TEAM HIGGINS

THE 2017 FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

ARBITRATION PURSUANT TO THE PERMANENT COURT OF ARBITRATION RULES 2012

IN THE PROCEEDING BETWEEN

THE REPUBLIC OF MERCURIA

(Respondent)

v.

ATTON BORO LIMITED

(Claimant)

MEMORIAL FOR RESPONDENT

25 SEPTEMBER 2017

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LIST OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
§/§§	Subsection(s)
ABC	Atton Boro and Company
ABG	Atton Boro Group
ABL	Atton Boro Limited
Art.	Article
ARV	Anti-Retro Viral Treatment
BIT	Bilateral Investment Treaty
CIL	Customary International Law
Facts	Uncontested Facts
FET	Fair and Equitable Treatment
HIV/AIDS	Human Immuno-Deficiency Virus/Acquired Immuno-Deficiency Syndrome
ICC	International Chamber of Commerce
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of Others
IPR	Intellectual Property Rights
LTA	Long-Term Agreement
MB-BIT	Mercuria Basheera-Bilateral Investment Treaty
NHA	National Health Authority
p. / pp.	Page(s)
PCA	Permanent Court of Arbitration
PO	Procedural Order
SCC	Stockholm Chamber of Commerce
TRIPS	Trade Related Investments on Intellectual Property Rights
UNCITRAL	United Nations Commissions on International Trade Law
VCLT	1969 Vienna Convention on the Law of Treaties
WTO	World Trade Organization

MEMORIAL FOR RESPONDENT

STATEMENT OF FACTS

MERCURIA-BASHEERA BIT

1. On 11 January 1998, Republic of Mercuria [**"Mercuria"** or **"Respondent"**] and Kingdom of Basheera [**"Basheera"**] concluded the Mercuria-Basheera Agreement for the Promotion and Reciprocal Protection of Investments the [**"MB-BIT"**], which entered into force on 10 March 1998.

THE ESCALATING CONTAMINATION OF GREYSCALE

2. In 1980, several cases indicated the existence of Greyscale, an incurable and communicable chronic disease that had spread 43 countries including Mercuria by several ways such as sexual intercourse. Being a threat to patients aged 15-49 years living with symptoms of desiccant skin, stiff muscles and severe joint pain, Mercuria pursued their public health standard, by raising awareness of the working-age community and establishing several agreements to ensure universal access to healthcare for treatments needed for greyscale such as Valtervite. As a result of Mercuria's efforts, a marked increase took place as a third of them obtained treatment and 50% of all adults were getting tested.

CLAIMANT'S BUSINESS IN MERCURIA

3. In April 1998, the Atton Boro Group incorporated Atton Boro Limited [**"Claimant"**], a wholly owned subsidiary in Basheera. Claimant was delegated to manage Valtervite in 50 jurisdictions including Mercuria. In May 2004, Claimant and Respondent entered into a 10-year Long-Term Agreement [**"LTA"**] for the supply of Sanior, which contained the Valtervite compound. Subsequently, Claimant set up its manufacturing unit in Mercuria for the production and distribution of Sanior.

TERMINATION OF THE LTA

4. The conclusion of the LTA proved to be successful in 2006. However, in 2007 the order value of Sanior doubled due to the rapid increase of Mercurian greyscale patients. Consequently, the National Health Authority [**"NHA"**] informed Claimant of its desire to renegotiate the price of the drug demanding an additional discount of 40%, in response, Claimant offered a

further 10% reduction off the price to form a total discount of 35%. However, due to the epidemic, Respondent was needed a 65% discount to be able to afford the purchase of Sanior. When Claimant was still not able to deliver, the NHA terminated the LTA on 10 June 2008, citing unsatisfactory performance by Claimant.

ENACTMENT AND ISSUANCE OF COMPULSORY LICENSE

5. One year after the termination of the LTA, Respondent implemented the compulsory license provision into Law No. 8458/09 [**"Patent Law"**] where authorized its issuance, 3 years after the licensee's patent was approved for three alternative reasons. It was in this context that Respondent granted HG Pharma compulsory license and accorded Claimant 1% of royalty fee over their investment, Valtervite, until greyscale was no longer a threat in 2009. Respondent's government did everything in their power to reduce the critical epidemic, as they even exported HG-Pharma's generic drug to three developing states in the form of humanitarian aid, which contributed to Respondent's health program in according universal access to healthcare as preventive measure.

REFERRAL TO ARBITRATION

6. Upon the failure to negotiate, Claimant submitted a request for arbitration to the Permanent Court of Arbitration [**"PCA"** or **"the Tribunal"**] dated 3 March 2009, alleging violations of the MB-BIT standards of protection and requesting for compensation for the considerable losses incurred from such violations.

SUMMARY OF ARGUMENTS

I. JURISDICTION AND ADMISSIBILITY

THE TRIBUNAL LACKS JURISDICTION AND CLAIMANT'S CLAIMS ARE INADMISSIBLE

7. The Tribunal has no jurisdiction to adjudicate the present case. The Arbitral Award rendered by the tribunal in Reef [**"Award"**] does not qualify as an investment protected under the MB-BIT and the claims raised by Claimant in the Notice of Arbitration are inadmissible (Section **I**). Moreover, Respondent can invoke the "denial of benefits" provision, as the substantive requirements of Article 2 MB-BIT are satisfied. (Section **II**)

II. MERITS

RESPONDENT DID NOT BREACH THE SUBSTANTIVE PROVISIONS OF THE MB-BIT

8. Respondent did not violate Article 3 MB-BIT for according Fair and Equitable Treatment [**"FET"**], complying with their contractual obligations pursuant to the Umbrella Clause by terminating the LTA, undergoing a standard enforcement proceeding for the Award, amending the Patent Law to be compliant with TRIPS and implementing the Patent Law by issuing HG Pharma's compulsory license. Particularly, that the enactment of Patent Law and issuance of compulsory license over Valtervite do not violate Article 3(2) MB-BIT (Section **III**). Furthermore, the proceedings to enforce the Award were not purposely delayed, (Section **IV**) and the LTA is a mere contractual claim as its termination was caused by Claimant's unsatisfactory performance pursuant to Article 3(3) MB-BIT (Section **V**).

ARGUMENTS

ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

I. THE ARBITRAL TRIBUNAL LACKS JURISDICTION OVER THE CLAIMS IN RELATION TO AWARD

1. Pursuant to Article 8 MB-BIT, the Permanent Court of Arbitration [**"PCA"**] Tribunal only has jurisdiction over a dispute between an investor of one Contracting Party and the other Contracting Party arising out of or in relation to an Agreement. While this provision serves as Respondent's standing offer to arbitrate, Claimant has unlawfully invoked Article 8 MB-BIT as the arbitration clause, as this Tribunal **[A]** lacks jurisdiction *ratione materiae* over the present dispute. Furthermore, **[B]** the claims raised by Claimant in the Notice of Arbitration are inadmissible.

A. The Tribunal Lacks Jurisdiction *Ratione Materiae* under the MB-BIT

2. The Tribunal lacks jurisdiction *ratione materiae* as the Award does not qualify as an investment under Article 1 MB-BIT. In cases where non-enforcement of awards may amount to breaches of BITs, investment tribunals have examined for such awards to enjoy protection under the BITs only if they qualify as investments.[1] The analysis of whether an award rendered by a tribunal is an investment is determined on a case-by-case basis and hinged on the definition of "investment" under the relevant BIT.[2]

3. In this vein, Respondent argues that the Award does not qualify as an investment under the MB-BIT since **[1]** the broad language of Article 1 MB-BIT entails exclusion of awards, thus, **[2]** it does not qualify as one under Article 1(c) MB-BIT. Should the Tribunal find otherwise, **[3]** it nonetheless does not qualify as an investment since the LTA did not transform into the

[1] *Frontier*, ¶¶222,231
[2] *GEA,* ¶139

Award. In any event, **[4]** the Award is not part of the overall operation of the original investment.

1. The Award does not fall under the chapeau of Article 1(1) MB-BIT

4. As the language of the BIT serves as a *lex specialis,*[3] to distinguish treaty investments from regular commercial investments, the Award must comply with the chapeau of the definition of investment under Article 1 MB-BIT. Despite the broad framing that includes "any kind of asset", the Award does not qualify as an investment under the chapeau of Article 1 MB-BIT as it is merely a residual right under the LTA, which does not meet up to the characteristics of the definition of investment.

5. Although the characteristics of an investment are not explicitly required in the BIT, Respondent can nevertheless rely on them, as these are the common characteristics of a "long-term foreign direct investment" that have been established by a number of past tribunals. [4] In this sense, the Award must **[a]** be a commitment to capital, **[b]** bear political risk, **[c]** have expectation of gain or profit and **[d]** provide economic contribution to Respondent's territory. Furthermore, Respondent shall demonstrate that none of these elements have been fulfilled to establish jurisdiction.

a. The Award is not a commitment of capital

6. In order for the Award to be a commitment of capital, it must provide substantial commitment and significance for Respondent's development.[5] In *Fedax*, the tribunal determined that the promissory notes were investments as they were being used by the state to finance its budget under a law of public credit.[6]

[3] *Fraport*, ¶305
[4] *Fedax*, ¶43; *Salini*, ¶52
[5] *Ibid.*
[6] *Fedax*, ¶42

7. In the present case, the Award, however, in and of itself cannot constitute as an investment as it is merely a legal instrument, which provides for the disposition of rights and obligations arising out of the contract,[7] being the LTA. In fact, the residual value being the $40 million provided no contribution to the Respondent's economic development, *infra*.[8] Therefore, the Award is not a commitment to capital under Article 1(1) MB-BIT.

b. The Award does not bear a political risk

8. Furthermore, the Award merely bears a commercial risk and not a political one. As held in *Fedax*, the very existence of a dispute in relation to the payment of the principal proves the risk that the holder of the notes has taken.[9] Moreover, the Award based on the breach of the contract could not qualify as an investment as the risk assumed by the investors for the non-performance of the contract is a mere commercial risk rather than an investment risk.

9. Similarly, the Award does not entail the assumption of an inherent economic or political risk but solely carry the risk of default or non-payment by Respondent. As the Award derives from the termination of the LTA, a sales contract for the supply of Sanior for the greyscale epidemic, there merely exists a high risk of the non-payment of the Award. [10]

c. The Award provided no expectation of gain or profit from economic activities

10. Additionally, the Award does not provide an expectation of gain or profit since it does not entail an obligation for Respondent to pay interest for the postponement of the payment of the Award.

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[7] *GEA*, ¶161
[8] Respondent's Memorial, ¶15
[9] *Fedax*, ¶40
[10] Facts, ¶10

11. In *Ambiente*, there exists an expectation of profit as there was an obligation for interest to be paid periodically in regard to the bonds and security entitlements.[11] In contrast, as the Award is not a financial instrument and its value remains unchanged for the past 7 years, there is clearly no expectation of interest to be paid.

12. Thus, as Claimant will only be receiving compensation for a breach of contract, there is no expectation of profit but rather an expectation of receiving payment from a debt.

d. The Award provides no specific economic contribution to Respondent's development

13. Despite the absence of an explicit territorial link condition, the object and purpose and Article 1 of the MB-BIT nonetheless confines for investments to fall under the MB-BIT when the investment gives an economic contribution to the Respondent state.[12]

14. The tribunals in *GEA*[13] and *Abaclat*,[14] ruled that the threshold for the Award to qualify as an investment is that it must provide an economic contribution to the development of Respondent.[15] The *GEA* tribunal further opined that even if the original contract could constitute as an investment, the award deriving from it involved no contribution to or relevant economic activity within the host state.[16]

15. Presently, bearing the burden of proof,[17] Claimant has failed to establish that the Award has economically contributed to Respondent's territory. Without any definitive proof, the unpaid Award must not be presumed to have contributed to Respondent's territory financially and economically since it was not used to generate any economic activities therein.[18] Additionally, not all funds in a state's treasury are used to contribute to the expansion of productive

[11] *Ambiente*, 486
[12] Annex 1, line 980, MB-BIT
[13] *GEA*, ¶162
[14] *Abaclat* Dissenting Opinion, ¶¶75-77, 119
[15] Annex 1, line 977
[16] *GEA*, ¶162
[17] PCA Rules, Art. 27(1)
[18] *Abaclat* Dissenting Opinion, ¶113

capacities of the state, as it could be used for other matters such as to finance wars, wars of aggression or even corruption.[19]

16. In light of the above, the Award must be excluded from Article 1(1) MB-BIT as it does not constitute as a commitment of capital, bear political risk, have an expectation of gain or profit and economically contribute to Respondent.

2. The Award is not a money claim under Article 1(1)(c) MB-BIT

17. Further, if an asset does not correspond with such inherent definition of "investment", and merely falls within one of the categories listed in Article 1 of the BIT, such inclusion does not, by and of itself, transform such asset into an "investment."[20] Thus, it is undisputed that the Award cannot qualify as a claim to money under Article 1(c) MB-BIT.

18. The Award is a residual claim to money in a general sense since a Contracting Party in whose favor the Award is made is entitled to financial compensation. The tribunal in *Saipem* held that the terms "credit for sums of money" cover rights under an award ordering a party to pay an amount of money. However, the tribunal further found that this is only valid for the payment of an unpaid loan under a treaty,[21] provided that it was one "under the existing contract" for the provision of petroleum services between Petrobangla, a state entity and the investors, and was further established by mutual consent.

19. In contrast, herein, as the Award derived from the terminated LTA and not an unpaid loan under an existing contract, it cannot constitute as a claim to money under the MB-BIT. In fact, the dispute over the termination of the contract has been settled by the tribunal in the Reef where a decision has been rendered. Considering that the LTA no longer exists having been reduced into a residual value of damages suffered by Claimant under the terminated contract,

[19] *Abaclat* Dissenting Opinion, ¶113
[20] *Romak*, ¶207
[21] *Saipem*, ¶48

the investor-investee relationship between Claimant and Respondent has likewise been dissolved.

20. Consequently, even if the Award may qualify as a generic debt owed to Claimant or a "claim to money" obliging Respondent to pay the sum of $40 million under litigation, this Tribunal must find that the Award does not qualify as a treaty investment under Article 1 MB-BIT.

3. Alternatively, the LTA has not been transformed into the Award

21. Past tribunals have also recognized that an award can be transformed from the original investment, and have characterized it as continuing an investment under a contract,[22] if there exists a *nexus* between the award and the original investment.[23]

22. The tribunal in *Frontier* opined that that Frontier's original investment in the form of existing advanced loans was transformed into an entitlement under an award. Although the form of the existing investment was altered, the protection of the original investment under Canada-Czech BIT was extended to the award.[24]

23. However, unlike *Frontier*, the LTA cannot be transformed into an entitlement under the Award, as the original contract is already terminated. Furthermore, the termination was already settled upon under the forum selection clause of the contract, by Claimant's own admission.[25]

24. Hence, due to the termination there is no longer any *nexus* between the Award and the non-existent LTA to be considered as falling within the terminal proviso of Article 1 MB-BIT.

4. In any event, the Award does not constitute as part of the overall operation of the LTA

[22] *Chevron, Frontier, Mondev; White Industries* ¶7.6.5
[23] *GEA*, ¶203
[24] *Frontier,* ¶231
[25] Response to Notice of Arbitration, ¶8

25. Even if the LTA *per se* can be deemed to have transformed into the Award, the Tribunal still lacks jurisdiction over the present dispute, as the Award does not form part of the overall operation of the object of the LTA.

26. The "overall operation" theory was recognized by the tribunal in *Saipem,* which held that an award qualifies as part of the entire operation of the investment if it crystallizes the parties' rights and obligations under the original contract.[26] Furthermore, the *GEA* tribunal ruled that it is not possible for an Award to qualify as an investment as the original Contract and the Award remain analytically distinct,[27] meaning that they can exist independent of the other.

27. Similarly, the LTA and the Award remain analytically distinct as both are separate and can exist independently. This distinction is evident as the Award is simply rights derived from the termination of the LTA. The rights arising from the Award are pecuniary obligations and merely a remedy against damages suffered in the original investment rights. These obligations under the award are *per se* separate from the investment. This is due to the fact that the pecuniary debt can be waived or assigned to third parties independently from the investment.[28]

28. Moreover, the Award is merely an unpaid receivable, which is a final determination under litigation whereas the LTA is proven to be an investment subject to the Host State's law. Thus, even though the LTA is protected under the MB-BIT, the Award is not as both remain analytically distinct.

29. In conclusion, as the Award does not qualify as an investment, this Tribunal must dismiss the present claim for lack of jurisdiction *ratione materiae* as mandated by Article 1(1) MB-BIT.

B. The Claims raised by Claimant are inadmissible

[26] *Saipem,* ¶¶127,128
[27] *GEA*, ¶162
[28] Chazournes & Kohen, ¶265

30. Even if the Tribunal has jurisdiction *ratione materiae* over the present dispute, Claimant's claims are inadmissible as **[1]** Claimant has waived its rights in regard to the claim of the issuance of the compulsory license. Furthermore, **[2]** the non-payment of the Award is a mere contractual claim which is outside the scope of Article 3(3) MB-BIT. In any event, **[3]** the delay in the claim in regard to the enforcement proceedings is premature.

1. Claimant has waived its right to question the issuance of compulsory license

31. Claimant has waived its right to cast doubt on the fairness of the issuance of the compulsory license before Respondent's domestic court. The tribunal in *Bayindir* held that investors who attempt to seek for remedies from private entities that act on a commercial nature must be addressed before a competent forum and under the proper law of such guarantee.[29]

32. Presently, though Claimant framed their cause of action as a Fair and Equitable Treatment **["FET"]** claim, they have accepted the finality of the issuance of the compulsory license over the patented Valtervite. This is because, no objections or appeals on its legality were raised during the time of its issuance in 2010, either before Respondent's domestic court or as an espousal of claim before the World Trade Organization **["WTO"]**.

33. Consequently, Claimant's belated assertion assailing the lawfulness of the issuance of the compulsory license is no longer admissible before this Tribunal.

2. The present dispute is merely a contractual claim

34. The dispute regarding the termination of the LTA is not a dispute relating to the treaty as required under Article 8 MB-BIT, instead is one of a contractual nature since **[a]** it was terminated due to unsatisfactory performance. Furthermore, **[b]** the LTA is an agreement based on a commercial transaction[30] and one to be resolved under the forum selection clause of the LTA.

[29] *Bayindir*, ¶489
[30] Response to the Notice of Arbitration, ¶8

a. The LTA was terminated due to unsatisfactory performance

35. The question herein is in regard to Claimant's unsatisfactory performance due to Claimant's inability to accord Respondent the discount that was required to purchase Sanior[31] for a number of people that was affected due to greyscale during 2003 to 2006.[32] Moreover, as the LTA was a commercial transaction between Claimant and NHA, no treaty obligations were violated, thus the claim is outside the scope of the umbrella clause, *infra*.[33]

b. Additionally, the existence of the forum selection clause provides that the claim is of a contractual nature

36. The existence of the forum selection clause under the LTA provides that the claim in regard to the termination of the LTA is merely a contractual claim. Although the tribunal in *SGS v. Philippines* found that it had jurisdiction over claimant's contractual claims, it declined to exercise jurisdiction since the agreement contained an exclusive forum selection clause that designated a different forum for resolving contractual disputes.[34] Applying the maxim *generalia specialibus non derogant*, a number of tribunals found that a forum selection clause should not be overridden and should be given precedence over the BIT since the former would apply more specifically to the dispute regarding the contract.[35]

37. Thus, similarly, as the termination of the LTA is a mere contractual claim, the forum selection clause under the LTA should be given precedence over the MB-BIT and this Tribunal must decline to admit this claim.

3. <u>Claimant's claim in regard to the delay in the enforcement proceedings is premature</u>

[31] Facts, ¶15
[32] Annex 3, line 1341
[33] Respondent's Memorial, ¶138
[34] *SGS v. Philippines*, ¶155
[35] *SGS v. Philippines*, ¶141

38. The claim raised by Claimant in the Notice of Arbitration regarding the delay in the enforcement proceedings is premature. Although there has been a 7-year delay in the enforcement proceedings of the Award, Respondent did not refuse to recognize and enforce the Award in the High Court of Mercuria **[“Court”]**. Thus, no violation of the New York Convention [**“Convention”**] has taken place, *infra*.[36]

39. In light of the above, the Tribunal must find that Claimant’s claims are inadmissible as they have waived its right to question the validity of the compulsory license, the LTA is a mere contractual claim, and that the 7-year enforcement of the Award is not an unreasonable delay.

40. In view of the foregoing, the Tribunal does not have jurisdiction over the present dispute and Claimant’s claims are inadmissible.

[36] Respondent’s Memorial, ¶113

II. CLAIMANT'S CLAIMS ARE NOT ADMISSIBLE AS RESPONDENT CAN DENY THE TREATY BENEFITS UNDER ARTICLE 2 MB-BIT

41. Even if the Tribunal has jurisdiction over the present dispute, Claimant's claims are nevertheless inadmissible. Respondent is entitled to deny Claimant the benefits of the treaty as the specific conditions of Article 2 MB-BIT are satisfied.

42. Article 2 MB-BIT provides that:

    "Each Contracting Party reserves the right to deny the benefits of this Agreement to: [...] a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized."

43. Under the language of the foregoing clause, Respondent can invoke Article 2 MB-BIT in the proceedings as **[A]** the denial of benefits clause applies automatically. In any event, Respondent **[B]** has properly invoked its right to deny of the treaty in timely fashion and **[C]** has successfully proven that Claimant falls under the scope of the substantive conditions of Article 2 MB-BIT.

A. Article 2 MB-BIT Shall be Interpreted to Apply Automatically

44. Article 2 MB-BIT does not specify any time limit for the exercise of the respondent state's right to deny the treaty benefits. In fact, Respondent can automatically deny the benefits to Claimant if the substantive conditions are met,[37] as it is subject to the fulfillment of the requirements of the wording of the MB-BIT.[38]

45. This interpretation was employed by the tribunal in *Ulysseas* which found that there is nothing in the clause that prevents a state from exercising its right after an investor had sought benefits of the treaty through a request for arbitration.[39] Furthermore, the *Guaracachi* tribunal held that "*[the] very purpose of the denial of benefits is to give the Respondent the possibility of*

[37] *Empresa*, ¶71
[38] Annex 1, Art. 2 MB-BIT
[39] *Ulysseas*, ¶172

withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed.'[40]

46. Accordingly, it would not be feasible to ask Respondent to monitor all investors to check whether they are controlled by third party nationals at the time they invest as such notification of the denial of benefits would *per se* be seen as an unfriendly and groundless act and contrary to the promotion of foreign investments.[41] In this regard, the benefits of the treaty was automatically denied when Claimant submitted its claim to arbitration since at the time of investment until the present time, Claimant continues not to meet the substantive requirements of Article 2 MB-BIT, *infra*.[42]

47. Additionally, as Claimant contends that such application would lead to legal uncertainty for Claimant to plan its investment in Respondent's territory, Respondent relies on the ruling of the tribunal in *Ulysseas* which found that the possibility of denial of benefits is known to an investor at the time of the investment and that the protection afforded by the BIT is subject during the life of the investment to such a denial.[43] As a result, this Tribunal must likewise find that when it made the investment in Respondent's territory, Claimant was aware of the possibility to be denied the benefits and to ensure that its ownership or control structure remains compliant with the standing prohibition set forth in Article 2 MB-BIT.

48. In light of the above, Article 2 MB-BIT applies automatically as prospective application would be inconsistent with the "promotion of foreign investment" purpose as the object and purpose of the MB-BIT.

B. In Any Event, Respondent Has Properly Invoked Its Right to Deny Claimant the Benefits of the Treaty in Timely Fashion

[40] *Guaracachi*, ¶376
[41] *Guaracachi*, ¶379
[42] Respondent's Memorial, ¶54
[43] *Ulysseas,* ¶173

49. Even if this Tribunal requires reasonable invocation to exercise the right to deny the benefits of the treaty, Respondent has timely denied the benefits to Claimant as a preliminary objection to jurisdiction.[44] As held in *Empresa*, the tribunal considered that the host state has exercised its right to deny the benefits at the proper stage of proceedings, namely when raising its objections on jurisdiction.[45] Due to the absence of special provision in the MB-BIT that limits the application of the denial of benefits clause, a plea of such invocation must be raised no later than in the statement of defense,[46] and within 30 days of the receipt of the notice of arbitration,[47] pursuant to the applicable PCA Rules.

50. Presently, Respondent has successfully informed Claimant of its right to invoke denial of benefits clause as Respondent raised its objection on 26 November 2016, nineteen (19) days after Claimant submitted the dispute to arbitration.[48] Consequently, the Tribunal must find that Respondent has not missed its window of opportunity to timely invoke as defense the denial of benefits clause.

51. In light of the above, Claimant's claims are nevertheless inadmissible as Respondent has properly invoked the denial of benefits clause in timely fashion and not required to give prior notification to Claimant.

C. Moreover, Respondent Has Complied with the Substantive Requirements of Article 2 MB-BIT

52. More importantly, the denial benefits clause under Article 2 MB-BIT applies as Claimant falls within the scope of the provision to be denied the benefits under the treaty.

53. Article 2 MB-BIT gives the Contracting Parties the right to deny the benefits of the treaty to a legal entity that does not have an economic connection of the state on whose nationality it

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[44] Response to Notice of Arbitration, p. 16
[45] *Empresa*, ¶71
[46] PCA Rules 2012, Art. 23(2)
[47] PCA Rules 2012, Art. 4(1)
[48] Response to Notice of Arbitration, p. 16

relies.[49] Such economic connection consists of ownership or control by a national of a state party to the treaty and substantial business activities in the state of incorporation.[50] This denial of benefits protects the Contracting Parties and their nationals from "free riding" non-BIT Party investors improperly invoking arbitration and other benefits under BIT.[51] As held in *Generation Ukraine*, a denial of benefits clause does not serve as a jurisdictional hurdle but only a potential filter on the admissibility of claims if it is properly invoked by the respondent state.[52]

54. Applying this rule of interpretation to the present case, two cumulative requirements must be met to deny Claimant the benefits of the MB-BIT. Presently, bearing the burden of proof,[53] Respondent has substantiated that Claimant **[1]** is owned or controlled by citizens or nationals of a third state, and **[2]** has no substantial business activities in the territory in which it is organized.

1. <u>Claimant is owned and controlled by citizens or nationals of a third state</u>

55. The basic condition to deny Claimant of substantive protections of the MB-BIT is satisfied in the present case as Claimant is owned and controlled by citizens or nationals of a third state, namely Atton Boro and Company [**"ABC"**].

56. As to ownership, Article 2 MB-BIT does not provide a threshold for "own". As a result, any form and scope of ownership, as long as it is held by nationals of a third state, would satisfy this requirement. Presently, this condition is met since Claimant's entire shareholding is held by Atton Boro Group [**"ABG"**], which in turn is wholly owned by the ABC, an enterprise incorporated in a third state, the People's Republic of Reef [**"Reef"**].[54]

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49 Dolzer & Schreuer, p. 55
50 Annex 1, Article 2(1) MB-BIT
51 *Pacific Rim*, ¶4.19
52 *Generation Ukraine*, ¶15.7
53 PCA Rules, Article 27(1)
54 Facts, ¶¶2,4

57. ABC's shares are currently held by a mix of private entities and private individuals of various nationalities.[55] In addition, Claimant is being funded by ABC, to set up its manufacturing unit in Mercuria, as well as to perform the LTA with the NHA from 1998 onwards.[56]

58. Furthermore, as to control, the tribunal in *Thunderbird* interpreted "independent control" as the power to effectively decide and implement the key decisions and material business activities, including but not limited to technology, access to suppliers, and access to markets.[57] Presently, Claimant is merely a vehicle company for carrying business in Africa and South American countries to manage a number of its portfolio of patents which were being assigned by ABC.[58] This further implies that Claimant does not have any decisive influence over the technology, access to supplies as well as access to market as all decisions in regard to Sanior, being ultra-vires and outside the scope of the material business of the Claimant , is directed back to the control of the ABC.

59. Moreover, Claimant only managed its principal dealings, patent management and contractual relationships which had no relations with the production of Sanior in any of the host countries, all of which are materially decided and subject to approval by the ABC.[59]

60. Therefore, Respondent can deny the treaty benefits to Claimant as the first limb of Article 2 MB-BIT is satisfied due to Claimant's failure to substantiate that it is neither owned nor control by citizens or nationals of a third state, namely Reef.

2. Claimant has no substantial business activities in Basheera

61. Not only is Claimant controlled by citizens or nationals of a third state, Claimant is a mere "mailbox company" set up by third state nationals as it does not conduct any substantial business activities in the territory in which it is organized.

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[55] PO3, line 1570
[56] PO3, line 1573
[57] *Thunderbird*, ¶108
[58] Facts, ¶4; PO2, ¶3
[59] Facts, ¶5

62. As the concept of "substantial business activities" is not defined in the MB-BIT, as guidance for interpretation,[60] the tribunal in *AMTO* assessed that the term "substantial" would not be a synonymous with "large", rather the decisive question would be the "materiality" and not the "significance of the business activities". Thus, it is sufficient that the entity meets the conditions based on its material investment-related activities conducted in the state of where it is incorporated, even though it employs a small but permanent staff.[61]

63. Presently, Claimant's business activities have minimal contribution to the territory in which it is organized. Claimant's business activities are mainly to manage its portfolio of patents registered in South America and Africa, and provide support for regulatory approval, marketing and sales as well as legal, accounting and tax services in South America and Africa.[62] The bulk of Claimant's operations are located in these two continents, whereas Basheera is located in Westeros,[63] which further implies that the business activities in Basheera pales in comparison to their activities in South America and Africa countries.

64. As the patent and contract management aspect of Claimant's business is minuscule or constitutes a very small portion compared to its entire business conducted in South America and Africa including the manufacture, sales and distribution of critical medicines, this Tribunal must find that the second substantive requirement of Article 2 MB-BIT is fulfilled as Claimant has not conducted any substantial business activities in the territory of its incorporation.

65. In light of the above, Respondent has substantiated that Claimant falls under the substantive conditions of Article 2 MB-BIT. As a result, the substantive protection of the investment treaty should not be accorded to Claimant. Therefore, this Tribunal must not retain jurisdiction and Claimant's claims must be dismissed.

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[60] VCLT, Art. 31(1)
[61] *AMTO*, §69
[62] PO2, ¶3
[63] PO3, line 1564

ARGUMENTS ON MERITS

III. RESPONDENT'S ENACTMENT OF PATENT LAW AND ISSUANCE OF COMPULSORY LICENSE FOR CLAIMANT'S INVENTION ARE CONSISTENT WITH THE MB-BIT

66. Even if the Tribunal retains jurisdiction over, it nevertheless has no power to adjudicate Claimant's claims in accordance with the MB-BIT, municipal law and relevant rules of international law pursuant to Article 3(3) MB-BIT, the umbrella clause.[64]

67. Additionally, in view of Respondent's sovereign right to establish its own laws,[65] its actions to plan, mitigate and contain greyscale's epidemic in its territory commencing from the termination of the LTA, enactment of Patent Law and subsequent issuance of compulsory license over Valtervite do not constitute a violation of FET.

68. The FET guarantee mandates a state to provide a stable and predictable legal and business framework for the investor's business, to accord due process and transparency, and to refrain from acting in an arbitrary or discriminate manner.[66] The threshold of FET in Article 3(2) MB-BIT is autonomous and goes beyond customary international law [**"CIL"**]. As such, its interpretation is made on a case-by-case basis,[67] regardless of whether Respondent's measures were taken in *bona fide.*[68]

69. Moreover, should FET equate to CIL,[69] Respondent is still not liable under the MB-BIT as **[A]** their Patent Law is consistent with their obligations under the Trade-Related Aspect of Intellectual Property Rights **["TRIPS"]** by way of the umbrella clause. Even if the Patent Law is inconsistent with TRIPS, **[B]** Respondent's issuance of the compulsory license over Valtervite does not violate Claimant's legitimate expectations under Article 3(2) MB-BIT.

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[64] *Micula*, ¶287
[65] *Parkerings*, ¶332
[66] Schill, p. 80
[67] *Saluka*, ¶291
[68] *Azurix*, ¶372
[69] *Kardassopolous*, ¶428

A. The Patent Law's Consistency with TRIPS Does Not Violate Article 3(3) MB-BIT

70. Respondent's measures of enacting the Patent Law and issuing compulsory license over Valtervite does not violate its obligations under TRIPS pursuant to Article 3(3) MB-BIT of the umbrella clause. Due to the Patent Law's consistency with TRIPS, these measures do not cause an undue interference with Claimant's investments, the Valtervite Patent, a protected Intellectual Property Right **["IPR"]**.

71. The umbrella clause in Article 3(3) MB-BIT provides for any obligations of the Respondent that have a specific and direct correlation to Claimant's investments[70] to be protected under the MB-BIT.[71] The scope of protection is narrow as it is specific and does not refer to obligations taken under TRIPS but rather, contracts such as the LTA considering it was made with the specific right to protect Claimant's investments.[72]

72. The tribunal in *Phillip Morris* held that even intellectual properties that are licensed within Uruguay have an inherent risk of instability and would only amount to specific obligations under the umbrella clause if they were contracted.[73] To an extent, the general provisions of the Patent Law cannot become a specific commitment to Claimant by merely issuing a compulsory license over Valtervite to HG Pharma.[74] In this sense, any claims made by Claimant in regard to TRIPS is outside the scope of the MB-BIT.

73. Furthermore, Claimant's claims under TRIPS cannot be brought before this PCA Tribunal as Article 23 WTO Dispute Settlement Understanding limits any claims under TRIPS to be brought before the WTO Council. Nonetheless, Respondent has not violated its obligations under TRIPS.

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70 Annex 1, Art. 1(d) MB-BIT; TRIPS, Art. 28(1)(a)
71 *Micula*, ¶411
72 *Noble Ventures*, ¶51
73 *Phillip Morris*, ¶481
74 Facts, ¶21; Annex 4, lines 1390-1395, 1412,1415

74. Article 31(h) TRIPS provides that:
"the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."

75. Respondent is not liable for providing Claimant an adequate royalty rate. Although there is no definite term of an "adequate royalty fee," States have determined royalty fees to be adequate based on the sector and purpose of authorization.[75] In Thailand, compulsory licenses are granted with royalty rates ranging from 0.5 – 3% based on the total market value of the generic pharmaceuticals. Such low rates are a core characteristic of compulsory licenses and ensure their efficacy in enhancing public access to drugs.[76]

76. Herein, the Court similarly fixed royalty rates for viral outbreaks to range from 0.5-3%[77] based on the Patent's economic value,[78] hence, Claimant's own rate of 1% should be deemed adequate as it falls squarely within such range.[79] Furthermore, while ABG's CFO contested the 1% royalty rate, both Claimant and ABG could have invoked their right to object its validity before a two-judge bench of the Court.[80] Accordingly, having failed to do so in 5 years before Claimant ceased its Sanior operations in Respondent's territory further implies that Claimant deems the 1% royalty fee to be adequate. Moreover, Claimant further waived its entitlement to an adequate royalty rate when Respondent's joint-venture, HG Pharma, in fact wrote to Claimant to request for its bank details to transfer the payment of royalty fees, but was not given a response.[81]

77. Thus, Respondent is not liable for complying with their obligations under TRIPS, as proven by HG Pharma's good faith attempt to pay the royalty fee due to Claimant.

B. Moreover, the Issuance of Compulsory License Over Valtervite Does Not Violate Claimant's Legitimate Expectations

[75] Love, p. 5
[76] Love, p. 55
[77] PO3, line 1589
[78] TRIPS, Art. 31(h)
[79] Facts, ¶21
[80] PO3, lines 1580,1600
[81] PO3, lines 1598,1599

78. More importantly, Respondent did not violate Claimant's legitimate expectations of regulatory stability at the time they issued the compulsory license over Valtervite as it in fact did not undermine their IPR.

79. A violation of legitimate expectation fundamentally equates to a FET violation when a state's measures contradict the investor's specific assurances on which it reasonably relied on when deciding to invest in the state.[82] The issuance of compulsory license over Valtervite does not violate Claimant's legitimate expectations are not undermined as **[1]** Claimant was not given assurances of regulatory stability. In any event, **[2]** Claimant relied on the assurances **[3]** in an unreasonable manner when investing in Respondent's territory.

1. <u>The rise of greyscale's outbreak is an inherent risk in Claimant's legitimate expectation</u>

80. Respondent did not assure Claimant of regulatory stability in complying with the conditions in the Patent Law as general provisions under a law do not amount to specific commitments to investors.

81. Due to the absence of a stabilization clause, the substantive, procedural and carve-out clause provisions under the Patent Law do not amount to a specific entitlement of regulatory stability.[83] A similar assessment was provided in *El Paso*, where the tribunal concluded that the assurances and provisions in Decree No. 1589/1989, in itself, do not constitute a specific commitment towards foreign investors as it would immobilize the legal order and prevent any adaptation to the circumstances of the state. While the laws would, at best, become reduced commitments, they do not guarantee complete stability as each investor bears all inherent commercial risks of the investment.[84]

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[82] *Siemens,* ¶300
[83] *El Paso*, ¶404
[84] *El Paso*, ¶394

82. As such, the substantive, procedural and carve-out clause conditions under the Patent Law cannot amount to specific assurances accorded to Claimant. Even if they do, they were not violated as **[a]** Sanior is not sufficiently utilized in the territory of Respondent, **[b]** Respondent and HG Pharma failed to obtain a voluntary license from Claimant, and that **[c]** greyscale's epidemic is of a national emergency.

a. Valtervite fulfilled the substantive conditions of Section 23(C)(1) of the Patent Law

83. Section 23(C)(1) of the Patent Law articulates that applications for compulsory licenses may only be accepted if:

"(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied; or
(b) that the patented invention is not available to the public at a reasonably affordable price; or
(c) that the patented invention is not worked in the territory of Mercuria."

84. Presently, HG Pharma's compulsory license is only accepted if and when Valtervite does not fulfill the reasonable requirements of the public and is unaffordable. Thus, the Court's acceptance of these conditions is factually met as, Valtervite **[i]** does not fulfill the reasonable requirements of the public, and **[ii]** is not reasonably affordable.

i. Valtervite does not fulfill the reasonable requirements of the public

85. Valtervite does not fulfill the reasonable requirements of the public in the form of Sanior as it is unequipped to treat all greyscale patients in Respondent's territory. A determination of whether a patent exceeds the reasonable requirements of the public is anchored on whether such product is *effectively used by the patient population*.[85]

86. Such assessment was made in *Natco Pharma Ltd v. Bayer Corp*, where Bayer's patented drug, Nexavar, would only be available to 2% of the assumed 8,842 eligible patients. Based on a

[85] *Bayer v. Natco,* p. 1

2008 report, the court held that the number of potential patients afflicted with kidney and liver cancer for a year would significantly be higher than Bayer's estimation of 8,842 patients. Taking into account that the public could not afford Nexavar at its rupees 280,000 per month, Nexavar did not meet up to the reasonable requirement.[86]

87. Similarly, Claimant was aware of the rise of greyscale's contamination as the disease spreads through sexual and air-borne transmission.[87] Even with Sanior's manufacturing facility in place, the rate of greyscale patients skyrocketed, exceeding Claimant's manufacturing capacity and NHA's liberal estimations of 578,000 greyscale patients in 2006.[88] Additionally, with the 20% to 80% discrepancy of Valtervite's effectiveness in preventing greyscale's transmission to healthy people,[89] Sanior was ultimately unequipped to treat and prevent the rising demand for greyscale medication. Hence, Valtervite, in the form of Sanior, is unable to fulfill the reasonable requirements of the public.

ii. Valtervite is unaffordable

88. The price of Sanior was unaffordable to Respondent as even with the discounted pricing of USD 27, it would cost Respondent's patients nearly USD 10,000 annually.[90]

89. An assessment on whether a drug is reasonably affordable is manifested in the public's ability to purchase the drug.[91] In Africa, the compulsory license over Anti-Retroviral Treatment **["ARV"]** allowed Human Immuno-Deficiency Virus/Acquired Immuno-Deficiency Syndrome **["HIV/AIDS"]** patients to purchase at USD 350 annually as their initial USD 10,000-15,000 annual costs were unaffordable to the public.[92] Even in Brazil, the compulsory licenses had allowed each patient to purchase ARV generic treatments at USD 99 in

[86] Hilty & Liu, p. 22
[87] PO3, line 1584
[88] Facts, ¶¶14,15; Annex 3, line 1342
[89] PO3, line 1586
[90] Annex 3, lines 1353-1354
[91] Hilty & Liu, p. 23
[92] Hoen & Berger, pp. 1,4

comparison to the previous USD 10,000 pricing.[93] This implies that treatment for incurable diseases in a developing country can be effectively affordable by way of compulsory licenses.

90. Sanior's annual pricing of USD 10,000 is also unaffordable for greyscale patients living in a crippling economy, *infra*.[94] Although the pricing is a result of NHA and Claimant's negotiation in 2004, such prices were made before the rising rate of greyscale patients.[95] In fact, after such rise, Respondent attempted to negotiate with Claimant for a further reduction but was denied of this possibility.[96] Moreover, Respondent's patients had in fact complained about the overpricing of Sanior by way of the NHA's Report of 2006 as it was based on the medical system and the multi-sectoral think tank that actively engaged with the public.[97] Therefore, Sanior is unaffordable to the public.

91. Consequently, the fulfillment of the substantive conditions under the Patent Law demonstrates that Respondent's decision to grant HG Pharma's compulsory license over Valtervite is grounded and does not violate the MB-BIT.

b. Moreover, Respondent and HG Pharma attempted to obtain a voluntary license from Claimant on reasonable terms and conditions

92. Furthermore, HG Pharma's application for compulsory license over Valtervite is valid as the parties of the proceeding had failed to obtain a cooperative negotiation before the compulsory license over Valtervite was issued.

93. As a procedural guarantee, all applications for compulsory licenses must strictly be a matter of last resort and issued only after the failure to negotiate or to reach an agreement on licensing terms with the patent holder.[98] This is imperative as it protects the legitimate interest of the

[93] WHO, p. 6
[94] Respondent's Memorial, ¶96
[95] Facts, ¶9
[96] Facts, ¶16
[97] Annex 3, lines 1314,1321
[98] TRIPS, Art. 31(b); *BDR Pharma v. Bristol Meyers Co.* p. 1

investors' investment under TRIPS.[99] In fact, the *Micula* tribunal further elaborated that investors could only enjoy the benefits of the EGO 24 framework once they fulfilled the procedural aspects within the framework.[100] Herein, prior to the proceedings of HG Pharma's application, HG Pharma and Claimant had in fact attempted to undergo amicable negotiations for a voluntary license on reasonable terms and conditions; yet, such negotiations were unsuccessful and caused Claimant to be impleaded before the Court itself.[101]

94. In light of the foregoing, HG Pharma's application for a compulsory license is well-founded on the fact that they have failed in their efforts to obtain a voluntary license from Claimant.

c. Additionally, the Court must dispense with the procedural requirement due to greyscale's national emergency

95. As a carve-out clause the requirement of negotiating with Claimant *supra*,[102] is exempted under the Patent Law if Respondent is in a state of national emergency or public non-commercial use.[103] Such exemption must occur herein, as **[i]** Respondent is in a state of national emergency, and **[ii]** Valtervite was issued for public non-commercial use.

i. Respondent should be given a wide margin of appreciation to declare its state of emergency

96. Respondent should be given a wide margin of appreciation as they were in a state of national emergency. A wide margin of appreciation allows Respondent to be exempted from the negotiation requirements if its measures were taken to protect the public interest.[104] As Respondent has the right to determine what constitutes a national emergency under the Doha

[99] TRIPS, Art. 30; Hoen & Berger, p. 1
[100] *Micula*, ¶429
[101] PO3, line 1576
[102] Respondent's Memorial, ¶91
[103] Annex 4, line 1415; TRIPS, Art. 31(b)
[104] *Electrabel*, ¶¶272,273; *Phillip Morris*, ¶399

Declaration,[105] the Tribunal must exempt Respondent from its negotiation requirement as the compulsory license over Valtervite was issued to contain greyscale's national emergency.

97. Under the Doha Declaration, general declarations do not need to be made under legislation or constitutional authority to constitute a national emergency. Rather, enacting compulsory licensing regimes and subsequently implementing its authorizations in the territory, is in itself, a declaration of national health emergency.[106] Such practice is manifested in Zimbabwe's HIV/AIDS emergency by implementing the compulsory license regime and subsequently granting compulsory license for ARV's to contain the disease in 2002.[107]

98. Herein, since greyscale's prevalence within the territory of Respondent in 2002, Respondent acted on its public health standard to contain the outbreak by conducting awareness workshops, and established the LTA for the supply of Sanior. However, such measures were inadequate in comparison to greyscale's increasingly viral outbreak.[108] Unlike HIV/AIDS, where the patients are only affected through sexual contact and are still able to work with the working population, greyscale is not only transmitted *via* sexual contact but it is also air-borne.[109] Its symptoms which stiffen the patients' muscles, causes severe-joint pains and swollen limbs, ultimately paralyze the patients ability to work.[110] As greyscale threatens the very existence of the working class and economic development of Respondent, it was necessary for them to grant HG Pharma's compulsory license over Valtervite and should be given a wide margin of appreciation.

ii. Valtervite was manufactured for public non-commercial use

99. Alternatively, Respondent is still exempted from its procedural requirements as Valtervite was manufactured for public non-commercial use. While TRIPS do not define what

[105] Doha Declaration, Art. 5(c)
[106] Correa, p. vii, §7
[107] Correa, p. 16
[108] Facts, ¶¶14,15
[109] PO3, line 1585
[110] Facts, ¶5; Annex 3, lines 1301,1330

constitutes as public non-commercial use, it is demonstrated when the license is not used by the government for profitable purposes, but for the public health.[111]

100. In Thailand, a compulsory license over ARV was issued to be manufactured locally. Without such license, Thailand could only provide treatment for one-fifth of the total 500,000 HIV/AIDS patients due to its monthly payment of USD 490 per patient, which exceeds Thailand's national budget. Although Thailand had attempted to ensure universal access by ways other than according its patients ARV treatment, HIV/AIDS patients were forced to discontinue treatment as they were not financially equipped to afford treatment. By manufacturing ARV at an inexpensive price, Thailand was able to provide accessibility for its patients through its health system.[112]

101. Herein, prior to the termination of the LTA in 2008, the number of estimated greyscale cases had risen to almost 600,000 people and even had a drastic 6400% increase within the next two years. Even though Claimant maintains that the distribution of Sanior is sufficient to maintain greyscale's outbreak, only 100,000 patients would receive such treatment under Respondent's health plan as it costs USD 10,000 annually per patient.[113] Additionally, it would cost almost USD 20 billion to ensure treatment for the 2,000,000 estimated greyscale patients as of 2008 alone.[114] As such expense exceeds greyscale's budget by 1000%,[115] these statistics demonstrate that greyscale's rapid increase would continue unless there is a more effective and affordable treatment to contain greyscale.

102. Furthermore, in regard to Respondent's actions of exporting treatment to three developing states facing financial difficulties in the form humanitarian aid,[116] Respondent acted on its sovereign right to prevent transmission through air-borne and to ensure the containment of greyscale.[117] Had Respondent not exported treatment to the three developing states, greyscale

[111] DeRoo, pp. 359, 389
[112] Hilty & Liu, p. 64-66
[113] Annex 3, lines 1354, 1360-1365
[114] Facts, ¶15
[115] Annex 3, line 1364
[116] Facts, ¶23
[117] Annex 1, line 988 MB-BIT; Doha Declaration, Art. 4

could have still been transmitted to Respondent's territory, contributing to the increasing rate of greyscale patients.[118]

103. Issuing HG Pharma's compulsory license allowed Respondent to reduce costs by over USD 1,2 billion, prevent greyscale's transmission[119] and ensure the accessibility of treatment to its greyscale patients for a longer period. Thus, Respondent should be exempted from the procedural requirements *supra*.[120]

2. <u>Claimant cannot rely on political statements for assurances of regulatory stability in the Patent Law</u>

104. As there was an upsurge in greyscale's outbreak, Claimant cannot rely on political statements that were made at the time the LTA was established, to expect that national legislations would remain unchanged.[121] Considering that Respondent did not give Claimant assurances of regulatory stability in the Patent Law by way of its political statements, the LTA, and the MB-BIT, Claimant should have expected for the laws to change.[122]

105. In fact, subsequently after the LTA was terminated, Respondent clearly stated their intention to *"take every measure it deemed necessary"* due to the rising number of greyscale, giving Claimant the reasonable expectation that the Patent Law would be enacted and implemented. Therefore, any reliance on the political statements and the LTA would be improper.

3. <u>Relying on assurances regulatory stability in the Patent Law is unreasonable</u>

106. Furthermore, Respondent did not assure Claimant for regulatory stability in complying with the Patent Law. As held in *El Paso*, political statements made in an ambiguous manner cannot be relied on in a reasonable manner to constitute a legitimate expectation,[123] unless they are

[118] Annex 3, line 1340
[119] Facts, ¶¶22,24
[120] Respondent's Memorial, ¶91
[121] Facts, ¶¶8,14,15,20
[122] *El Paso*, ¶398
[123] *El Paso*, ¶378

seen as a whole, with the subsequent conducts of the state.[124] As affirmed by the tribunal in Micula, the Romanian prime minister's political statement during an interview did amount to an assurance of regulatory stability as they restated their intention to uphold the national legislation for 10 years.[125]

107. Contrary to *Micula*, Claimant's reliance on assurance of regulatory stability when deciding to invest in the territory of Respondent is unreasonable as the political statements to *"empower and engage the patent holders by 'rolling out the red carpet for investors'"* were made to induce the establishment of the LTA[126] rather than to enact the Patent Law.[127] In fact, subsequently after the LTA was terminated, Respondent did not give any explicit or implicit assurances to Claimant in regard to the Patent Law that it would be enacted and implemented to grant compulsory licenses.

108. Hence, relying on political statements that were made at the time the investment was made is unreasonable to establish a legitimate expectation of complying with the Patent Law.

109. Accordingly, the enactment of the Patent Law and issuance of compulsory license to HG Pharma does not violate TRIPS or Claimant's legitimate expectation of regulatory stability, and consequently, MB-BIT.

[124] *Parkerings*, ¶331
[125] *Micula,* ¶¶687-689
[126] Facts, ¶¶8,9
[127] Facts, ¶21

IV. RESPONDENT IS NOT LIABLE UNDER ARTICLE 3 MB-BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS

110. Respondent not only reasonably issued the compulsory license, but they also did not fail to administer justice to Claimant in the enforcement proceedings of the Award. Presently, the behavior of the Court has successfully accorded FET pursuant to Article 3(2) MB-BIT.

111. In January 2009, the Tribunal seated in Reef passed an Award in favor of Claimant, determining the compensation needed to be accorded to Claimant for the alleged damages caused by the termination of the LTA.[128] Subsequently, on 3 March 2009, Claimant filed for enforcement proceedings of the Award.[129] However, Claimant further claimed that the proceedings were continuously prolonged and adjourned by the Court.[130]

112. By assessing the timeline of proceedings, the Tribunal must recognize that **[A]** Respondent did not violate the Convention and they have also **[B]** not failed to accord Claimant effective means of asserting their claims and enforcing their right in domestic Court.

A. Respondent Did Not Violate the New York Convention as They Never Refused to Enforce the Award

113. Article III of the Convention states:

"*Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory"*

114. Under the language of the foregoing clause, Respondent, is obliged to recognize and enforce awards.[131] However, the provision does not provide a certain time limit on when the award must be enforced.

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[128] Facts, ¶17
[129] Facts, ¶18
[130] Facts, ¶10
[131] PO2, ¶2

115. Accordingly, Claimant may make an investment treaty claim against the Court if they wrongfully refused to enforce the Award.[132] However, a claim stating that there has been a violation due to a seven-year delay would be insufficient and invalid to establish a violation of the Convention.[133] Nonetheless, there is no legal violation as Respondent, being a party to the Convention, recognizes their obligations. This is evident through Respondent's acknowledgement of Claimant's Award pursuant to Article III of the Convention.[134]

116. In order to refuse enforcement of an award, courts may invoke the public policy exception.[135] This approach was taken in *Frontier*, where they had exempted themselves from recognition and enforcement of the final award rendered by PCA tribunal. The tribunal found this to be reasonable as Czech provided that ordering a bankruptcy trustee to grant secured charges to the benefits of a creditor would contradict the bankruptcy and composition act, making it illegal and a breach of Czech's public order.[136]

117. However, in the present dispute, the Court did not invoke Article V (2)(b) of the New York Convention, as they never attempted to refuse the enforcement of the Award. In fact, they acknowledged the Award as the Court heard the application[137] and ordered that the NHA shall be given notice of the application by May 2009 of the same year.[138] Furthermore, two years after the application of the Award, both Claimant and NHA successfully made oral submissions as of June 2013,[139] and with Claimant's own admission even sought amicable settlement.[140]

118. Thus, as Claimant's enforcement application of the Award was heard, there exists no legal or factual basis as to how the Court had refused to enforce the Award. Conclusively, a seven-year period in enforcement does not constitute as a violation of the Convention.

[132] Kühner, ¶3
[133] Facts, ¶10
[134] Notice of Arbitration, Exhibit 1, ¶2
[135] New York Convention, Art. V(2)(b)
[136] *Frontier*, ¶¶512, 525
[137] Notice of Arbitration, Exhibit 1, ¶2
[138] Notice of Arbitration, Exhibit 1, ¶3
[139] Notice of Arbitration, Exhibit 1, ¶25
[140] Notice of Arbitration, Exhibit 1, ¶43

B. Respondent Did Not Fail to Accord Claimant the Effective Means of Asserting Claims and Enforcing Rights in Domestic Court

119. The seven-year period in the enforcement proceedings as well as the ability to accord Claimant effective means of asserting claims and enforcing rights **[1]** do not amount to a breach of FET pursuant to Article 3(2) MB-BIT. In any event, the Tribunal must find through an assessment of the timeline of proceedings, **[2]** the Court did not cause undue delays and shall not be held liable for a violation of the effective means standard.

1. The failure to accord effective means does not amount to a breach of FET pursuant to Article 3(2) MB-BIT

120. The third line of the preamble states:

"*The contracting parties recognize the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration*"

121. When presented as a provision within the BIT,[141] the standard above constitutes *lex specialis* and undeniably guarantees access to the courts and the existence of institutional mechanisms for the protection of investments.[142] However, as the standard is found within the preamble of the MB-BIT instead of a provision in the treaty, it does not amount to a breach of the FET.

122. In past cases such as *White Industries* and *Chevron*, the investor invoked the effective means obligation through Article 4(5) of the India-Kuwait BIT and Article II (7) of the United States-Ecuador BIT.[143] Following the principles of International Law, the investors in both cases held the effective means of asserting claims as a primary rule, [144] allowing them to claim a breach of the provision when establishing a violation of the claimant's protection of investments.

[141] *Mondev*, ¶242
[142] *Duke Energy*, ¶393
[143] *Chevron*, ¶254; *White Industries*, ¶11.4.1
[144] Alina, p. 45

123. On the other hand, regarding the present dispute, the preamble statements of the BIT are merely products of negotiation and drafting.[145] As held by the tribunal in *SG Vs. Dominican Republic*, the preamble statement is merely a statement and not a first-order obligation for contracting states.[146] Thus, the effective means standard is not a substantive obligation and Claimant may not use it to claim a violation of the MB-BIT.

2. <u>In any event, Respondent is not liable for the breach of the effective means standard</u>

124. Even if the Tribunal finds that Claimant is permitted to invoke the effective means standard as a substantive obligation, Respondent nevertheless maintains that the standard was not breached. In order to establish whether a breach of the effective means standard has occurred, the tribunals in *White Industries* and *Chevron*[147] required an assessment on the **[a]** complexity of the proceedings, **[b]** behavior of litigants involved and **[c]** behavior of the court themselves.

a. The enforcement proceedings in relation to the Award were complex despite its commercial nature

125. Commercial disputes are complex and may require over seven years of enforcement. Within the case of *White Industries*, the decision considered the presence of the Supreme Court in the proceedings. Consequently, the occurrence of delays was reasonable to an extent and did not alarm the tribunal regarding whether it contributed into a breach of the effective means standard.[148]

126. Similarly, on 25 October 2013, the parties argued on the jurisdiction of the Commercial Bench.[149] The Supreme Court of Respondent's territory confirmed that Commercial Benches did not have jurisdiction over enforcement of the Award, thus Claimant's application was transferred to a regular bench of the Court.

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[145] Newcombe & Paradell, p. 116
[146] *SGS v. Dominican Republic,* ¶32
[147] *Chevron*, ¶250; *White Industries,* ¶10.4.10
[148] *White Industries,* ¶10.4.12
[149] Notice of Arbitration, Exhibit 1, ¶27

127. Conclusively, with the involvement of the Supreme Court, the complexity of the case must be deemed as founded, as it was not unreasonable for delays to occur upon the deliberation of their decisions regarding jurisdiction.

b. NHA's conduct during the enforcement proceedings are not attributable to Respondent

128. The conduct of NHA was constrained by an administratively burdened organization with few lawyers, hence the Court has no involvement of any kind. Through this assessment, it becomes evident that the Court imposed consequences when NHA were absent for proceedings as **[i]** they would have heard the matter *ex-parte* and **[ii]** would have taken adverse measures during the proceedings.

i. The Court declared that it would hear the matter *ex-parte*

129. Admittedly, no replacement lawyers were present during seven instances in court proceedings.[150] Consequently, in compliance with state practices regarding enforcement proceedings of awards from India,[151] Indonesia,[152] Kenya,[153] Nigeria,[154] as well as Tanzania,[155] the Court declared that it would hear the matter *ex-parte* if the NHA or any replacement lawyers failed to attend the next proceeding.

ii. Additionally, the Court also affirmed adverse measures during the proceedings for Claimant

130. On the count of another absence by the NHA on the 8 November 2012 proceeding, the Court stated that it would take adverse measures if the NHA did not appear for the next

[150] Notice of Arbitration, Exhibit 1, ¶¶22, 23, 25
[151] Desai, p. 9
[152] Carl & Reni, ¶6.8
[153] Kenya Gazette, p. 898
[154] Mayomi, p. 2
[155] Mashamba, p. 102

proceeding.[156] Hence, although the Court was unable to attend to a few of Claimant's objections due to the circumstances as an overburdened judiciary, it did impend consequences on the NHA when its conduct went against the laws of Respondent's territory. Thus, it is shown that the Court did not ignore or allow NHA's misconduct during the enforcement proceedings.

c. Respondent's judiciary did not accord liberal treatment to public counterparts thus there has not been a breach of the effective means standard

131. The more imperative assessment of the effective means entails a determination of whether the delays were caused by the judiciary.[157] However Respondent shall not be held liable for allowing delays to take place, as the standard specifically requires the Court to have caused the delays themselves.

132. In *White Industries,* when assessing the delays within the proceedings in enforcement of White's award, the Tribunal considered the circumstances of the host state. They concluded that India, as a developing country, has an over-stretched judiciary and must be held to different standards than countries like Switzerland, the United States or Australia.[158]

133. Based on the timeline of proceedings, there was a pattern adjournment, as it would last two to four months. Even when Claimant requested for a shorter adjournment, circumstances would bring the adjournments back to a longer pattern.[159] This is due to Respondent's status as a developing nation struggling with multiple critical diseases.[160] In fact, Respondent constantly made Claimant aware of this when proceedings were forcibly delayed due to lengthy arguments from other cases.[161]

[156] Notice of Arbitration, Exhibit 1, ¶21
[157] *AMTO,* §75
[158] *White Industries*, ¶5.2.18
[159] Notice of Arbitration Exhibit 1, ¶¶23, 32
[160] Facts, ¶2
[161] Notice of Arbitration, Exhibit 1, ¶¶9, 15, 20, 24, 40

134. Furthermore, the Court was not only accommodating to the NHA but also to Claimant as shown on 29 June 2013 when they granted Claimant's request for an additional hearing.[162] The Tribunal must also consider the 17 September proceeding of the same year, where the NHA submitted its objection to the jurisdiction of the commercial bench, leading to the Court questioning whether the objection should be entertained when it had not been raised on any previous occasion, evidently denying any liberal treatment towards the NHA.[163]

135. Thus, through a factual assessment, it becomes clear that the Court did not tolerate NHA's conduct in proceedings, and the delays were always caused in good faith. Therefore, the Tribunal shall conclude that there were no unreasonable extensions or adjournments granted or caused by the Court, and thus there has not been a breach of the effective means standard.

[162] Notice of Arbitration, Exhibit 1, ¶¶25, 15, 20, 24, 40
[163] Notice of Arbitration, Exhibit 1, ¶26

V. THE TERMINATION OF THE LTA BY THE RESPONDENT'S NHA DOES NOT AMOUNT TO A TREATY VIOLATION PURSUANT TO ARTICLE 3(3) MB-BIT

136. Although a unilateral termination of the LTA had taken place, the NHA did not violate the termination provision, which held that the agreement would stay valid for ten years effective from its commencement date subject to the supplier's satisfactory performance.[164] As a result, **[A]** the LTA is not protected under the ambit of the Umbrella Clause pursuant to Article 3 MB-BIT as it was legally terminated by the NHA due to Claimant's unsatisfactory performance. Consequently, **[B]** Claimant is not owed compensation for the alleged damages caused by the termination of the LTA.

A. The LTA is Not Protected Under the Ambit of the Umbrella Clause

137. In accordance with the termination provision held in Clause 6 of the LTA, the agreement can be terminated when the investor performs unsatisfactorily, which was the case herein.

138. In *Bayindir,* the M1 Motorway Project contract between Bayindir and Pakistan was terminated due to Bayindir unsatisfactory performance. This was due to Bayindir's pace of work,[165] as the engineer representatives of the Motorway Project constantly expressed their concern on Bayindir's rate of progress. Hence, the tribunal affirmed that Respondent's concerns about Bayindir's performance were deemed founded.[166]

139. Similarly, the NHA had recommended for the pricing policy of Sanior to be revisited,[167] as it was necessary due to 6400% rise in greyscale patients.[168] Even without the 65% percent discount the NHA struggled, as it cost a third of the overall state budget to provide for the poorest 100,000,[169] not taking into account the 500,000 other estimated number of greyscale

[164] Facts, ¶10
[165] *Bayindir,* ¶¶304-308
[166] *Bayindir,* ¶314
[167] Annex 3, line 1371
[168] Annex 3, line 1341
[169] Annex 3, line 1365

patients in 2006. However, Claimant refused to adapt to the circumstances and only offered to accord a 35% discount for Sanior.

140. All complaints made by the NHA in regard to the pricing of Sanior were reasonable as Claimant was not able to sell Sanior at the discounted rate that was appropriate for the critical epidemic of greyscale. Moreover, since Respondent provided proper grounds for a lawful termination of the LTA, the grounds of unsatisfactory performance are fulfilled and thus did not breach the termination provision of the LTA.

141. Therefore, the LTA does not fall under the ambit of the umbrella clause pursuant to Article 3(3) MB-BIT.

B. Respondent is Not Liable to Compensate Claimant for the Alleged Damages

142. Claimant desires to usurp the power of the local courts by requesting this PCA Tribunal to enforce the Award. However, Respondent has not failed to fulfill their obligations under the MB-BIT and Claimant had led themselves to be damaged as they performed unsatisfactorily. Presently, Claimant shall not be accorded the amount of $1.54 Billion as compensation for the alleged FET violation, non-payment of the royalty fee, as well as the Award.[170]

143. The tribunal in *Saipem* applied the Chorzow Factory principle, in which a remedy is provided to the investor as a consequence of the damages suffered due to the state's failure to fulfill their obligations regarding the investment and all situations that may have existed had the act been committed.[171]

144. However, it would be unjust for Claimant's compensation to include the royalty fees that are owed,[172] as Claimant did not respond when HG-Pharma requested for Claimant's bank details to transfer the royalties for the non-voluntary license, as established, *supra*.[173]Nor should the

[170] Notice of Arbitration, ¶14(2)
[171] *Saipem,* ¶201
[172] Notice of Arbitration, ¶5
[173] Respondent's Memorial, ¶74

compensation include the $40 million from the Award as such decision must be rendered by the Court and not this PCA Tribunal.

145. As a result, Respondent invites the Tribunal to delimit the compensation according to the facts of the case and abstain from allowing Claimant to usurp the power of the Court. Conclusively, Claimant substantially contributed to its own losses and therefore, shall not be accorded the $1.54 Billion compensation by Respondent.

PRAYERS FOR RELIEF

146. Respondent respectfully asks the Tribunal to find that:

I. It lacks jurisdiction over the present dispute in relation to the Award;
II. Claimant's claims are inadmissible pursuant to Article 2 MB-BIT;

147. Should the Tribunal find that it has jurisdiction over the present dispute, Respondent respectfully asks the Tribunal to conclude that:

III. Respondent did not breach its substantive obligations stipulated under the MB-BIT, particularly to accord fair and equitable treatment to Claimant and to observe its obligations towards Claimant's investment;

148. Should the Tribunal find that Respondent's breach of obligation cannot be exempted, Respondent respectfully asks the Tribunal to conclude that:

IV. Claimant is not entitled to USD 1,540,000,000;
V. Alternatively, Respondent cannot be ordered to perform restitution either by the pre-Award interest and post-Award or to pay all costs related to these proceedings;

Respectfully Submitted on September 25, 2017

By

Team Higgins

On Behalf of the Republic of Mercuria