioned, the Respondent requests the Tribunal to acknowledge the legality of the alleged indirect expropriation.

[90] Uncontested Facts, para. 21
[91] Procedural Order No. 3, §1597-9
[92] Uncontested Facts, para. 21
[93] Procedural Order No. 3, §1576-80

II. THE CONDUCT OF MERCURIA'S JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDING RESPECTS ARTICLE 3 OF THE BIT

102. Broad length of judicial proceedings in domestic courts do not always signify a violation of the Fair and equitable treatment standard. Arbitration tribunals have cited special circumstances to justify length of judicial proceedings. They are associated with the complexity of the issues. [94]

103. On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria to execute recovery of Atton Boro's arbitration Award against the NHA under the LTA. So far, the enforcement proceedings have lasted 7 years. Complexity issues and internal circumstances during the proceeding has led enforcement proceedings to take time.

A. Complexity issue in the Enforcement Application No. 873/2009

104. According to Jan de Nul v. Egypt case, the excessive duration of proceedings before courts can be considered unsatisfactory in terms of efficient administration of justice, but may not be contemplated as denial of justice if the Tribunal is aware that the issues were complex[95]. Therefore, the tribunal needs to be mindful on the complexity of the enforcement proceeding of Atton Boro's arbitration Award against the NHA under the LTA.

105. Other legal issues came out through the enforcement proceeding, extending the time for the suit to conclude. On 27 March 2012, the NHA sought an Amendment Application of its written submissions, considering recent decisions of the Supreme Court of Mercuria. Atton Boro objected to the request, claiming prohibition to apply new decisions to pending proceedings. Both parties were able to file notes and present oral submissions setting out their positions on the issue.

106. Another legal issue that arose during the enforcement proceeding was about the jurisdiction of the Commercial Bench of Mercuria´s High Court. On 30 April 2012, Atton Boro requested the Court to transfer its application for enforcement along with the NHA's Amendment Application, to a Commercial Bench of the Court. Atton Boro argued that the Supreme Court

[94] Dolzer and Schreuer, Principles of International Investment Law, p. 155-6.
[95] Jan de Nul v. Egypt, para. 202-4.

affirmed that the *Commercial Bench had exclusive jurisdiction to hear enforcement application.*[96] Approving the request, on 14 June 2012 the regular bench of the Court, transferred the application for enforcement and the amendment application to the Commercial Bench of the Court.

107. Nevertheless, on 17 September 2013, the NHA objected the jurisdiction of the Commercial Bench to hear about the enforcement proceeding. NHA objection was based on the Supreme Court´s decision of 1 September 2013 which states that the *Commercial Courts Act 2012 only applied to commercial suits and not to enforcement proceedings*.[97]

108. Due to the above, the Court granted the parties an opportunity to make their submissions on jurisdiction, on the limited aspect of the Supreme Court decision. On 25 October 2013 the Court ruled that it had jurisdiction to hear enforcement application under the Commercial Courts Act 2012. Nevertheless, on 2 January 2014, Atton Boro´s application for enforcement and NHA´s amendment application, were retransferred to the regular Bench of the High Court due to a notification of the High Court website on 2 December 2013.

109. Considering the above, the enforcement proceeding on Reef´s arbitral award has been complex because of the number of legal issues that have emerged throughout the procedure. It is the duty of the judicial system, to analyze each of these conflicts in law to render its decision according with the law. During an enforcement proceeding, it is mandatory to guarantee the right to a defense. Thus, the judge must listen the arguments of each party to resolve the legal issue according to due process. The respect of parties' rights in relation to due process, means that Atton Boro´s application for enforcement may remain pending without violating the fair and equitable standard establish in article 3 of the BIT.

1. Enforcement of arbitral award is contrary to Public Policy

110. Mercuria, having ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, has the right to refuse the recognition and enforcement of any award that is contrary to Mercuria's public policy.

[96] Notice of Arbitration, Exhibit 1, p. 8, §255
[97] Ibid, p. 10, §290

111. According to Article (V) (2) (b) of the New York Convention, the award must comply with the public policy of the enforcement state. In case this does not happen. Article V (2) (b) of the New York Convention states that all members may refuse the recognition and enforcement of an arbitral award if they demonstrate to the competent authority that the recognition or enforcement of the award is contrary to the public policy of that State.

112. Claims of public policy protection from an arbitration award is entirely dependent upon the laws of individual states for its application. [98] Therefore, *national courts may interpret public policy entirely at their own discretion*.[99] Despite that the interpretation varies from one state to another, most developed countries commonly bear a *pro-enforcement attitude towards arbitral awards which they consider to be a stand-alone element of public policy itself.*[100] Unfortunately, developing countries, such as Mercuria, usually do not possess a developed jurisdiction that have interpreted narrowly public policy by the domestic courts.

113. Reef is the State where the tribunal issuing the 20 January 2009 award had its seat. Reef, and Mercuria are parties to the New York Convention. Hence, Mercuria has a duty to recognize and enforce Reef's arbitral awards. Nevertheless, if an arbitral award does not comply with Mercuria's public policy, it may not be recognized and enforced inside the state. This is particularly the case of Reef's arbitral award.

114. To enforce Reef's arbitral award, on 3 March 2009 Atton Boro exercised its rights to file enforcement proceedings before the High Court of Mercuria. In response, the NHA requested that the court declare that it would decline enforcement of the Award on the ground that it was contrary to public policy.

115. Thus, NHA's Claim produces greater complexity to the enforcement proceeding in question. For Mercuria's High Court the complexity arises from the need to assess two matters before determining the enforcement of the Award. First, it must determine if the award infringes

[98] Sattar, Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?, p. 4
[99] Ibid. p.4
[100] Ibid. p. 5

Mercuria's fundamental values and second whether the arbitration tribunal in Reef ensured procedural fairness.[101]

B. Minimum Standards of Fair and Equitable Treatment on Atton Boro's enforcement application before the High Court of Mercuria

116. Investors' protection through the fair and equitable treatment standard, is known as a guarantee offering a positive incentive for foreign investors[102]. To have fair and equitable treatment through access to justice, States must grant at least procedural minimum standards. As Ambatielos case mentioned, procedural minimum standard means that:

> *"foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country."*[103]

117. Considering the above, the respondent submits first that Mercuria gave Attom Boro full freedom to appear before the High Court to file enforcement proceedings to execute recovery of Atton Boro's arbitration Award against the NHA under the LTA. Besides, the High Court of Mercuria *allowed bringing any action provided or authorized by law*[104] such as objections, submissions for time extension, requests for adjournments, the lodging of appeals and the possibility to attempt amicable settlement.

118. Also, the High Court of Mercuria gave the claimant the legal opportunities *to deliver any pleading by way of defense, set off or counterclaim and to use the Courts fully*[105] and *to avail himself of any procedural remedies or guarantees provided by the law*.[106]This was allowed

[101] Desai, Khan and Chatterjee, Public Policy and arbitrability challenges to the enforcement of foreign awards in India, p. 207.
[102] Saluka v. Czech Republic, p.168
[103] Ambatielos claim, p. 111
[104] Ibid
[105] Ibid
[106] Ibid

when the Court directed both parties to file notes setting out their respective positions on issues such as Atton Boro´s application for enforcement issue, the NHA´s amendment application and the issue about the jurisdiction of the Commercial Bench to hear about the enforcement proceeding.

119. In this vein, High Court guaranteed Atton Boro's rights inside Mercuria, respecting minimum standards of fair procedure and due process provided in Mercuria's Procedural Law, customary international law and in article 3 of the BIT.

III. THE TERMINATION OF THE LTA BY THE NHA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT

120. The Respondent submits that the termination of the LTA by the NHA does not constitute a breach of Article 3(3) of the BIT, on the grounds that (A) The LTA is a commercial agreement which is not subject to the BIT, (B) The LTA provides a specific forum for dispute resolution, which the Claimant preferred before the one included in the BIT, and (C) The NHA's acts are not attributable to the Respondent.

A. The LTA is a commercial agreement, which is not subject to the provisions of the BIT

121. Ordinary commercial contracts, in principle, shall not fall within the scope of BITs.[107] Local commercial agreements are to be ruled by the national law of the place where they are subscribed and executed. International commercial contracts tend to be ruled by generally accepted rules of law, if parties do not exercise their liberty to agree upon a particular applicable law.[108] Since these agreements are celebrated by equal parties in the context of market dynamics, they escape the ambit of BITs.

122. In the case at hand, the Claimant and the NHA subscribed a supply agreement called the LTA. The LTA has its own proper law, which is Mercurian commercial law, considering that it was celebrated and executed in the territory of Mercuria. Considering that the LTA does not

[107] Zivkovic, Recognition of Contracts as Investments in International Investment Arbitration, para. 39
[108] HCCH, Principles on Choice of Law in International Commercial Contracts, Articles 2-3

qualify as an investment, it would be incorrect to apply BIT provisions to any disputes arising out of it.

123. The SGS v. Pakistan Tribunal dismissed the Claimant's contention that a breach of a provision of services contract could be elevated to a breach of the Swiss-Pakistan BIT. Notably, the claim was based upon a clause of the Swiss-Pakistan BIT that constitutes an "umbrella clause". The Tribunal deemed that extending the clause's reach to such an extent would be contrary to the purpose of international investment law, which is to limit the scope of investment law, and would result excessively burdensome to host States.[109] As a conclusion, the Tribunal found that an umbrella clause cannot automatically transform a purely contractual claim into a treaty claim.

124. The LTA was conceived by its parties in exercise of their commercial capacity. Additionally, the parties to the LTA are not Contracting Parties to the BIT. Should the Tribunal deem that Claimant is an investor of the contracting party Basheera, the NHA is not a Contracting Party so Article 3(3) could not be applied to obligations arising out of the LTA.

125. Also, the LTA was conceived by its parties in exercise of their commercial capacity. Even if this Tribunal finds that the State of Mercuria is bound by the LTA, a breach of it does not constitute a breach of the BIT as well. The Tribunal for the El Paso v. Argentina case determined that commercial contracts celebrated by the State or a state entity are not covered by the BIT, nor by an eventual umbrella clause contained in it. Specifically, it stated:

> *"Interpreted this way, the umbrella clause read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State -owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign – such as stabilization clause – inserted in an investment agreement."*[110]

126. The Respondent submits that this Tribunal ought to adopt the same stances as the above mentioned tribunals.

[109] SGS v. Pakistan, paras. 166-168
[110] El Paso v. Argentina, para. 81

B. LTA provides a specific forum for dispute resolution, which the Claimant preferred before the BIT arbitration

127. The Claimant and the NHA subscribed the LTA after a protracted negotiation phase. Thus, all of the LTA's content was freely negotiated and agreed upon by both parties. The LTA provided a specific forum for the resolution of disputes arising out of it. When the NHA terminated the LTA, the Claimant resorted to the arbitral proceeding provided under the LTA.[111] What is more, it was properly conformed and passed an award in favor of the Claimant.

128. Several investment dispute tribunals have found that they lack jurisdiction over contractual claims when the contract under study provides a specific forum for dispute resolution. The Tribunal for the SGS v. Philippines case considered that general provisions of BITs should not prevail over specific dispute settlement agreements provided in the contract from which the claim arises.[112] It concluded that it "*should not exercise jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved*".[113]

129. The Malicorp v. Egypt Tribunal deemed that the purpose of investment arbitration shall not be a second forum for parties to a contract that failed to follow the procedure for dispute resolution they agreed upon, much less be a second instance or an appeal mechanism for those parties not satisfied with the result of the provided solution.[114] Also, it stated that:

> *"It is hard to see how an investment treaty would be breached by the mere fact of a breach of a contract, as long as the control mechanisms put in place by that contract are functioning normally."*[115]

130. In the present case, the Claimant and the NHA agreed upon a valid dispute resolution mechanism consisting of arbitration proceedings. Moreover, the Claimant invoked the arbitration provided by the LTA to resolve the dispute regarding whether the termination by

[111] Uncontested Facts, para. 17
[112] SGS v. Pakistan, para. 134
[113] Ibid, para. 155
[114] Malicorp v. Egypt, para. 103(c)
[115] Ibid

the NHA constituted a breach. It is important to emphasize on the fact that those arbitral proceedings functioned perfectly, to such extent that Claimant obtained a favorable Award.[116]

131. Considering the above, the Respondent submits that a claim for a breach of the LTA should not be analyzed nor resolved as a breach of the BIT.

C. The NHA's acts are not attributable to the Respondent

132. Article 4 of the ILC DARSIWA establishes that acts of any state organ shall be considered acts of the State under international law. It also determines that a state organ is "*any person or entity which has that status in accordance with the internal law of the State"*.[117] In the present case, the Claimant contends that the Respondent must be held accountable for the conduct of the NHA in the context of the LTA. Contrary to such a claim, the Respondent submits that the NHA is not an organ of Mercuria.

133. The NHA is an independent entity, funded by both public and private contributions. It has acted autonomously and in exercise of commercial capacity since it was created, without orders or participation of government officials.[118] The NHA is subject to regulations and supervision of the Ministry of Health of Mercuria, thus the former is not part of the latter. Actions by the NHA do not bind the State of Mercuria, much less when it acts in the context of commercial activities.

134. Certain case law has limited the extension of BIT jurisdiction over contractual claims in which the State is not a party. The Tribunal in the Salini v Morocco case concluded the following:

> *"The Tribunal considers that its scope of application regarding the nature of disputes is limited as to the persons concerned. In the case where the State has organized a sector of activity through a distinct legal entity, be it a State entity, does not necessarily follow that the State has accepted* a priori *that the jurisdiction offer*

[116] Uncontested Facts, para. 17
[117] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 4
[118] Procedural Order No. 3, § 1591-1595

> *contained in Article 8 should bind it with respect to contractual breaches committed by this entity".*[119]

135. In the case at hand, it is clear that the Respondent was not a party to the LTA. Hence, this Tribunal shall not automatically extend its jurisdiction to the analysis of breaches of the LTA. If it does, then it shall consider that the breach of the LTA does not constitute directly a breach of the BIT.

136. Likewise, in the Impregilo v. Pakistan case, the Tribunal concluded that it lacked jurisdiction under the BIT to decide over the claims regarding breaches of the Contracts at issue. The Contracts at issue were subscribed by the Claimant and a legal entity called WADPA, different from the State of Pakistan. Article 9 of the Italy-Pakistan BIT does not cover breaches of contracts in which the State is not a party.[120]

137. It may be concluded that the text of Article 3(3) of the BIT limits the duty to observe any obligation entered into with regard to an investment solely to the Contracting Parties. Thus, the alleged breach of LTA could not be elevated to a breach of the BIT, considering the Respondent was not a party to the LTA.

138. In any event, the Respondent also submits that the Tribunal could not attribute the NHA's actions directly to Mercuria, considering that it is not a state organ in conformity with Mercuria's law.

139. On the basis of the foregoing, the Respondent respectfully requests the Tribunal to conclude that the termination of the LTA by the NHA does not amount to a violation of Article 3(3) of the BIT.

[119] Salini v. Morocco, para. 60
[120] Impreglio v. Pakistan, para. 216