TEAM HSU

FOREIGN DIRECT INVESTMENT MOOT COMPETITION
Boston, 2–5 November 2017

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 ARBITRATION RULES OF THE PERMANENT COURT OF ARBITRATION

- between -

ATTON BORO LIMITED
Claimant

- and -

THE REPUBLIC OF MERCURIA
Respondent

MEMORIAL FOR RESPONDENT

PCA Case No. 2016-74

Registry
The Permanent Court of Arbitration

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Alps	*Alps Finance and Trade AG v Slovakia* – Award, 5 March 2011
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CIM	*Compagnie Internationale de Maintenance (CIM) v Ethiopia* – Award, 1 January 2009
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ELSI	*Elettronica Sicula S.p.A. (USA v Italy)* – I.C.J, Judgment, 20 July 1989
Nicaragua	*Case concerning military and paramilitary activities in Nicaragua (Nicaragua v USA)* – I.C.J., Judgement, 27 June 1986
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WTO EC	*EC - Protection of trademarks and geographical indications for agricultural products and foodstuffs*, Panel Report, 15 March 2005
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Doha Declaration TRIPS/Public health	Doha Declaration on TRIPS and Public Health, 2001
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Wehland	Wehland – *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, 2013
Yannaca-Small	*Yannaca-Small – Parallel Proceedings in The Oxford Handbook of International Investment Law,* 2008

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Calvo Principles	International Conference of American States Adopted Principles, 1890
IISD	Nikiéma – *International Institute for Sustainable Development, Best Practices – Indirect Expropriation,* 2012
ILC Articles	International Law Commission – *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001
OECD	OECD – *The Multilateral Agreement on Investment - Commentary to the Consolidated Text*, 1998
WHO Royalties	WHO – *Remuneration Guidelines for non-voluntary use of a patent on medical technologies*, 2005

INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
BIT	Agreement Between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments, 1998
Facts	Statement of Uncontested Facts
ICSID	International Centre for Settlement of Investment Disputes
IP	Intellectual Property
L	Line
Law	Law No. 8458/09
LTA	Long-Term Agreement
New York Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
NHA	The National Health Authority
NHA Report	NHA's Annual Report, 2006
Notice	Notice of Arbitration
P.(PP.)	Page(s)
p.(pp.)	Page(s)
PCA	Permanent Court of Arbitration
PO	Procedural Order
Response	Response to the Notice
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
VCLT	Vienna Convention on the Law of Treaties, 1969
WHO	World Health Organization
WTO	World Trade Organization

STATEMENT OF FACTS

1. "*There is a sufficiency in the world for man's need but not for man's greed*."[1] The present arbitration is the work of a rapacious pharmaceutical corporation to reap ever-greater profits from a developing country, battling under significant budget constraints against a severe health crisis for more than fifteen years.

2. The Republic of Mercuria ("**Respondent**" or "**Mercuria**") is a developing country from Westeros[2] which strives to achieve greater economic welfare and universal access to healthcare for its people, as enshrined in its Constitution.[3] To pursue those goals, Mercuria cultivated an attractive and favorable environment for foreign investments by concluding a large number of BITs[4] which fostered successful partnerships with global pharmaceutical companies.[5]

3. Up to the filing of this abusive claim, Mercuria had never experienced any dispute with pharmaceutical companies, let alone been targeted in investment arbitration.[6]

4. This dispute arises out of a health crisis related to the greyscale epidemic which Mercuria faces since 2002.[7] By 2003, greyscale had already contaminated an alarming proportion of the working-age population of Mercuria and continued spreading.[8] In 2004, in light of the urgency, the National Health Authority (the "**NHA**"), a Mercurian public corporation,[9] entered into a long-term supply agreement (the "**LTA**")[10] with the

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1 Mahatma Gandhi.

2 PO3, P49:L1564.

3 PO1, P39:¶2:L1256-1257.

4 Facts, P28:¶1:L843-844.

5 PO1, P39:¶3: L1261-1262.

6 PO3, P50:L1588-1589.

7 PO1, P41:L1312.

8 Facts, P28:¶6: L872-873.

9 PO3, P50:L1593-1594.

10 PO2, P48:¶6:L1528.

Atton Boro Group, a multi-billion dollar pharmaceutical giant,[11] active all over South America, Africa[12] and Westeros.[13] Indeed, the Atton Boro Group had developed a patented treatment for greyscale ("**Sanior**"), after expending 1 billion dollars in 1990s, which it commercializes ever since in more than 50 countries worldwide.[14]

5. In only one year, between 2005 and 2006, despite Mercuria's best efforts to reduce transmission,[15] the number of greyscale patients relying on public healthcare programs soared from 10,000 to 100,000 million.[16] As the number of patients dependent of national healthcare schemes grew dramatically, so did Atton Boro's profits and Mercuria's cost overrun. In 2007 only, Atton Boro generated an income of 7.5 billion dollars under the LTA,[17] while this amount exceeded by far the financial abilities of a developing country like Mercuria.

6. Forecasts for 2008 were extremely distressing as a further doubling in demand for greyscale treatment[18] was bound to completely deplete Mercuria's financial resources while Atton Boro would continue to make egregious profits out of Mercuria's suffering.

7. NHA had no other choice than to ask Atton Boro to renegotiate the price under the LTA and to accept lesser profits – still amounting to 15 billion dollars[19] – and not bankrupt Mercuria's entire healthcare system.

8. While 15 Billion USD would have been more than enough for its needs, it was obviously not enough for its greed!

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[11] Facts, P31:¶25:L965.

[12] Facts, P28:¶24:L861.

[13] PO3, P49:L1564.

[14] Facts, P28:¶3:L857-858.

[15] PO1, P41:L1316-1318.

[16] See ¶124, FN192.

[17] See ¶124.

[18] Facts, P29:¶15:L916-917.

[19] See ¶126.

9. As Atton Boro refused this compromise, even though it ensured profits out of proportion with its initial one-billion investment, NHA was left with no choice but to stop ordering Sanior from Atton Boro and terminate the LTA.[20] Atton Boro's failure to renegotiate in good faith further plunged Mercuria into a much deeper crisis, with a shortage of medicines to tend to its greyscale patients.

10. While NHA was under considerable strain to ensure continued treatment of infected patients to prevent further transmission of the disease, Atton Boro launched arbitration proceedings in Reef, where it obtained a 40-million-dollar award (the "**Award**").[21] Enforcement proceedings are now pending in Mercuria (the "**Proceedings**").[22]

11. After two years without being able to secure an alternative source of supply for greyscale drugs,[23] Mercuria, as a means of last resort, availed itself of the possibility to grant non-voluntary licenses under the TRIPS Agreement in cases of national emergencies.[24] After enacting a law introducing compulsory licenses into its IP regime (the "**Law**"),[25] a domestic generic manufacturer was granted such license and healthcare centers across Mercuria could at last cater to the needs of greyscale patients.[26]

12. While local remedies would have been available to challenge the grant of the license,[27] the Atton Boro Group chose to divest from its investment entirely[28] and apply all its efforts in the present arbitration.

13. The initiation of this arbitration is no more than an attempt to extort payment from Mercuria, since it well knows that Mercuria's dire financial situation would not allow it

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[20] Facts, P30:¶17:L930.

[21] Facts, P30:¶17:L932.

[22] PO3, P50:L1595.

[23] PO3, P50:L1583-1584.

[24] Facts, P30:¶20:L944-946.

[25] PO1, PP44-45.

[26] Facts, P30:¶21:L947-952.

[27] PO3, P50:L1576.

[28] Facts, P31:¶25:L963-964.

to sustain the costs of prolonged arbitration proceedings.[29] The Atton Boro Group has brought its claim through a special purpose vehicle incorporated in Basheera, Atton Boro Limited ("**Atton Boro**" or "**Claimant**"),[30] in order to strong-arm Mercuria into a settlement.

14. The Claimant's conduct is shameful. It comes as no surprise that it would choose to keep these proceedings confidential!

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[29] PO1, P43:L1363-1364.

[30] Facts, P28:¶4:860.

STATEMENT OF ARGUMENTS

Jurisdiction

15. The Tribunal lacks jurisdiction to hear Claimant's claims for the following reasons.

16. *First*, Respondent validly denied Claimant the benefits of the BIT by exercising its right under Article 2(1) BIT in due course (**I**).

17. *Second*, Claimant's contractual claims do not "*arise out of or relate to*" an investment since the asset-based definition provided under Article 1(1) BIT is not self-sufficient, and neither the LTA nor the Award constitutes protected investments under the BIT (**II.A**).

18. *Finally*, the Tribunal does not have jurisdiction to hear the claims under Article 3(3) BIT as it does not extend its protection to Claimant's pure contractual claims and Respondent never entered into any obligation towards Claimant. In any event, Claimant waived its right to arbitrate contractual disputes arising out of the LTA by accepting the arbitration clause contained herein (**II.B**).

Merits

19. *First*, Respondent did not fail to observe any obligation towards Claimant protected under Article 3(3) BIT, as the termination of the LTA by NHA is not attributable to Mercuria and in any event does not constitute a breach of Article 3(3) BIT (**III**).

20. *Second,* Respondent did not violate its obligation to accord FET to Claimant under Article 3(2) BIT. Claimant was not denied justice as it failed to proceed through Mercuria's judicial system as a whole and did not adduce sufficient evidence showing that the Proceedings disregarded due process (**IV**). Conversely, Respondent submits that the enactment of the Law and the issuance of the License were well within its right to regulate under the BIT, as well as the TRIPS Agreement, in matters of public health. No assurances of the contrary were ever given to Claimant (**V**).

ARGUMENTS

PART ONE: JURISDICTION

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMANT'S CLAIMS SINCE RESPONDENT EXERCISED ITS RIGHT UNDER ARTICLE 2(1) BIT

21. Respondent invokes Article 2(1) BIT as a preliminary objection to jurisdiction. Therefore, Claimant's claims shall be dismissed and the Tribunal does not have jurisdiction to hear any claims related to the BIT (**A**). Indeed, Respondent submits that both substantive requirements under Article 2(1) BIT are met (**B**).

A. Article 2(1) contains an express prior reservation of Mercuria's right to deny the benefits of the BIT

22. Respondent's denial of Claimant's rights under the BIT qualifies as a jurisdictional objection (**1**) and satisfies the procedural requirements, *i.e.* it was notified in due course (**2**) and does not require any prior notice (**3**).

1. All claims in this arbitration shall be dismissed under the jurisdictional objection provided in Article 2(1) BIT

23. Respondent's intent to deny Claimant the benefits of the BIT is a jurisdictional objection. In *Pac Rim*, a similar provision embracing the dispute-settlement clause was recognized as a jurisdictional objection.[31] Likewise, in *Ulysseas*, since the advantages covered by the denial of benefits provision included BIT arbitration, "*a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction*"[32].

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[31] *Pac Rim*, ¶4.4.

[32] *Ulysseas Interim Award*, ¶172.

24. Indeed, the wording of Article 2(1) is all-encompassing as it reserves the right to a Contracting Party "*to deny the advantages of this Agreement*" as a whole, including the consent to arbitration provided under the dispute settlement clause.

25. Respondent draws the attention of the Tribunal to the sharp contrast between Article 2(1) BIT and Article 17 ECT, the latter's ambit not covering the consent provision.[33] Thus, all conclusions on this point from ECT tribunals are irrelevant for the present case.[34]

26. Respondent's consent to arbitration is conditional since Claimant only had a defeasible right to protection. When Claimant decided to invest in Mercuria through its Basheeran subsidiary, it was well aware that the relevant BIT contained a denial of benefits clause and that the host State, acting as a sovereign, limited its consent. It cannot allege a violation of its legitimate expectations of protection since the possibility of a future denial of benefits was part of the legal framework of the BIT. "*No one can accept more than what is being offered*" and Claimant cannot ask for more than what Mercuria agreed upon, since "*whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional*"[35].

27. Lastly, in some BITs, there is a screening procedure at entry; *i.e.* States exercise a prior control over potential investors. In this regard, the denial of benefits clause is a compromise since it welcomes all investors freely but offers a right to the State to deny later on.

28. As Respondent can deny the benefits of the BIT as a whole, the Tribunal does not have jurisdiction to hear Claimant's claims.

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33 *Plama*, ¶140.

34 *Pac Rim*, ¶4.3.

35 *Guaracachi*, ¶¶372-375.

2. All claims shall be dismissed since Respondent invoked Article 2(1) BIT in due course

29. Since the BIT's denial of benefits provision has a jurisdictional nature, a discussion of retroactive versus prospective application is not required. The provision applies when the issue is raised in the Notice and if the conditions are found to be met, then there is no jurisdiction to hear the merits of the claims.

30. Respondent invites the Tribunal to state that Article 2(1) BIT does not contain any express time limitation as to the invocation by a Contracting Party of the denial of benefits clause. All the more, it does not require that it occurs before arbitration commences as it cannot be treated as the unilateral withdrawal of that Party's consent to arbitration.[36] Indeed, a contrary interpretation would place an untenable burden on the Respondent, contrary to the ordinary meaning and purpose of the BIT,[37] as it would trigger an unfriendly behavior of States towards investors.[38]

31. Since there is no time limit in the provision, the relevant time limit is contained in the Arbitration Rules,[39] which provide that the respondent may deny the benefits to claimant at the proper stage of the proceedings, *i.e.* when raising its objection on jurisdiction,[40] no later than in the statement of defense.[41]

32. In the present case, the applicable Article 23(2) of the 2012 PCA Rules states that: "*A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defense*."

33. Therefore, Article 2(1) BIT, as a jurisdictional objection, was invoked in due course in the Response, since its right was activated upon Claimant's Notice.

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36 *Pac Rim*, ¶4.90.

37 *Pac Rim*, ¶4.85.

38 *Guaracachi*, ¶379.

39 *Pac Rim*, ¶4.85.

40 *Empresa*, ¶71.

41 *Ulysseas Interim Award*, ¶172.

3. The denial of benefits clause does not impose any prior notice requirement

34. Article 2(1) BIT does not impose on States any express prior notice requirement. Therefore, the Tribunal should not add a requirement that the Contracting Parties did not agree on.

35. This is especially true since Claimant is a long-standing pharmaceutical company with many years of experience in the sale and manufacturing of medicines, hence a wise investor that undeniably planned its investment. When analyzing the risks of the Mercurian market it had reviewed the BIT, which is not kept secret from investors.[42] It was therefore warned on the potential future denial of benefits, providing the substantive conditions are met. Claimant cannot pretend that any type of further notice was required since it specifically ventured into the Mercurian market to gain the protections of the BIT between its home State and the host State. It cannot now pretend to ignore a provision contained in the same instrument!

B. Respondent is entitled to deny the benefits to the Claimant which fall within the scope of Article 2(1)

36. The Tribunal shall not find jurisdiction over Claimant's claim since it failed to adduce sufficient evidence as to Article 2(1) requirements (**1**). Indeed, Claimant is owned and controlled by a Reefian company (**2**) and has no substantial business activity in Basheera (**3**).

1. Claimant failed to disclose sufficient evidence to establish the Tribunal's jurisdiction

37. Respondent submits that any party who initiates arbitration should establish that the alleged dispute is *prima facie* within the tribunal's jurisdiction.[43] Therefore, to guarantee the proper administration of justice, Claimant bears a general duty to disclose necessary

[42] *Guaracachi*, ¶383.

[43] *Oil Platforms*; *Jan de Nul Jurisdiction*, ¶69; *Impregilo*, ¶108; *SGS/Pakistan*, ¶145; *Bayindir Jurisdiction*, ¶197; *Abaclat*, ¶302; *Alps*, ¶248.

evidence where the information is not otherwise accessible.[44] States would face an impossible burden as they cannot be constantly informed of the corporate structure of all investors within their territory.[45] Indeed, Claimant is the only one possessing corporate documents. Furthermore, the structure of a company can constantly change throughout the life of the investment, and Respondent can only become aware of who owns or controls a company within its territory at the time when a dispute arises.[46]

38. However, in the present case, Respondent requested twice the disclosure of specific documents through the clarification requests.[47] Claimant refused each time to provide such information, especially regarding the nationality of its ultimate shareholders, while it is uncontested that "*a claimant* [should] *provid*[e] *necessary information* [on] *ownership and control* [...], *especially when reasonable doubt has been raised*"[48].

39. Respondent therefore invites the Tribunal to draw negative inferences from Claimant's persistent failure to comply with the document requests.

40. In any event, the "*paucity or ambiguity*"[49] of Claimant's submissions is insufficient to meet the substantive requirement under Article 2(1) BIT.

2. In any event, Claimant is not owned nor controlled by a national of a Contracting State

41. Claimant failed to establish it is neither owned nor controlled by a national of a Contracting State.

42. *First*, the Tribunal shall construe Article 2(1) in accordance with Article 31(1) VCLT and the *effet utile* principle. Respondent argues that "*nationals*" refers indistinctly to

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44 *Amto*, ¶65; *CCL*, p.127.

45 *Amto*, ¶65.

46 *Guaracachi*, ¶379.

47 Clarification Requests No.1 and No.2.

48 *CCL*, p.127.

49 *Amto*, ¶65.

both natural and legal persons.[50] Indeed, it cannot be contested that a legal entity can have in itself a corporate nationality.[51] Equally, the object and purpose of the denial of benefits provision, *i.e.* to exclude from the protection of the BIT "*mailbox*" companies, favors a loosened concept of ownership as encompassing all the fictitious corporate schemes solely designed at gaining the BIT's protection without contributing to the State's economy. In the present case, Claimant failed to provide evidence regarding its ultimate shareholders, hence the Tribunal shall consider its ultimate known beneficiaries at the top of the corporate chain, *i.e.* Atton Boro & Company.

43. *Second*, as to the ownership requirement, Claimant is nothing more than a mere Basheeran holding company, as it is undisputed that it is wholly owned by Atton Boro & Company, organized under the laws of Reef.[52]

44. Alternatively, as it is not necessary to prove control when ownership has already been proven,[53] if this Tribunal does not find that Claimant is owned by an entity of a third State, *quod non*, it is controlled by a Reefian company for the following reasons:

(i) Claimant's initial investments were all made by Atton Boro & Company, since all its patents were assigned by the latter.[54]

(ii) Claimant asserts that Atton Boro & Company's directors come from several countries, including Basheera and Mercuria.[55] Consequently, some do not.

(iii) The Prior Tribunal was seated in Reef[56] and Claimant's legal expenses were directed towards a Reefian lawfirm.[57]

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[50] *Veteran*, ¶545; *Yukos*, ¶537; *Hulley*, ¶536; *Khan*, ¶415.

[51] Jones.

[52] Facts, P28:¶¶2-4:L845-860.

[53] *Plama*, ¶170.

[54] Facts, P28:¶4:L862.

[55] PO3,P50:L1571.

[56] Facts, P30:¶17:L932.

[57] Notice, P2:L48-53; Response, P15:L440-445.

3. Atton Boro has no substantial business activities in Basheera

45. Claimant has failed to establish its economic connection to Basheera.

46. Indeed, Atton Boro Group incorporated Claimant in Basheera merely as a vehicle for carrying on business in South American and African countries,[58] as well as for gaining access to the protections of the BIT.

47. Claimant's business is limited to managing a portfolio of patents registered in other countries and to provide management services to Atton Boro Group affiliates. All its business activities are directed to third countries; hence any economic nor social contribution in Basheera is hardly perceptible.

48. Equally, Claimant's allegations that it is detaining a bank account and an office space[59] in Basheera, even if acknowledged by this Tribunal, are very narrow. It shows, at most, a very limited presence in Basheera, since it belongs to a leading pharmaceutical company with a wide range of activities.

49. In addition, Claimant did not produce any evidence as to the following elements:

(i) It did not prove that the funds expended in Claimant's activities originate from its own activities in Basheera and not from its Reefian parent, holding 100% of its shares.[60]

(ii) It does not provide any information regarding shareholders' and board of directors' meetings.[61]

(iii) Claimant only set up a manufacturing unit in Mercuria,[62] but did not engage in any production or commercial activities in Basheera.

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[58] Facts, P28:¶4:L859-861.

[59] Facts, P28:¶4:L863.

[60] *Pac Rim*, ¶¶4.8-4.10-4.76.

[61] *Guaracachi*, ¶217.

[62] Notice, P4:¶7:L116.

50. For all the above reasons, Claimant does not demonstrate any meaningful economic connection with its State of incorporation and therefore, does not have any substantial activities.

51. In sum, both limbs of Article 2(1) BIT are met and Respondent validly denied the benefits of the BIT. Consequently, the Tribunal lacks jurisdiction over Claimant's claims.

II. THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMANT'S CONTRACTUAL CLAIMS

52. Respondent will demonstrate that, first, the LTA and the Award are not protected investments under the BIT (**A**) and second, the Claimant's purely contractual claims do not fall within the scope of Article 3(3) BIT (**B**).

A. Claimant's contractual claims do not relate to protected investments

53. Respondent's jurisdictional objections further relate to Claimant's claims in relation to the termination of the LTA and the Proceedings of the Award (the "**Contractual Claims**").[63] In order for the Tribunal to assert jurisdiction, the Contractual Claims must qualify as "*Investment Disputes*" that *arise out of or relate to* the BIT.[64] The BIT's provisions invoked by Claimant, *i.e.* the FET set out in Article 3(2) BIT and the umbrella clause under Article 3(3) BIT, require the existence of an investment.[65]

54. The Tribunal lacks jurisdiction to adjudicate the Contractual Claims as they do not arise out of or relate to an investment.[66] Indeed, the asset-based definition provided under Article 1(1) BIT is not self-sufficient (**1**). Yet, neither the LTA (**2**) nor the Award (**3**) falls within the ordinary meaning of an 'investment'.

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63 Response, P16:¶¶3-4:L469-476, P17:¶10.1:L519-520.

64 BIT, Article 8; *Iberdrola*, ¶301.

65 BIT, Article 3(2), Article 3(3), Preamble.

66 *Romak*, ¶243.

1. The asset-based definition of an 'investment' under Article 1(1) BIT is not self-sufficient

55. In order to ascertain jurisdiction, the Tribunal should go beyond the asset-based definition of an 'investment' under Article 1(1) BIT (**a**) and apply the 'objective definition' to the LTA and the Award separately (**b**).

a) A literal interpretation of "claims to money" in Article 1(1)(c) would contradict the ordinary meaning of an investment and lead to a "manifestly absurd or unreasonable result"

56. Claimant suggests that the LTA and the Award are "*claims to money*" qualifying as protected investment under Article 1(1)(c) BIT. Respondent submits that this interpretation is meritless.

57. On the one hand, Claimant's literal interpretation of "*claims to money*" would contradict the ordinary meaning of an investment.[67] The asset-based definition of an 'investment' under Article 1(1) BIT is not self-sufficient and the term "investment" has a meaning in itself.[68]

58. On the other hand, the mechanical application of Article 1(1)(c) suggested by Claimant would lead to an outcome "*manifestly absurd or unreasonable*".[69]

59. *First*, it would render meaningless the distinction between protected investments and purely commercial transactions.[70] It is only in "*exceptional circumstances*" that commercial transactions qualify as protected investments.[71] As found in *Nova Scotia*:

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[67] VCLT, Article 31(1).

[68] *Nova Scotia*, ¶77; *Romak*, ¶180; *Capital Financial Holdings*, ¶461.

[69] VCLT, Article 32(2)(b).

[70] *Romak*, ¶¶184-185; *Joy Mining*, ¶58; *Garanti Koza*, ¶330.

[71] *Joy Mining*, ¶58; *Global Trading*, ¶56; *Romak*, ¶205; OECD, ¶11.

> "[n]*either the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute*".[72]

60. *Second*, interpreting Article 1(1)(c) BIT as encompassing arbitral awards would create a new instance of review over domestic decisions to annul, enforce or refuse enforcement of arbitral awards.[73] Indeed, any award rendered in favor of a national of a contracting party would be considered a "*claim to money*". Accordingly, the refusal or failure by the host State to enforce such an award would provide sufficient grounds for an investment tribunal to conduct a *de novo* review over this decision. Admitting such *de novo* review would directly contradict the spirit of the New York Convention, to which Mercuria and Basheera are contracting parties.[74] Its Article V only provides for limited grounds to refuse recognition and enforcement of awards.

61. *Finally*, Claimant's interpretation of "*claims to money*" leads to consider that every contract concluded with a State entity would constitute an investment providing an investment tribunal with jurisdiction over the contract.[75] In turn, this would amount to a *de facto* denunciation of the exclusive forum selection clause contained in the LTA.[76]

62. It follows that the Tribunal should go beyond Article 1(1)(c) BIT in considering whether the LTA and the Award amount to protected investments.

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72 *Nova Scotia*, ¶82.

73 *Romak*, ¶186; Bjorklund, ¶7.61; Reisman/Iravani, p.39; Mansinghka/Srikumar, pp.19-20.

74 PO2, P48:L1497-1499.

75 *Romak*, ¶187.

76 Response, P17:¶8:L505-506.

b) The objective definition of an 'investment' should apply separately to the LTA and the Award

63. In light of the above, the Tribunal shall proceed to apply the objective definition to the LTA and the Award.[77] Respondent further submits that the LTA and the Award, as two distinct agreements, should separately satisfy this objective definition.[78]

64. This view is consistent with the 'doctrine of separability' according to which an arbitration clause constitutes an agreement separate from the main contract.[79] Furthermore, an arbitral award is inherently contractual in nature due to the contractual nature of arbitrators' mission under the arbitration clause:

> "[A]*rbitrators serve as the agents of the parties that have given them authority by way of the arbitration agreement. The resulting arbitral award is considered to be* a contract *in itself that was formed by the agents on behalf of the respective parties*".[80]

65. Therefore, the LTA and the Award, as two different contracts, should separately meet the ordinary meaning[81] of an 'investment'.

2. The LTA is a purely commercial arrangement that does not fall within the ordinary meaning of an 'investment'

66. The LTA, as a "*purely commercial supply arrangement*",[82] does not meet the high threshold for considering a sales contract as an investment.[83] As Respondent will demonstrate, the LTA did not involve the required contribution (**a**) and duration (**b**)

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[77] *Romak*, ¶¶207-208; *Alps*, ¶¶231-235; *Nova Scotia*, ¶84. Within the ICSID system, *see GEA*, ¶¶141&162; *KT Asia*, ¶¶165-166; *Capital Financial Holdings*, ¶¶461-462; *CIM*; Schreuer, pp.128-134; Douglas, ¶340.

[78] *GEA*, ¶162.

[79] Bermann, p.21; Clasmeier, pp.91-93.

[80] Clasmeier, p.145 (emphasis added); Heuzé, p.3, pp.34-47.

[81] VCLT, Article 31(1).

[82] Response, P16:¶9:L500-501.

[83] *Joy Mining*, ¶58; *Global Trading*, ¶56; *Romak*, ¶205.

within the territory of Mercuria. Especially, the performance of the LTA did not amount to a risk different from that of an ordinary sales contract (**c**).

a) As a sales contract, the LTA did not involve a particular contribution to Mercuria

67. The Tribunal needs to address whether the LTA amounted to a mere "*transfer of title in performance of a sale of goods contract*" or to a "*contribution in kind*" in furtherance of Claimant's business venture in Mercuria.[84] The determinant factor is whether performance of the LTA amounts to a contribution greater than is typical for a company engaged in an ordinary sale of goods business.[85] In *Cuba v Italy*, the sale of medicine by a pharmaceutical company was found to be insufficient to qualify as a protected investment since performance of the sales contract had the immediate effect of replacing the goods sold with the agreed price.[86]

68. Claimant does not adduce any evidence demonstrating that the LTA provided for more than a series of consecutive sales of consumable goods in exchange for full payment by NHA on a periodic basis, and at predefined terms.[87]

b) The LTA did not involve a duration different from that of consecutive sales contracts

69. Respondent further submits that duration is to be measured by reference to the contribution made.[88] In the present case, the LTA amounts to consecutive sales contracts. Accordingly, the LTA cannot be understood as having a duration greater than that of each underlying instantaneous transaction under which Sanior was supplied and paid for on a periodic basis.[89]

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[84] *Romak*, ¶222.

[85] *Joy Mining*, ¶56; *Global Trading*, ¶56; *CIM*.

[86] *Cuba/Italy*, ¶219.

[87] Response, P16:¶8:L500-501; Facts, P29:¶10:L895-896.

[88] *Nova Scotia*, ¶84, ¶¶100-101; *Romak*, ¶225; *L.E.S.I.*, p.19, ¶13(iv); *Cuba/Italy*, ¶219.

[89] Facts, P29:¶10:L895-896.

c) The LTA did not involve any risk other than purely commercial risks

70. The LTA does not amount to a risk different from that arising in an ordinary commercial transaction. The possible non-payment for the goods supplied or the mere termination of an agreement are insufficient to amount to an investment risk,[90] *i.e.* a situation in which the investor cannot predict the outcome of his transaction.[91]

71. In the present case, the 'risk' allegedly assumed by Claimant under the LTA is not different from the ordinary counterparty risk inherent to any commercial transaction. This counterparty risk was further hedged by the fact that NHA committed to purchase a minimum annual order-value,[92] and Claimant was perfectly aware of NHA's contractual right to terminate the LTA in the event of unsatisfactory performance.[93] Indeed, any reasonable purchaser would terminate a contract due to its supplier's unsatisfactory performance.[94]

3. The Award is not a 'claim to money' falling within the ordinary meaning of an 'investment'

72. Contrary to Claimant's contentions, the Award, whether considered as Claimant's contractual right to payment under the LTA (**a**), or in itself (**b**), does not qualify as a protected investment.

a) The Award, as a contractual right to payment under the LTA, cannot constitute an investment

73. Even considering the Award and the LTA collectively, Respondent submits that for the Award to qualify as a protected investment, the LTA must qualify as an investment in

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90 *Nova Scotia*, ¶105; *Romak*, ¶229*; Joy Mining*, ¶57; *Global Trading*, ¶56.

91 *Romak*, ¶¶230-231.

92 Facts, P29:¶10:L896-897.

93 Facts, P29:¶10:L897-899.

94 Response, P16:¶8:L502; PO3, P50:L1594-1595; Facts, P30:¶17:L930-931.

the first place.[95] Indeed, if the underlying transaction is not an investment within the meaning of the BIT, the mere "*crystallization*" of rights arising thereunder in an arbitral award cannot transform it into an investment.[96] This is all the more true in light of Article 1(1) *in fine* BIT according to which "*any change in the form of an investment does not affect its character as an investment*".[97] This provision makes clear that the existence of an underlying investment is a condition precedent to the application of this transformation-clause.[98]

74. Since the LTA is a mere commercial transaction that does not possess the ordinary features of an investment, the Award cannot transform Claimant's contractual right to payment under the LTA into a protected investment.

b) The Award in itself does not possess the "ordinary features" of an investment

75. Investment tribunals agree that an award, on a standalone basis, does not possess the ordinary features [99] of an investment.[100]

76. Indeed, the Award involved no contribution to Mercuria.[101] As the arbitration was seated in Reef[102] and Claimant retained the services of a Reefian law firm, [103] all expenses related to this arbitration were incurred in Reef and as such, did not involve any economic activity in Mercuria.

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95 *Chevron Interim Award*, ¶184; *Saipem*, ¶127; *White Industries*, ¶7.6.10.

96 *Romak*, ¶ 211.

97 BIT, Article 1(1).

98 *Frontier*, ¶ 231; *GEA*, ¶162.

99 *Salini/Morocco*, ¶52; Douglas, pp.161-164.

100 *GEA*, ¶161; Mansinghka/Srikumar, p.18. For a refusal to consider an enforcement decision as an investment: *see Energorynok*, ¶96.

101 *GEA*, ¶162.

102 Facts, P30:¶17:L932.

103 Notice, P2:L48-53.

77. In the absence of any commitment of resources to Mercuria, the Award cannot feature the necessary requirements of risk and duration.[104] The mere risk related to the success or failure of the Reefian proceedings is an ordinary risk that any party involved in legal proceedings would bear and cannot be equated with an investment risk.

78. Finally, it cannot be argued that the Award, rendered by a tribunal seated in Reef[105] contributed in any manner to the economic development of Mercuria.[106]

79. In view of the above, the Tribunal lacks jurisdiction over Claimant's Contractual Claims which do not arise out of or relate to an "*Investment Dispute*".

B. Claimant's Contractual Claims fall outside the scope of Article 3(3) BIT

80. To establish jurisdiction under Article 3(3) BIT, Claimant must prove cumulatively that: (*i*) Respondent "*entered into*" (*ii*) a protected "*obligation*" (*iii*) "*with regard to investments*". As demonstrated above, the last condition is not fulfilled since Claimant has not made a protected investment under the BIT.[107]

81. Nor are the two other conditions met, as Article 3(3) BIT does not cover Claimant's mere contractual claims under the LTA (**1**) to which Mercuria was never party (**2**). Finally, by accepting the LTA's dispute resolution clause, Claimant waived its right to arbitrate disputes arising thereof under the BIT (**3**).

1. Claimant's pure contractual claims are not covered by the scope of Article 3(3) BIT

82. Respondent does not share the view that umbrella clauses do not protect obligations arising out of contracts,[108] as this would deny any *effet utile* to the provision. Nor is it

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[104] *Romak*, ¶207; *Nova Scotia*, ¶100; *GEA*, ¶162; *Abaclat*, ¶¶346-351; *KT Asia*, ¶¶165-167.

[105] Facts, P30:¶17:L932.

[106] *Salini/Morocco*, ¶57; *White Industries*, ¶7.4.18.

[107] *Garanti Koza*, ¶330.

[108] *SGS/Pakistan*, ¶166.

appropriate to consider that every contractual obligation shall be protected as a treaty obligation by way of *umbrella* clauses.[109] Such approach is "*unpersuasive*" as it would transform all contractual obligations of States under municipal law into international law obligations.[110]

83. Therefore, in determining which obligations are protected by Article 3(3) BIT, this Tribunal shall adopt a balanced approach to avoid "*destructive*" consequences of transforming any minor undertaking into a treaty obligation.[111]

84. *First*, while Respondent accepts that contractual obligations in general, may be covered by the ordinary meaning[112] of the wording "*any obligation*" of Article 3(3) BIT, its scope remains limited to State's "*sovereign*" obligations, excluding simple commercial obligations.[113] This view is consistent with the purpose of the Treaty's substantive provisions,[114] which is to protect foreign investors from the abuse of public powers.[115] Moreover, Mercuria did not intend for trivial disputes under ordinary commercial contracts to be arbitrated under the BIT.[116]

85. *Second*, for a contractual claim to be protected by the Treaty, it must be brought under a substantive treaty standard.[117] Article 3(3) not being an autonomous provision, its protection will only be triggered if a contract claim also involves a violation a treaty standard of protection, such as FET, full protection and security, MFN, etc.[118]

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109 *Noble Ventures*, ¶54; *SGS/Philippines*, ¶127.

110 McLachlan/Shore/Weiniger, ¶¶4.152-4.155.

111 *El Paso Jurisdiction*, ¶82.

112 VCLT, Article 31(1).

113 *El Paso Jurisdiction*, ¶¶79-81; *Pan American*, ¶¶108-109; *Joy Mining*, ¶72.

114 VCLT, Article 31(1).

115 McLachlan/Shore/Weiniger, ¶4.156.

116 *SGS/Pakistan*, ¶167.

117 *Joy Mining*, ¶75, ¶81.

118 *El Paso Jurisdiction*, ¶¶84-85.

Otherwise, an investment tribunal lacks jurisdiction under an umbrella clause over a claim arising exclusively out of a commercial contract.[119]

86. Claimant alleges that the termination of the LTA breached Article 3(3)[120] and yet, does not claim that this termination constitutes a violation of any substantive treaty standard, thus relying solely on the umbrella clause.

87. Moreover, the obligations under the LTA are not "*sovereign*" in nature. They are contained in a sales contract[121] under which NHA, acting as an independent commercial party,[122] would purchase Sanior at a fixed price.[123] As a result, Claimant's pure contractual claims do not fall within the scope of Article 3(3).

2. *Article 3(3) BIT cannot be usefully invoked as Respondent was never party to the LTA*

88. To assume jurisdiction, the Tribunal shall still determine whether Respondent "*entered into*" the LTA. Thus, the relevant act here is the conclusion of the LTA. However, Mercuria never concluded any agreement with Claimant (**a**) and the LTA's conclusion is not, in any event, attributable to Respondent (**b**).

a) Mercuria, as distinct from NHA, never "entered into" any obligation towards Claimant

89. Article 3(3) BIT requires privity of the underlying contract equally on the side of the State and the investor,[124] as a precondition to trigger the protection.[125] The privity

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119 *El Paso Jurisdiction*, ¶85; *SGS/Pakistan*, ¶¶161-162.

120 Notice, P5:¶13:L147-148.

121 Facts, P29:¶10:L895-896.

122 Notice, P16:¶8:L500-501.

123 Facts, P29:¶10:L896-897.

124 *Oxus*, ¶368, ¶848; *WNC*, ¶334; *Azurix*, ¶384; *Siemens*, ¶205.

125 Salacuse, ¶11.6; *Hamester*, ¶347; *EDF/Romania*, ¶317.

condition shall be read together with Article 8 BIT,[126] as it limits jurisdiction to disputes between "*an investor of one Contracting Party and the other Contracting Party*". The wording "*entered into*" refers to the terms "*it*" and "*Contracting Party*". Here, the Contracting Parties to the BIT are Mercuria and Basheera.[127] Consequently, the protected contractual obligations may only be those "*entered into*" by Mercuria itself.[128] If a contract is signed by a different entity, jurisdiction under the umbrella clause is precluded.[129] Finally, Article 3(3) does not have the effect of altering the parties to the protected obligation,[130] this question remains governed by the *lex contractus*.[131]

90. Indeed, NHA remains the *obligor* as it "*entered into*" the LTA, not Respondent, and Atton Boro – the *obligee*, as their status as contracting parties cannot be altered for the purposes of the umbrella clause. Thus, this tribunal lacks jurisdiction, as the privity requirement is not met under Article 3(3) BIT.

b) In any event, the conclusion of the LTA by NHA is not attributable to Respondent

91. The following discussion is only relevant if this Tribunal decides that Article 3(3) does not require privity and extends its protection to contracts of separate entities. In such case, the Tribunal cannot rely on the ILC Articles to determine whether Respondent "*entered into*" the LTA, as they are only applicable to attribute wrongful acts and cannot be used "*for other purposes for which it may be necessary to define the State or its Government*."[132] Moreover, being secondary rules, they cannot be invoked in the absence of a violation of a primary rule.[133]

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126 *Impregilo*, ¶¶211-216.

127 BIT, Preamble.

128 McLachlan/Shore/Weiniger, p.140.

129 *Alpha*, ¶424; *Impregilo*, ¶223; *Amto*, ¶110; *Nagel*, ¶163.

130 *CMS Annulment*, ¶95(c); Sasson, p.188.

131 *Hamester*, ¶347; McLachlan/Shore/Weiniger, ¶4.225; Sasson, p.188.

132 ILC Articles, Commentary, Chapter II, ¶5; Sasson, p.186.

133 ILC Articles, General Commentary, ¶1.

92. But even assuming *arguendo* that they are applicable, the conclusion of the LTA is still not attributable to Respondent as none of the criteria set forth by Articles 4, 5 and 8 ILC are met.

i) NHA is not a State organ under Article 4 ILC

93. Pursuant to Article 4 ILC, acts of State organs are attributable to that State under international law. Further, to determine whether an entity is a State organ, the Tribunal shall refer to its "*status in accordance with the internal law of the State.*"[134] Consequently, if under its domestic law, the entity has a distinct legal personality from that of the State, it cannot be a State organ.[135]

94. In the present case, NHA was instituted by trusts and was accorded a status of a public sector corporation, distinct from the State of Mercuria.[136] It contracts obligations on its own behalf,[137] and as a corporation with legal personality, it can be sued in its own name and was party to arbitration proceedings with Claimant before the Prior Tribunal.[138] Accordingly, NHA is not a State organ of Mercuria.

95. Moreover, NHA cannot be regarded as a *de facto* State organ since an entity with distinct legal personality may only "*in exceptional circumstances be equated to an organ of a State*."[139] The applicable test in this regard is that of "*complete dependence on the State*", requiring proof of "*great degree of State control.*"[140]

96. However, this condition is not met, as NHA operates independently from Respondent and is partially funded with private contributions.[141] Also, to conduct its activities NHA

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[134] ILC Articles, Article 4(2); *Ulysseas Final Award*, ¶126; *Hamester*, ¶183; *Jan de Nul Award*, ¶160.

[135] *Bayindir Award*, ¶119; *EDF/Romania*, ¶190; *GEA*, ¶262.

[136] PO3, P50:L1592-1593.

[137] Facts, P29:¶9:L891-894.

[138] Facts, P30:¶17:L931.

[139] Crawford/Pellet/Olleson, p.243.

[140] *Bosnian Genocide*, ¶¶392-393.

[141] PO3, P50:L1592-1593.

does not require any approval from Respondent.[142] The relationship between NHA and the Ministry of Health is a mere cooperation, since such entities cannot "*operate in an institutional or regulatory vacuum*" and may have links with other authorities.[143] Therefore, NHA, not being a *de jure* nor a *de facto* State organ, its acts are not attributable to Respondent under Article 4 ILC.

ii) NHA did not exercise governmental authority when it entered into the LTA under Article 5 ILC

97. Attribution under Article 5 ILC requires to prove cumulatively that: (i) the entity is empowered to exercise governmental authority; (ii) and the exercise of this capacity "*in the particular instance*".[144] Accordingly, the general exercise of governmental authority is not sufficient and the act in question must also be accomplished in such capacity.[145] Therefore, if such conduct concerns "*private or commercial activity in which the entity may engage*",[146] there could be no attribution of such act to the State.[147] For example, a conclusion by an entity, empowered with public powers, of a commercial agreement for renovation of a property, without the need for State's approval, does not relate to the exercise of governmental authority.[148]

98. In the present case, NHA is not empowered, under the law of Mercuria, to exercise governmental authority. Acting in commercial capacity, it "*entered into*" a simple sale of goods contract,[149] for which it did not need any authorization from the government, and the latter was not even involved in the negotiations of the LTA.[150] Therefore, the

142 PO3, P50:L1594.

143 *Bayindir Award*, ¶119.

144 ILC Articles, Article 5; *Jan de Nul Award*, ¶163.

145 *Almas*, ¶214; *Hamester*, ¶193; *Bayindir Award*, ¶122.

146 ILC Articles, Commentary, Article 5, ¶5.

147 *Hamester*, ¶201; *Bosh*, ¶¶176-177; *Almas*, ¶219; *Bayindir Award*, ¶123.

148 *Bosh*, ¶177.

149 Facts, P29:¶9:L891.

150 PO3, P50:L1594.

conclusion of the LTA by NHA is a mere business decision and not a sovereign conduct capable of proving attribution under Article 5 ILC.

iii) NHA was not controlled by Mercuria when it entered into the LTA for the purpose of Article 8 ILC

99. Article 8 ILC attributes conduct of entities to the State if such entities act "*on the instructions of, or under the direction or control of that State*". The applicable test is the high threshold test of "*effective control*",[151] requiring to prove both "*a general control of the State*" over the entity and "*a specific control*" over the act in question.[152]

100. Regarding the "*general control*", NHA operates in complete independence from Mercuria[153] and merely provides the Ministry of Health with annual reports[154] and recommendations on health problems.[155]

101. Regarding the "*specific control*", it was NHA who wrote an invitation to Atton Boro to make an offer for supplying Sanior,[156] not the Ministry. The negotiations and conclusion of the LTA were conducted by NHA exclusively, without any involvement on the part of the government[157] which proves the absence of any "*control*", "*instructions*" or "*direction*" of Respondent necessary to establish attribution under Article 8 ILC.

102. Since it was demonstrated that the conclusion of the LTA is not attributable to Mercuria under the ILC Articles, this Tribunal lacks jurisdiction to hear the claims under Article 3(3) as Respondent did not "*enter into*" any obligation towards Claimant.

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151 *Teinver*, ¶722; *Tulip*, ¶¶304-305.

152 *Nicaragua*, ¶99; *Jan de Nul Award*, ¶173; ILC Articles, Article 8, Commentary, ¶7.

153 Facts, P50:L1591.

154 Facts, P28:¶6:L872, P29:¶13:L907.

155 Facts, P29:¶7:L881.

156 Facts, P29:¶9:L891.

157 PO3, P50:L1594

3. *By accepting the LTA's arbitration clause, Claimant waived its right to bring contractual claims under the BIT*

103. First, an exclusive forum selection clause constitutes a waiver to arbitrate under a BIT, if the agreement containing it post-dates that BIT.[158] Indeed, when NHA and Atton Boro concluded the LTA in 2004,[159] the BIT had already been in force for over seven years.[160] Yet, they did not choose the dispute resolution options under the BIT and, on the contrary, agreed to submit their future disputes under the LTA to an exclusive jurisdiction of the Prior Tribunal.[161] This Tribunal should not disregard the will of the parties to the LTA.

104. Second, a contractual forum selection clause precludes the exercise of jurisdiction under a BIT "*in relation to contractual claims even in the absence of an explicit provision to that effect*".[162] It is only when it comes to treaty claims that the waiver has to be explicit.[163] This approach is consistent with the view that an investment tribunal shall give effect to any contractual forum clause "*where the essential basis of a claim brought before* [it] *is a breach of contract.*"[164] In other terms, so far as contract claims are involved, the BIT's dispute settlement provision cannot override a contractual arbitration clause,[165] which constitutes an effective waiver of the right to arbitrate contractual disputes under the BIT.

105. Here, the Claimant's pure contractual claims, based entirely on the allegedly wrongful termination of the LTA, cannot be "dressed up" as treaty claims by mere application of the umbrella clause. Thus, by agreeing to a contractual forum provided for in the LTA,

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158 Wehland, ¶3.112.

159 PO2, P48:¶6:L1528.

160 Facts, P28:¶1:L840.

161 Facts, P30:¶17:L931-932.

162 Wehland, ¶3.113; *Saluka Jurisdiction*, ¶¶56-58; *Malicorp*, ¶103.

163 Wehland, ¶3.113.

164 *Vivendi I Annulment*, ¶98.

165 *SGS/Philippines*, ¶143; *SGS/Pakistan*, ¶¶161-162; *Saluka Jurisdiction*, ¶57.

and submitting its contractual claims before the Prior Tribunal,[166] which conclusively resolved the dispute with NHA, Claimant definitively waived its right to arbitrate the same contractual claims before an investment tribunal. Therefore, this Tribunal lacks jurisdiction over the claims under Article 3(3).

166 Facts, P30:¶17:L931; Response, P17:¶8:L506.

PART TWO: MERITS

III. RESPONDENT DID NOT FAIL TO OBSERVE ANY OBLIGATION TOWARDS CLAIMANT PROTECTED UNDER ARTICLE 3(3) BIT

106. Even if the Tribunal should consider that it has jurisdiction over Claimant's claim under Article 3(3) BIT, Claimant failed to prove a breach of said Article. Neither of the two conditions of Article 2 ILC are met to characterize an internationally wrongful act, as the termination of the LTA is not attributable to Respondent (**A**), and in any case, such act would not constitute a breach of Article 3(3) BIT (**B**).

A. The termination of the LTA by NHA is not attributable to Respondent under Articles 4, 5 and 8 ILC

107. As demonstrated above, the termination of the LTA is not attributable to Respondent as NHA is not a State organ in the sense of Article 4 ILC.[167] Moreover, when terminating the LTA, it did not exercise governmental authority, nor did it act under the instruction, control or direction of Respondent.

108. Under Article 5 ILC, attribution requires that the precise act be performed in the exercise of governmental authority.[168] Accordingly, Claimant must demonstrate that the act was "*not merely an act that could be performed by a commercial entity*".[169] Indeed, if "*the termination was in purported exercise of contractual powers*" there could be no attribution under Article 5 ILC.[170]

109. Any reasonable purchaser could have terminated the LTA for unsatisfactory performance. By invoking Claimant's unsatisfactory performance, NHA merely exercised a contractual right. Claimant might argue that the budget concerns

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[167] *See* ¶¶93-96.

[168] *See* ¶¶97-98.

[169] *Hamester*, ¶193.

[170] *Almas*, ¶251.

surrounding the health crisis caused the LTA's termination, and that such concerns bear a governmental 'touch'. However, the State cannot be held responsible for NHA's funding and subsequent decisions.[171] Therefore, NHA did not exercise 'governmental authority' when it terminated the LTA.

110. Regarding Article 8 ILC, Respondent has already established[172] that it attributes conduct of an entity to the State only under exceptional circumstances[173], in case of "effective control", *i.e.* State control of the entity in general *and* in the specific instance.

111. Claimant fails to provide clear evidence of any instruction, direction or control given by the State to NHA to terminate the LTA. General statements by the Minister for Health expressing "*concern*" over the number of greyscale cases months before the termination, or a meeting between the Director of NHA, the Minister and the President of Mercuria[174] cannot constitute meaningful evidence of control, direction or instructions of Respondent over the termination, such as for instance "*express clearance*" of the government to terminate the contract[175]. This is all the more true as NHA had announced, well before the above-mentioned meeting that it would be "*compelled to terminate the agreement*" failing renegotiation of the price of Sanior.[176] The high threshold of Article 8 ILC is thus not met.

112. In light of the above, the termination of the LTA cannot be attributed to Respondent, and this Tribunal is thus not required to examine whether the termination of the LTA would amount to a breach of Article 3(3).

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171 *Amto*, ¶108.

172 *See* ¶¶99-100.

173 *EDF/Romania*, ¶200.

174 Facts, PP29-30:¶¶15-16.

175 *Bayindir Award*, ¶125, ¶128.

176 Facts, P29:¶15:L918-921.

B. In any event, the termination of the LTA does not amount to a breach of Article 3(3) BIT

113. Respondent cannot be held liable for a breach of Article 3(3) BIT as Claimant has not proved a breach of NHA's obligations under the LTA (**1**) and in any case, the termination of the LTA could not amount to a breach of Article 3(3) BIT (**2**).

1. Claimant has not established that NHA breached the LTA

114. This Tribunal is not bound by the findings of the Award which has no *res judicata* effect in the present proceedings (**a**). To the contrary, the Tribunal should re-examine the Award (**b**) and find that Claimant has not adduced sufficient evidence to prove that NHA breached the LTA (**c**).

a) The Award has no res judicata effect over this Tribunal

115. It is well established that an international tribunal is not bound by a previous decision rendered by a domestic tribunal, as the decisions of such courts "*cannot constitute res judicata vis-à-vis international courts and tribunals that belong to a different legal order*".[177]

116. In the present case, the decision of the Prior Tribunal established pursuant to the LTA's arbitration clause and applying the *lex contractus* belongs to the national legal order and cannot have *res judicata* effect upon this Tribunal.

117. This Tribunal is therefore free to re-examine the matter and arrive at a different conclusion than that of the Prior Tribunal.

[177] Yannaca-Small, p.1017; *See* also Brownlie, p.50; McLachlan/Shore/Weiniger, ¶4.14; *Al Tamimi*, ¶358; *Industria Nacional Annulment*, ¶87.

b) The Tribunal should reach its own conclusion regarding the alleged breach of the LTA

118. In the absence of a binding effect, a prior decision of the national legal order is "*open to evaluation on the international plane*",[178] especially where there is an objection as to its validity.

119. Indeed, the *Malicorp* tribunal re-examined the rescission of a contract "*to take account of the fact that the* [prior commercial] *award has been criticised by the Respondent*", which "*refuse*[*d*] *to submit to that decision or to accept its conclusions*".[179] The Annulment Committee endorsed this approach whereby the tribunal identified the questions that arose under national law and reviewed the prior tribunal's analysis to reach its own conclusions.[180]

120. In the present case, NHA criticized the Award by making a public policy objection to its enforcement in Mercuria, and the Proceedings before the High Court are still pending.[181] In this context, it is clear that this Tribunal needs to re-examine the conclusions of the Award to decide upon the claim under Article 3(3), especially as Respondent was not party to the prior proceedings.

c) Claimant has not adduced sufficient evidence to establish that the termination of the LTA is wrongful

121. NHA was constrained to terminate the LTA for unsatisfactory performance as Claimant failed to discharge its duty to renegotiate the contractual terms in good faith.

122. Pursuant to a well-recognized principle of international commercial law, where the performance of a long-term contract becomes excessively onerous for a party due to an adverse change of circumstances, the other party has a duty to renegotiate its terms in

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178 McLachlan/Shore/Weiniger, ¶¶4.14-4.15.

179 *Malicorp*, ¶¶103(d), 130.

180 *Malicorp Annulment*, ¶¶159-160.

181 PO3, P50:L1595.

good faith.[182] All modern sets of transnational contractual rules include a clause concerning such a fundamental change to a contract's equilibrium and provide for the duty to renegotiate the contractual terms.[183]

123. It cannot be seriously questioned that NHA faced substantially altered circumstances in 2008. While in 2005, the number of patients relying exclusively on public health schemes to obtain greyscale treatment was 10,012,[184] it increased to 100,000 by the end of 2006.[185]

124. The cost of greyscale treatment in the fourth quarter of 2006 ("**Q4(2006)**") represented 250 million USD.[186] While this amount already constituted a major budget constraint, NHA had to double its orders under the LTA in each quarter of 2007 to cope with an ever-increasing demand for treatment,[187] leading to an overall annual cost of <u>7.5 billion USD</u>.[188] This figure represented over 37 times the annual greyscale budget[189] and was more than double the national health budget of Mercuria.[190]

125. At the beginning of 2008, NHA estimated that the number of patients in its care would again double in 2008,[191] resulting in a projected annual cost for 2008 of <u>32 billion USD.</u>[192] Had NHA continued to perform the LTA under the initial terms, it would have had to disburse in 2008 an amount representing 160 times the annual greyscale budget

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182 Fouchard/Gaillard, ¶¶1482-1483.

183 *See* UNIDROIT Principles of International Commercial Contracts (2010), Article 6.2.3(1); Principles of European Contract Law, Article 6:111.

184 NHA Report, P43:L1359-1360.

185 NHA Report, P43:L1360-1361.

186 Q4(2006) = 1 billion USD / 4 quarters = 250 million USD.

187 Facts, P29: ¶15:L916-917.

188 Q1(2007) = 2 x 250 million USD = 500 million USD; Q2(2007) = 1 billion USD; Q3(2007) = 2 billion USD; Q4(2007) = 4 billion USD; overall annual cost (2007) = 7.5 billion USD.

189 NHA Report, P29:L1361-1362; greyscale program budget = 1 billion USD / 5 = 200 million USD.

190 NHA Report, P29:L1361-1362; national health budget = 1 billion USD x 3 = 3 billion USD.

191 Facts, P29:¶15:L918-921.

192 The number of patients was 1,600,000 in Q4(2007) and rose to 3,200,000 in 2008.

and 11 times the national health budget. In addition, these figures represent minimal values to account for NHA's costs, as they only take into account the most vulnerable patients depending entirely on the national healthcare system.[193]

126. It is in this dramatic context that early 2008, NHA informed Claimant of the imperative need to renegotiate the price of Sanior.[194] Although Claimant's profits in 2007 multiplied by 16 to reach 7.5 billion USD in 2007,[195] it refused to engage in any meaningful negotiation by offering a mere 10% discount. Claimant's bad faith is further evidenced by the fact that under the 40% discount conditions proposed by NHA,[196] Claimant would still have earned 15 billion USD for the sale of Sanior in Mercuria,[197] representing around 15 times the alleged cost of developing and putting to market Sanior's active ingredient,[198] while the medicine is marketed in over 50 countries.[199]

127. Nevertheless, NHA terminated the LTA only 6 months after its first attempt to renegotiate it,[200] when performance has become virtually impossible.

128. Notwithstanding these exceptional circumstances, the Prior Tribunal considered, somewhat surprisingly, that NHA's termination was wrongful. Whether such a decision is not contrary to public policy under Mercurian law is currently disputed before the High Court. In any event, this Tribunal should conclude that NHA had a valid reason to terminate the LTA in light of Claimant's failure to discharge its duty of renegotiate the

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193 NHA Report, P29:L1363-1366.

194 Facts, P29:¶15:L919-920.

195 Facts, P29:¶15:L916-917.

196 Facts, P30:¶15:L923-925.

197 The projected annual order value would have represented 32 billion USD under the initial terms of the LTA, at the 25% discounted rate. Under the proposed 40% discounted rate, it would have represented 15 billion USD. The 40% discount in addition to the 25% discount represents 35%/75% x 32 billion USD = 15 billion USD).

198 PO3, P50:L1600-1601.

199 Facts, P28:¶3:L856-858.

200 Facts, P30:¶17:L930-931.

LTA in good faith. However, should the Tribunal requires additional evidence on this point, the Parties should be allowed to present further submissions.

2. *NHA's termination of the LTA, as a mere exercise of contractual rights, cannot constitute a violation of Article 3(3) BIT*

129. *First*, Article 3(3) BIT shall not be interpreted as providing protection against any breach. "[W]*hat is unlawful in the municipal law may be wholly innocent of violation of a treaty provision*".[201] The contrary would necessarily create unreasonable consequences as any minor breach of contract could amount to a treaty breach.[202] Therefore, where the umbrella clause does not provide sufficient limits, restrictions should be applied to balance its interpretation.[203]

130. *Second*, only the State in the exercise of its sovereign authority, and not as ordinary contracting party, assumes obligations under a BIT.[204] To determine whether Mercuria breached Article 3(3), the Tribunal should determine if there was any "*interference in the contract execution through governmental action*",[205] and not simply *"situations in which a State acts merely as a contractual partner"*.[206]

131. The failure for a State to perform its contractual obligations does not result in a treaty breach, unless it "*has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign*".[207] Such *iure imperii* condition cannot be assimilated with attribution under the ILC Articles,[208] as they set an additional requirement: a conduct could very well be attributed to the State and yet constitute a

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[201] *ELSI*, ¶73.

[202] *SGS/Pakistan*, ¶167.

[203] *Pan American*, ¶99; *Joy Mining*, ¶81.

[204] *Impregilo*, ¶260; *Salini/Jordan*, ¶155.

[205] *Siemens*, ¶253.

[206] *Almas*, ¶279; *Joy Mining*, ¶72.

[207] *Azurix*, ¶53.

[208] ILC Articles, Article 4, Commentary, ¶6.

mere commercial act. As such it is not covered by the scope of the umbrella clause in Article 3(3) BIT. In any case, there is still no evidence that NHA used sovereign powers.

132. On the contrary, NHA did not step outside its role as an ordinary contracting party acting in a purely "*commercial capacity*".[209] As a matter of fact, NHA terminated the LTA on the basis of a contractual provision,[210] as a consequence of Claimant's refusal to renegotiate the initial price of Sanior. The Prior Award's appreciation of NHA's contractual termination does not affect the nature of the act, *i.e.* the absence of sovereign powers.

133. Moreover, Claimant fails to prove any link between the meeting of the Director of NHA with the Minister for Health and the LTA's termination. The sole existence of this meeting is insufficient to demonstrate that NHA used sovereign powers to terminate the LTA. Therefore, Claimant cannot reasonably argue that the termination was not a purely commercial decision.

134. Therefore, the termination of the LTA constitutes a mere exercise of contractual rights that cannot amount to a violation of Article 3(3) BIT by the State.

IV. NO DENIAL OF JUSTICE WAS COMMITTED BY MERCURIA'S JUDICIAL SYSTEM

135. Claimant was not denied justice as it failed to proceed through Mercuria's judicial system as a whole (A) and did not adduce sufficient evidence that the Proceedings disregarded due process (B).

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209 Response, P17:¶8:L500-507.

210 Facts, P30:¶17:L930.

A. Mercuria's entire court system was not given the opportunity to decide on the Proceedings

136. Under the customary minimum standard of treatment, "denial of justice implies the failure of a national legal system as a whole to satisfy minimum standards".[211]

137. The Contracting Parties did not intend to create broader obligations regarding justice than that provided for by the minimum standard as the BIT's Preamble does not create any substantive obligation.[212]

138. In assessing denial of justice, tribunals operate a minimum control respecting sovereign States' independence. In this regard, States, to the greatest extent possible, are free to organize their judicial system as they deem fit.[213] The national legal systems are presumed to function in conformity with international law requirements.[214]

139. Hence, the interference in internal affairs can only be accepted in very limited circumstances, *i.e.* if the conduct is sufficiently egregious to shock or at least surprise a sense of judicial propriety.[215] As stated by the *Glamis Gold* tribunal:

> "*To violate the customary international law minimum standard of treatment* [...] *an act must be sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons - so as to fall below accepted international standards.*"[216]

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211 Paulsson, p.130.

212 Newcombe/Paradell, p.154; *Bayindir Jurisdiction*, ¶230.

213 Paulsson, p.108.

214 Freeman, p.56; Paulsson, p.117.

215 *ELSI* ¶128; *Loewen* ¶132; *Jan de Nul Award* ¶192; *Chevron Partial Award*, ¶244; *Arif*, ¶445.

216 *Glamis Gold*, ¶22.

140. Moreover, such an interference in internal affairs can only be admitted if the judicial system of the State has been tested as a whole, including the appellate and review mechanisms composing its system of checks and balances.[217]

141. As such, the exhaustion of local remedies is a substantial element of denial of justice: the responsibility of the State can only be engaged if a definitive decision by a court of last resort has been rendered.[218] Hence, the isolated conduct of a lower court cannot amount to denial of justice.[219]

142. The premise of this finality requirement is to ensure that the treatment of nationals is not unduly disadvantaged in comparison with that of aliens who have accepted to be subject to the same domestic framework.[220]

143. As it serves a different purpose, this finality requirement of denial of justice should be distinguished from the admissibility requirement of the local remedies rule.[221] In fact, the question is not whether the claim can be brought on the international plane, but rather whether the responsibility of the State can be engaged. This distinction implies the application of a different regime to both rules. Indeed, while an offer to arbitrate in the BIT can operate as a waiver of the admissibility rule, it cannot be so for the finality requirement of denial of justice.[222] Consequently, the exceptions that apply to the admissibility requirement are broader than that of the finality requirement.

144. In application of the finality requirement, delays cannot, in principle, amount to a denial of justice.[223] Claimant must additionally prove that it was in the absolute impossibility to go through the entire court system and obtain a final decision.

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217 *Jennings*; Oppenheim pp.543-545; Freeman, pp.291-292, 311-312.

218 Freeman, p.413.

219 *Loewen*, ¶154; Paulsson, p.109.

220 Calvo Principles; Freeman, p.714.

221 *Loewen*, ¶159; Paulsson, p.105.

222 *Loewen*, ¶¶159-164.

223 Guerrero Report.

145. The *Loewen* tribunal set a very high threshold for exceptions to the finality rule, considering that despite "*the practical impact on Loewen's right of appeal*", it was not completely impossible for claimant to go through the entire court system.[224]

146. In the present case, no evidence was brought that the delays were so important as to render impossible for Claimant to avail itself of the entire judicial system of Mercuria. Conversely, the Proceedings complied with due process.

B. The High Court conducted the Proceedings in due process of law

147. If the Tribunal decides to examine the conduct of the Proceedings despite Claimant's failure to exhaust local remedies, Respondent submits that the Proceedings entirely complied with the minimum standard of treatment as the delays were justified and the judge was impartial.

148. <u>As to the delays</u>, international law does not set a specific time limit for delays to amount to denial of justice,[225] nor does the New York Convention impose a time limit for enforcement of foreign awards. In some cases, 9 or 10 years of proceedings did not amount to denial of justice.[226] Tribunals also find relevant that the investor's applications are heard within months instead of years.[227]

149. Whether delays qualify as denial of justice requires a fact-specific analysis, taking into consideration the complexity of the Proceedings, the Court and Claimant's behaviors, and Claimant's need for a speedy resolution.[228]

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224 *Loewen*, ¶¶210-217.

225 *Toto Award*, ¶155.

226 *Jan de Nul Award,* ¶204.

227 *White Industries,* ¶10.4.17, ¶10.4.22.

228 *Chevron Partial Award,* ¶250; *White Industries* ¶10.4.10; *Toto Award* ¶163.

150. The complexity of the issues is a determinant factor and is to be evaluated under national law, considering each phase of the proceedings separately, in light of the parties' submissions.[229]

151. NHA raised a public policy exception which constitutes the most complex ground for non-enforcement under the New York Convention. It also constitutes a critical issue under national law as the Supreme Court issued a decision regarding the obligation to renegotiate in case of change of circumstances.[230]

152. In addition to the merits phase, both parties submitted complex matters to the Court. Precisely, Claimant raised a jurisdictional issue regarding the jurisdiction of the Special Benches, in disregard of the Commercial Act.[231] The transfer of the case was unfounded and led to almost one year delays.

153. Conversely, NHA submitted a procedural issue relating to the amendment of its submissions aiming at shedding light on Mercurian law regarding public policy as recently interpreted by the Supreme Court.[232] This submission was justified and was admitted by the Court.[233] Atton Boro, by contesting this amendment application acted in an excessively formalistic manner that obliterated the fact that a decision disregarding the Supreme Court's decisions would have great chances to be overturned by an appellate court. This obstructive behavior on the part of Claimant led to over 2-year delays.

154. Still in this formalistic line of behavior, Claimant asked to reply to NHA's response to the application – which was not indispensable since it had already submitted its arguments in the application.[234]

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229 *Jan de Nul Award*, ¶204; *White Industries,* ¶¶10.4.11-10.4.12.

230 Notice, P8:¶16:L245-250.

231 Notice, P10:¶26:L291-294, ¶28:L301-307.

232 Notice, P8:¶16:L245-250.

233 Notice, P11:¶36:L328-330.

234 Notice, P7¶10:L.220-221.

155. Despite these procedural drifts, the Proceedings were never stalled. Both additional issues raised by the parties were decided by the Court which behaved in great diligence, asking NHA to submit its arguments shortly,[235] and warning it that it would take adverse measure in case of absence.[236] It nevertheless tolerated absences, in conformity with Mercurian law, particularly when a medical certificate was furnished or when the parties started amicable settlements.[237]

156. The Court ceased to set hearings after the parties submitted they were attempting these amicable settlement. As it is Atton Boro's turn to make its oral submissions on the merits of the case, Claimant should have asked the Court to set a hearing. Once again, Claimant has neglected the proceedings just as it had neglected to send its bank details for the payment of royalties.[238]

157. Moreover, the nature of the proceedings preclude the need for swift resolution as only criminal proceedings, as opposed to commercial proceedings can justify such a need.[239]

158. In addition, the FET standard is always assessed given the political and economic situation of the State.[240] As part of FET, denial of justice also requires that these circumstances be taken into consideration,[241] in particular the level of development of the State.[242]

159. Specifically, Mercuria is a developing State, struggling with a health crisis. The delays must be assessed in light of these specific circumstances that justify the overburdened docket of the Court.[243]

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235 Notice, P7:¶6:L211-212.

236 Notice, P7:¶5:L207-209, P9:¶21:L271-274.

237 Notice, P12:¶¶42-43:L347-352.

238 PO3, P50:L1597-1599.

239 *White Industries*, ¶10.4.14.

240 *Bayindir Award,* ¶192-193; *Duke Energy*, ¶340; *Parkerings*, ¶335; *Generation Ukraine*, ¶20.37.

241 *Toto Award*, ¶165.

242 *White Industries*, ¶10.4.18; Paulsson, p.27.

243 Notice, P10:¶32:L317-319; Response, P17:¶9:L510-515.

160. As of impartiality, Respondent submits that Claimant has manipulated the facts obliterating the orders in disfavor of NHA. In fact, the judges have warned NHA that its absences would be sanctioned,[244] and ordered the rejoinder to be sent in a short delay.[245] Apart from this delay in the submission of the rejoinder, both parties benefited from equal time to prepare their written submissions. Moreover, the judge accepted the requests for additional time for both parties and refused NHA's request once.

161. In view of these elements, the conduct of the Proceedings does not amount to a denial of justice.

V. MERCURIA'S IP RELATED MEASURES COMPLIED WITH ITS INTERNATIONAL OBLIGATIONS

162. Mercuria did not violate Claimant's legitimate expectations (**A**), nor did it act contrary to its obligations under TRIPS (**B**).

A. Claimant had no legitimate expectations that Mercuria would not adapt its legal framework when confronted with a public health crisis

163. Mercuria's right to regulate on public matters (**1**) precluded the creation of any legitimate expectations on behalf of Claimant (**2**).

1. Mercuria has a right to regulate public health matters

164. Contrary to Claimant's allegations, Respondent has no obligation to provide a stable legal framework.

165. Some tribunals found such an obligation in view of the specific wording of the applicable BIT[246] or in the investment agreement between the State and the investor.[247]

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244 Notice, P7:¶5:L207-209, P9:¶21:L271-274.

245 Notice, P8:¶14:L240-242.

246 *CMS*, ¶274; *LG&E*, ¶124; *Occidental*, ¶183.

247 *Parkerings*, ¶332; *Toto Award*, ¶244; *Total*, ¶117.

However, in the present case, neither did the LTA contain a stabilization clause, nor the Contracting Parties intend to guarantee a stable legal framework.

166. The object and purpose of the BIT, *i.e.* the stimulation of foreign investment and the flow of capital,[248] should be analyzed in the wider context of the "*economic development of the Contracting Parties*".[249] The latter is the ultimate goal "*which must benefit all, primarily national citizens and companies, and secondarily foreign investors*"[250] and could be achieved only through the host State's right to regulate and its ability to adapt its legal framework to the "*emerging needs of its people*",[251] when the "*protection of health*" is at stake.[252] It is thus clear that the Contracting Parties intended to retain their right to regulate in the highly sensitive area of public health.

167. This intention also accounts for the unique wording of the expropriation provision.[253] Indeed, in Article 6(4) Contracting Parties included a carefully drafter carve-out,[254] which safeguards their rights to regulate in matters of "*public health*" by excluding such measures from the scope of indirect expropriation.[255]

168. In the same vein, the Contracting Parties expressly agreed in Article 6(1) BIT that mere interferences with property rights would not give rise to compensation except when carried out in violation of due process.[256]

169. In the present case, it is uncontested that the non-discriminatory measures taken by Mercuria, namely the enactment of the Law and the grant of the License, were taken in the interest of public health. Indeed, these measures were solely intended to tackle

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[248] BIT, Preamble.

[249] BIT, Preamble.

[250] *Lemire*, ¶273.

[251] *Total*, ¶115.

[252] BIT, Preamble.

[253] BIT, Article 6.

[254] BIT, Article 6(4).

[255] *IISD*, p.11.

[256] BIT, Article 6(1).

greyscale, a severe and pervasive epidemic which turned into a health crisis.[257] As such, these measures would fall within the carve-out of Article 6(4) BIT. In any case, these measures, implemented in due process, did not deprive Claimant of its Patent and thus amount to a mere interference[258] within the meaning of Article 6(1) BIT.

170. More generally, Respondent did not fail to accord FET by allegedly frustrating Claimant's legitimate expectations and perfectly complied with other international obligations.

2. Respondent did not frustrate Claimant's expectations

171. Contrary to Claimant's allegations, Respondent did not make any specific representations not to adapt its regulatory framework to changed circumstances in the face of a public health crisis.

172. When legitimate expectations, in the form of specific representations made by state representatives (i) and relied on by the investor (ii), are frustrated by the host State, there is a violation of the FET standard (iii). Respondent will demonstrate that none of these criteria are met in the present case.

173. Legitimate expectations arise from representations made in the form of a promise or an assurance given by the host State and specifically received by the investor.[259] Political,[260] or encouraging statements[261] made pursuant to general investment encouragement policies[262] do not constitute specific representations. These expectations must also be reasonable in light of particular circumstances.[263]

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257 Response, P16:¶6:L485-486; Facts, P28:¶6:L875.

258 Gibson, p.379.

259 *Parkerings*, ¶¶331, 334; *Total*, ¶¶117, 429; Newcombe/Paradell, p.287; McLachlan/Shore/Weiniger, ¶¶7.184-7.185.

260 *El Paso Award*, ¶¶395-396.

261 *Nagel*, ¶¶291, 326.

262 *PSEG*, ¶241.

263 *Duke Energy*, ¶340; *Saluka Partial Award*, ¶304.

174. On January 2004, the Minister for Health made a general statement during a press conference regarding the IPR regime,[264] immediately shared by the President of Mercuria with further encouraging remarks.[265] None of these statements were specifically addressed to Claimant, and were only political statements part of the investment encouragement policy of Mercuria.

175. Moreover, Claimant could not have reasonably expected that a developing country[266] faced with a health crisis would not take any measures to adapt its domestic legislation. As early as 2003, legislative changes were "*far from being unpredictable*"[267] since NHA already mentioned an imminent public health concern that could "*spiral into a national crisis within a decade*".[268] There was a "*nationwide campaign*"[269] and "*massive public information*"[270] specifically launched to prevent and mitigate greyscale. Claimant was well aware of the risk but still chose to make a "*not very prudent investment*".[271]

176. The existence of legitimate expectations further requires the reliance of the investor,[272] meaning that the representation necessarily precedes the investment decision.

177. The question does not arise in respect of the Patent acquired 6 years before the press statement in 2004.[273]

178. Regarding its further investment decisions, Claimant could argue that they were all premised on the 2004 press statement. However, it cannot also argue without contradicting itself that it ignored the 2006 press conference where the Minister for

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264 PO1, P39:¶4:1265-1271.

265 Facts, P29:¶8:L889-890.

266 Response, P17:¶9:L511.

267 *Parkerings*, ¶335.

268 Facts, P28:¶6:L872-876.

269 NHA Report, P41:L1316-1318.

270 NHA Report, P41:L1319.

271 *Olguín*, ¶65(b); *Parkerings*, ¶¶335-336.

272 *Enron*, ¶262.

273 PO3, P50:L1574-1575.

Health expressed concerns about the prevalence of greyscale and stated that the government would take "*every measure it deemed necessary*"[274] to treat its people.

179. An experienced businessman that relied on one representation should have held back from further investing once this representation ceased to exist in the presence of a contrary representation. If Claimant, as a businessman with hundred years of experience,[275] relied on the press statement of January 2004 to enter into the LTA in July 2004[276], and then to set up its manufacturing unit for Sanior,[277] it should have decided to hold back from further expanding its manufacturing unit in 2007, just after the press conference of 2006. By abstaining to do so, Claimant showed that it never relied on any of the alleged representations made by Mercuria. Indeed, Claimant, driven by its desire to make an even greater profit following the rapid increase in Sanior's demand,[278] only accepted the business risk.[279] However, as stated by the *MTD* Tribunal, "*BITs are not insurance against business risk*".[280]

180. Lastly, the breach of the FET standard needs to be established on the basis of a balancing test between the "*importance and urgency of the public need pursued*" by the measures taken by the host State, and "*the seriousness of the prejudice caused to the investor*".[281]

181. Mercuria, had no choice but to adapt its legislation to face the escalating health crisis. Struggling to deal with a critical disease for the first time,[282] it had the "*responsibility to amend its legislation*"[283] and render Valtervite available for its people, pursuant to its

[274] Facts, P29:¶14:L914-915.

[275] Facts, P28:¶2:L846-848.

[276] PO2, P48:¶6:L1528.

[277] Facts, P29:¶11:L900-901.

[278] Facts, P29¶15:L916-917.

[279] *Parkerings*, ¶¶335-336.

[280] *MTD*, ¶178. *See Maffezini*, ¶64; Ripinsky/Williams, ¶8.3.2.

[281] *Total*, ¶123; *See Lemire*, ¶284.

[282] PO3, P50:L1588-1590.

[283] *Total*, ¶115.

Constitutional obligation.[284] Moreover, the measures adopted by Respondent are temporary[285] and do not prevent Claimant from making use of its patented compound Valtervite with its other business partners. Therefore, the Law and the License were totally proportionate.

182. Moreover, tribunals are reluctant to find a breach of an international obligation where the investor claims to be a victim of the maladministration of the host State, but still "*abandons its investment without any effort at overturning the administrative fault*"[286] before national authorities[287] and use investment arbitration as an easy way to get money without much effort.

183. In the present case, Claimant had the possibility to ask for a judicial review of the Court's decisions on the License and the royalty rate,[288] and to contest the "*continuing existence of the circumstances*"[289] that led to the grant of the License. Claimant clearly abandoned its investments and this should further dissuade the Tribunal to conclude in a breach of the FET standard.

B. Respondent respected its international obligations under TRIPS

184. Preliminarily, there is no explicit reference to WTO/TRIPS within the substantive provisions of the BIT that could give this tribunal competence to address consistency with TRIPS.[290] Thus, the stability and predictability of the multilateral trading system shall prevent investors from challenging State practices on the basis of TRIPS before investment tribunals.[291] Furthermore, IP-related disputes have a distinct dimension with

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[284] PO1, P39:¶2:L1256-1257.

[285] Facts, P30:¶21:L949-951.

[286] *Generation Ukraine*, ¶20.30.

[287] See *Jan de Nul Jurisdiction*, ¶121; *Parkerings*, ¶¶449, 452.

[288] PO3, P50:L1578-1580.

[289] TRIPS, Article 31(g)(i)(j).

[290] *See* US-Uruguay BIT, Article 6(5).

[291] *WTO US*, ¶7.75; Biadgleng, pp.26-27.

specific *fora i.e.* domestic law remedies and WTO mechanism.[292] Claimant's claim, being purely IP-related, should not have standing before this Tribunal.

185. Respondent, emphasizing the risk of an unlimited jurisdiction *rationae materiae* of the Tribunal, submits that TRIPS is not applicable to the dispute through Article 11 BIT **(1)**, and that, even interpreted in the light of TRIPS, it complied with the FET standard **(2)**.

1. TRIPS is not directly applicable to the dispute through Article 11

186. Respondent submits that TRIPS cannot be invoked through Article 11 because it does not entitle 'investments' of investors to a treatment 'more-favorable' that of the BIT.

187. *First*, TRIPS is not an agreement protecting 'investments' of IP right holders. It is only by including IP rights as 'assets' under BITs and analyzing IP rights as property rights that they become 'investments'.[293] Therefore, the nature of TRIPS and the BIT are different with only the latter entitling IP rights as 'investment' to a protection.

188. *Second*, the BIT gives direct protection to IP right holders through its substantive provisions, while TRIPS has set only minimum standards of IP protection with no direct effect on individuals.[294] Even a human rights treaty, granting direct rights to individuals, was not applicable through a similar clause since the BITs provide a higher and more specific level of protection.[295]

189. Consequently, and since Claimant does not demonstrate that TRIPS is more-favorable than the BIT, it cannot claim the direct applicability of TRIPS under Article 11.

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292 Biadgleng, pp.32-33.

293 Dreyfuss/Frankel, pp.570-572.

294 *WTO US*, ¶7.72.

295 *Spyridon*, ¶312.

2. ***Respondent accorded fair and equitable treatment to Claimant in light of its rights under TRIPS***

190. Respondent submits that the Tribunal should not interpret the BIT, and the FET standard, as to nullify its rights under TRIPS.

191. The majority of WTO Members being developing countries, their special interests and needs are to be given crucial importance.[296] As such, the gravity of the public health problems affecting developing countries is recognized in TRIPS.[297] Accordingly, TRIPS underlines that the protection of IP rights should be conducive to social and economic welfare, seeking a balance between obligations of right holders and users.[298] It recognizes that the protection of public interest such as public health is a guiding principle of the Agreement.[299] Therefore, limitations to patent protection are integral elements of patent governance,[300] especially regarding public health concerns.

192. This essential right to regulate public health matters is further embodied in the BIT's Preamble where Contracting Parties intended to "*build on their respective rights and obligations*" under WTO/TRIPS. Mercuria, to tackle the health crisis had to take necessary measures and in doing so, acted in accordance with Article 31 TRIPS and respected all its requirements.

193. *First*, neither Article 31 TRIPS, nor the Paris Convention, contain any restriction with regard to the grounds on which a compulsory license could be granted. The Court exercised its discretional power in doing so.[301]

194. *Second*, the Court heard the matter through a fast-track process because Mercuria was facing a national emergency. This waiver is enshrined in the Law and stems from Article

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[296] Ministerial Declaration.

[297] Doha Declaration TRIPS/Public health.

[298] TRIPS, Article 7.

[299] TRIPS, Article 8.

[300] Patent Protection, p.3; *WTO EC*, ¶7.598.

[301] PO2, P48:¶5.

31(b) TRIPS. The qualification of 'national emergency' is self-judging[302] and includes public health crisis.[303] In 2003, NHA was already warning that the "*public health concern*" could become a "*national crisis within a decade*".[304] Only 3 years later, NHA Report highlighted the spurge in greyscale cases,[305] which increased year after year.[306] The President of Mercuria had to enact the Law in October 2009 because the concern escaladed into a public health crisis[307] urging to find a cost-saving solution to treat Mercurian citizens.[308] Therefore, it is not surprising that the Court used this waiver to grant the License through a fast-track process.

195. *Third,* Claimant was part of the procedure before the Court[309] and was notified of the grant of the License in conformity with Article 31(b) and Article 41(3) TRIPS.

196. *Fourth,* the scope and duration of the License is circumscribed, as it will be in force only until greyscale is no longer a threat to public health in Mercuria.[310] It is unreasonable to hope that a threat to public health would fade away in few years since critical diseases, such as HIV/AIDS, remain a threat for decades, especially in least-developed and developing countries, such as Mercuria. Moreover, Mercuria was struggling with budgetary problems while a significant portion of its population affected by greyscale depends on its healthcare program. Therefore, generic drugs could only help reduce the threat caused by greyscale. Mercuria thus acted in accordance with Article 31(c).

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302 Doha Declaration TRIPS/Public health, ¶5(c).

303 Doha Declaration TRIPS/Public health, ¶5(c).

304 Facts, P28:¶6:L874-876.

305 NHA Report, P42:L1341-43.

306 Facts, P29:¶15.

307 Response, P16:¶6:L490.

308 NHA Report, P43:L1358-1373.

309 PO3, P5:L1576.

310 Facts, P30:¶21:L950.

197. *Fifth,* the License was granted predominantly for the domestic market, and HG-Pharma is not exporting greyscale to neighboring countries[311] in accordance with Article 31(f) TRIPS. Mercuria exported medicines to neighboring countries in the form of humanitarian aid with the aim of preventing the spread of greyscale across borders,[312] without using the system under Article 31bis TRIPS.

198. *Sixth,* Claimant has been granted a 1% royalty, which represents an "*adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization*."[313] Indeed, an 'adequate remuneration' is self-judging[314] and should be based on the particular circumstances of each case. The economic value of the authorization, *i.e.* the License, should take into account the therapeutic value of the medicine – including the advance it represents over other available products – the public's financial capacity and the need to respond to public health exigencies.[315] Royalty rates in Mercuria ranged from 0.5% to 3% of revenue.[316] Claimant could not have legitimately expected a royalty beyond these rates. Moreover, the License was taken because of a public health crisis and the high cost of Valtervite for the public.[317] The 1% rate is further justified since the efficiency of Valtervite to prevent transmission of greyscale remains highly contested.[318] The remuneration was therefore suited to the insignificant therapeutic value of Valtervite.

199. Finally, in line with Article 31(i)(j) TRIPS, Mercuria provided Claimant with a judicial review before a two-judge bench[319] of the Court opened to appeal before the Supreme Court.

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311 PO2, P48:¶5:L1523-24.

312 NHA Report, P41:L1298-1303.

313 TRIPS, Article 31(h).

314 TRIPS, Article 1(1); WHO Royalties, p.5.

315 WHO Royalties, p.83.

316 PO3, P50:L1589-90.

317 NHA Report, P43:L1358-1373.

318 PO3, P50:L1585-87.

319 PO3, P50:L1578-80.

200. Therefore, the tribunal should find that Respondent accorded FET to Claimant in accordance with TRIPS. In any event, Claimant has already been granted a compensation, the royalty, but refused to give its bank details. Granting a higher compensation to Claimant would render the compulsory licensing regime for public health purposes meaningless and would make Mercuria pay a higher price for Valtervite, exactly what the License was meant to avoid.[320]

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[320] VanAaken, p.117.

PRAYER FOR RELIEF

201. In light of the above, Respondent respectfully requests this Tribunal to find that:

(i) It lacks jurisdiction over the present dispute;

(ii) Respondent did not breach its obligations under Article 3(3) BIT;

(iii) Respondent did not breach its obligations under Article 3(2) BIT;

(iv) Claimant shall bear all costs related to these proceedings.

Submitted on 25 September 2017 by TEAM HSU

On behalf of Respondent

THE REPUBLIC OF MERCURIA