TEAM KHAN

ARBITRATION UNDER

THE MERCURIA-BASHEERA BIT,

THE PERMANENT COURT OF ARBITRATION RULES 2012

ATTON BORO LIMITED

(Claimant)

v.

THE REPUBLIC OF MERCURIA

(Respondent)

PCA CASE NO. 2016-74

MEMORIAL FOR RESPONDENT

September 25, 2017

TABLE OF CONTENTS

LIST OF AUTHORITIES

Books

Diehl	A. Diehl, T*he Core Standard of International Investment Protection – Fair and Equitable Treatment* (2012).
Dolzer/Schreuer	Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008).
Kenneth	Kenneth Vandevelde, *U.S. International Investment Agreements* (2009).
Kinsella/Rubins	Stephan Kinsella and Noah Rubins, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (2005).
Kolb	Robert Kolb, *La Cour internationale de Justice* (2013).
Lew/Mistelis/Kröll	Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (2003).
Linderfalk	Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007).
McLachlan/Shore/Weiniger	Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2017).
Muchlinkski	Peter T. Muchlinkski. *Multinational enterprises & the law*. 2nd ed. (2010).
Newcombe/Paradell	Andrew Newcombe and Lluís Paradell. *Law and Practice of Investment Treaties: Standards of Treatment* (2009)
Newcombe/Paradell	A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).
Picherack	J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?* (2008).
Redfern/Hunter	Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (2009).

Reinisch	August Reinisch, *Standards of Investment Protection* (2008).
Reinisch	August Reinisch, *Standards of Investment Protection* (2008).
Rubino-Sammartano	Mauro Rubino-Sammartano, International Arbitration: Law and Practice (2014).
Salacuse	Jeswald W. Salacuse, *The Law of Investment Treaties* (2015).
Schill	Stephan W. Shill, *The Multilateralization of International Investment Law* (2009).
Schill/ILJ	Stephan W. Shill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law* (2006)
Schreuer *et al.*	Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinelair, *The ICSID Convention: A Commentary* (2009).
Shaw	Malcom N. Shaw, *International Law* (2008).
Small	Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010).
Sornarajah	Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2010).
Steffen/Krajewski	Steffen Hindelang, Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016).
Vandevelde	Kenneth Vandevelde, *A unified theory of Fair and Equitable Treatment* (2010).
Villiger	Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (2009).
Villiger	Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (2009).

Articles & Chapters

Andrew	Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law* (2005).

Biadgleng	Ermias Biadgleng, *IP rights under investment agreements: the TRIPS plus implications for enforcement and protection of public interest*, in: South Centre Research Paper (2006).
Correa	Carlo Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, in: Michigan Journal of International Law (2004).
De Visscher	De Visscher, *Le déni de justice en droit international*, 52 Recueil des Cours (1935).
Gastrell/Le Cannu	Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of "Denial-of-Benefits" Clauses in Investment Treaties: A Review of Arbitral Decisions*, in: ICSID Review (2015).
Gehne/Brillo	Katja Gehne and Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, in: NCCR Working Paper (2013).
Gibson	Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, in: American University International Law Review (2010).
Graham/Vives	James Graham and Carlos Vives, *La no ejecución de un laudo arbitral comercial internacional como expropiación indirecta*, in: I Jornadas Del Foro De Arbitraje en Materia de Inversiones (2010).
Klager	Roland Klager, *Fair and equitable treatment: a look at the theoretical underpinnings of legitimacy and fairness* in: Journal of World Investment and Trade (2010).
Krishan	Devashish Krishan, *A Notion of ICSID Investment*, in: Investment Treaty Arbitration (2008).
Kröll	Stefan Kröll, *Recognition and Enforcement of Awards*, in: Arbitration in Germany (2007).
Lee	Chieh Lee, *Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration*, in: Contemp. Asia Arb. J. (2016).

Lin	Xiuqin Lin, *Prior Negotiation and Remuneration for Patent Compulsory Licensing: Practice, Problem, and Proposal,* in: Compulsory Licensing (2015).
Lin	Lin, Tsay-Yu. *Compulsory licenses for access to medicines, expropriation and arbitration under bilateral investment agréments – issues beyond TRIPS*, in: International Review of Intellectual Property and Competition Law (2009).
Mann	F.A.Mann, *British Treaties for the Promotion and Protection of Investments*, in: British Yearbook of International Law (1981).
Mayer	Jörg Mayer, Policy Space: What, for What, and Where?, in: Development Policy Review (2009).
Mistelis	Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, in: ICSID Review (2013).
Mistelis/Baltag	Loukas A. Mistelis and Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, in: Penn St L Rev (2009).
Okediji	Ruth Okediji, *Is Intellectual Property "Investment"? Eli Lilly V. Canada And The International Intellectual Property System*, in: University of Pennsylvania Journal Of International Law (2014).
Pandat	Anki Pandat, 30 Million Pending Cases: Fixing India's Overburdened Judiciary: Is there a short-term solution for India's backlogged courts? (April 26, 2016).
Pantopoulou	Pantopoulou, Elena. The status and legal effect of compulsory license in Investment Law.
Ruse-Khan	*Ruse-Khan, Henning Gross. Litigating Intellectual Property Rights*, in: Investor-State Arbitration: From Plain Packaging To Patent Revocation (2014).
Schreuer	Christoph Schreuer, *Consent to Arbitration*, in: The Oxford Handbook of International Investment Law (2008).

Schreuer 2	Christoph Schreuer, *What is a Legal Dispute?*, in: International Law between Universalism and Fragmentation (2008).
Schreuer 3	Christoph Schreuer, *Fair and Equitable Standard (FET): Interaction with Other Standards* (2007).
Skinner/Miles/Luttrell	Matthew Skinner, Cameron A. Miles, Sam Luttrell, *Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping*, in: JWELB (210).
Skinner/Miles/Luttrell	Matthew Skinner, Cameron A. Miles, Sam Luttrell, *Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping*, in: JWELB (210).
Smeureanu	Smeureanu, Ileana M. *Five Facts About Recognition and Enforcement of Foreign Awards in Central and Eastern Europe* (2014), Kluwer Arbitration Blog.
Thow/McGrady	Anne Marie Thow and Benn McGrady, *Protecting policy space for public health nutrition in an era of international investment agreements*, in: Bulletin of the World Health Organization (2004).
Tudor	Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008).
Vadi	Valentina Vadi, *Towards a new dialectics: pharmaceutical patents, public health and foreign direct investments*, .in: Journal of Intellectual Property and Entertainment Law (2015).
Verhoosel	Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, in: Journal of International Economic Law (2003).
Verrill	Charles Owen Verrill, *Are WTO violations also contrary to the fair and equitable treatment obligations in investor protection agreements?*, in:International Law Weekend (2004).
Voon/Mitchell/Munro	Tania Voon, Andrew Mitchell, James Munro, *Legal Responses to Corporate Manoeuvring in International Investment Arbitration*, in: Journal of International Dispute Settlement (2014).

Zhang	*Xiao-Jing Zhang, Proper, Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping,* in: Contemp. Asia Arb. J. (2013).

Miscellaneous

AC Act	India, Arbitration and Conciliation Act (1996).
Black's Law Dictionary	Henry Campbell Black, *Black's Law Dictionary* (1990).
Brazilian Code	Brazilian Civil Procedural Code (2015).
Cotula	Lorenzo Cotula, *Regulatory Takings, Stabilization Clauses and Sustainable Development*, OECD Global Forum on International Investment VII (2008).
Draft ILC	United Nations, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 (2001).
ICC Guide	ICC Guide to National Procedures for Recognition and Enforcement of Awards Under the New York Convention (2013)
Notes of Interpretation	North American Free Trade Agreement, *Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission* (31 July 2001).
Prescription Act	South Africa Prescription Act (1969).
Remuneration guidelines	Remuneration guidelines for non-voluntary use of a patent on medical technologies WHO/TCM/2005 (2005).
UNCTAD Definitions	United Nations Conference on Trade and Development, *UNCTAD Series on issues in International Investment Agreements II: Scope and Definition* (2010).
UNCTAD Fair and Equitable	United Nations Conference on Trade and Development, *UNCTAD Series on Issues in International Investment Agreements II: Fair and Equitable Treatment* (2012)
UNCTAD Trends	United Nations Conference on Trade and Development, *Bilateral investment treaties 1995-2006: trends in investment rulemaking* (2007).

WTO & International Health	LO, Chang-Fa. External Regime Coherence: WTO/BIT and Public Health Tension as an Illustration, 7 Asian WTO & International Health Law & Policy 263, 276 (2012)

LIST OF LEGAL SOURCES

Arbitral Decisions

ICSID

Aguas del Aconquija	*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No.ARB/97/3, Award (August 20, 2007).
Ampal-American Juris	*Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and Mr. David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (February 1, 2016).
ATA Construction	*ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (May 18, 2010).
Azinian	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (November 1, 1999).
Azurix	*Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006).
Cargill	*Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009).
Casualty	*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (September 5, 2008).
Deutsche Bank Dissenting	*Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02, Dissenting Opinion (October 23, 2012).
Duke Energy	*Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (August 18, 2008).
Enron	*Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010)
Feldman	*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002).
Flughafen Zürich	*Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case

	No. ARB/10/19, Award (November 18, 2014).
GEA Group	*GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award (March 31, 2011).
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001).
Global Trading	*Global Trading Resource Corp and Globex International Inc v. Ukraine*, ICSID Case No. ARB/09/11, Award (December 1,2010).
Joy Mining	*Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (August 6, 2004).
LG&E	*LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006).
Loewen	*Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case n. ARB(AF)/98/3, Award (June 26, 2003).
Maffezini	*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (November 13, 2000).
Micula	*Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award (December 11, 2013).
Mondev	*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (October 11, 2002).
MTD	*MTD Equity Sdn Bnh v. Republic of Chile*, ICSID Case n. ARB/01/7, Decision on Annulment (March 21, 2007).
Nova Scotia	*Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/1, Award (April 30, 2014).
Pac Rim Juris	*Pac Rim Cayman Limited Liability Company v. El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's jurisdictional objections (June 1, 2012).*

Plama Juris	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005).
Pyramids	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction and Dissenting Opinion (April 14, 1988).
Saipem Juris	*Saipem SpA v. Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction (March 21, 2007).
Salini Juris	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (July 23, 2001).
Sempra	*Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007)
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).
Vannessa Ventures	*Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award (January 16, 2013).
Venoklim	*Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (April 3, 2015).
Waste Management	*Waste Management Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 APril 2004).

PCA

Chevron	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL Rules, Interim Award (December 1, 2008).
Chevron Opinion	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL rules, Opinion of Jan Paulsson (March 12, 2012).
Rurelec	*Guaracachi America, Inc and Rurelec PLC v. The*

	Plurinational State of Bolivia, PCA Case No 2011- 17, UNCITRAL Rules, Award (January 31, 2014).
Ulysseas	*Ulysseas, Inc v. The Republic of Ecuador*, PCA Case No. 2009-19, UNCITRAL Rules, Interim Award (September 28, 2010).
Yukos Juris	*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No AA 227, UNCITRAL Rules, Interim Award (November 30, 2009).

***Ad hoc* Decisions**

CME	*CME Czech Republic B V v The Czech Republic*, Partial Award, UNCITRAL Award (September 13, 2001).
Frontier	*Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL, Final Award (November 12, 2010).
Gami	*Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004).
Glamis	*Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award (June 18, 2009).
Grand River	*Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011).
Myers	*S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Final Award (December 30, 2002).
Mytilineos	*Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction (September 8, 2006).
National Grid	*National Grid plc v. The Argentine Republic*, UNCITRAL Arbitration Rules, Award (November 3, 2008).
Oostergatel	*Oostergatel and Theodora Laurentius v Slovakia*, UNCITRAL, Final Award (April 23, 2012).
Pope	*Pope & Talbot Inc. v. The Government of Canada,* UNCITRAL, Interim Award (26 June 2000).
Saluka	*Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award (March 17, 2006).

White Industries	*White Industries Australia Limited v. The Republic of India*, Final Award (November 30, 2011).

International Court Cases

Barcelona Traction	*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, Second Phase (February 5, 1970).
Corfu Channel	*Corfu Channel Case (United Kingdom v. Albania)*, ICJ, Assessment of Compensation (December 15, 1949).
Diallo	*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, ICJ, Preliminary Objections (May 24, 2007).
El Oro	*El Oro Mining and Railway Co (Ltd) (Great Britain) v United Mexican State, V RIAA191 (Great Britain-Mexico Claims Commission*, Decision No. 55 (June 18, 1931).
ELSI	*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment (July 20, 1989).

Treaties

Doha Declaration	Declaration on the TRIPS agreement and public health, adopted on November 14, 2001.
ECT	Energy Charter Treaty, signed in Lisbon 1994, entered into force May 16, 1998.
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York 1958, entered into force June 7, 1959.
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, entered into force January 1, 1995.
VCLT	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force January 27, 1980.

Miscellaneous

2004 Canada Model BIT	Model Foreign Investment Protection and Promotion Agreement ("FIPA").

2009 ASEAN Comprehensive Investment Agreement	Association of Southeast Asian Nations Comprehensive Investment Agreement, signed on February 26, 2009.
CAFTA-DR	Central American-Dominican Republic Free Trade Agreement, signed on August 5, 2004.
US Model	US Model BIT (2012).

LIST OF ABBREVIATIONS

§/§§	Paragraph(s)
AB&Co	Atton Boro and Company
ABG	Atton Boro Group
Award	Award directed the NHA to pay Atton Boro damages for breaches the LTA
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
HCM	High Court of Mercuria
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
Draft ILC	Responsibility of States for Internationally Wrongful Acts
LTA	Long-Term Agreement
Mercuria-Basheera BIT	Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Mercuria and the Kingdom of Basheera
NHA	Mercuria National Health Authority
NOA	Notice of Arbitration
NTC	National Treatment Clause
NYC/New York Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p/pp.	Page(s)
Patent	Mercurian Patent No. 0187204 granted on 21 February 1998
PCA	Permanent Court of Arbitration
PCA Rules	Permanent Court of Arbitration Rules 2012
PO1	Procedural Order No.1
PO2	Procedural Order No.2
PO3	Procedural Order No.3
Reef	People's Republic of Reef
RNOA	Response to Notice of Arbitration
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development about Fair and Equitable Treatment
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

1. Overview of the Main Events

2. On **11 January 1998**, the Kingdom of Basheera ("Basheera") concluded an Agreement for the Promotion and Reciprocal Protection of Investments ("Mercuria-Basheera BIT") with the Republic of Mercuria ("Respondent" or "Mercuria").

3. Atton Boro Limited ("Claimant"), the investor, is a wholly owned subsidiary incorporated on **5 April 1998** in the territory of Basheera by the Atton Boro Group ("ABG" or "Group"). Whilst ABG's business operations comprise state-of-the-art research efforts in epidemic diseases, Claimant was incorporated to conduct public-private collaborations with South American and African States or their agencies for the production and supply of medicines at competitive rates. The Group's primary holding is Atton Boro and Company ("AB&Co"), a corporation organized in the People's Republic of Reef ("Reef").

4. In **1997**, the Group managed to synthesize Valtervite, a compound lauded as an effective tool to counter an STD named greyscale. AB&Co then went to obtain patents for Valtervite in Reef and in 50 other jurisdictions. This included the Republic of Mercuria ("Respondent"), wherein it obtained Mercurian Patent No. 0187204, granted on **21 February 1998** ("the Patent") and currently held by Claimant.

5. In **2003**, Respondent's National Health Authority ("NHA") issued a report underlining a looming public health crisis of greyscale, prompting the government to seek pharmaceutical companies interested in long-term contracts to supply the country with new and effective medicines at discounted prices. The same year, as a parallel effort, the NHA began promoting prevention and engaging Mercurians to regularly get tested for an array of STDs, greyscale included.

6. On **19 January 2004**, the Minister for Health publicly lauded a partnership running from **1999** to **2004** between Claimant and the NHA to counter HIV/AIDS and, on **20 January 2004**, Respondent's President posted a tweet both inviting and praising investors interested in carrying out business in Mercuria.

7. Following an invitation from the NHA in **May 2004**, Claimant agreed to a Long-Term Agreement ("LTA") to supply Sanior, a Valtervite-based drug, to Respondent at a 25% discounted rate for ten years. The LTA was concluded on **20 July 2004**. Soon thereafter Claimant set up a manufacturing unit for Sanior in Mercuria and delivered the first consignment in **June 2005**. By the end of **2006**, around a third of greyscale patients were undergoing Sanior-based treatment.

8. On **26 December 2016**, the Minister for Health publicly addressed the 2006 NHA annual report and expressed concerns on how the STD awareness and self-test campaigns had unearthed the theretofore unknown prevalence of greyscale amongst Mercurians. She stated that "the government would take every measure it deemed necessary to ensure that patients of greyscale could avail treatment". Consequently, the order values for Sanior doubled with each quarter in **2007**. Claimant then purchased machinery and land to increase its manufacturing capability.

9. In early **2008**, the NHA informed Claimant of its intention to renegotiate the price for Sanior. However, parties failed to agree on an additional discount rate as Claimant offered 10%, whereas the NHA demanded 40%.

10. On **10 June 2008**, the NHA terminated the LTA alleging the supplier's unsatisfactory performance. Claimant invoked arbitration against the NHA and, on **20 January 2009**, a tribunal seated in Reef passed an award ("Award") in Claimant's favor, directing the NHA to pay USD 40 million in damages for breach of the LTA. On **3 March 2009**, Claimant filed enforcement proceedings before the High Court of Mercuria ("HCM"). The NHA requested the Court to decline enforcement of the Award arguing it would be contrary to public policy.

11. The Award enforcement proceedings are heretofore ongoing. The HCM adjourned hearings in several occasions for reasons comprising the NHA being absent, general Court backlog and time extensions for submissions. Matters were further complicated by jurisdictional issues arising from the **10 January 2012** Commercial Courts Act, which were only clarified in **September 2013**.

12. On **10 October 2009**, amidst the Award's enforcement proceeding, the President of Mercuria promulgated Law No. 8.458, a National Legislation to amend the Intellectual Property Law which allowed for the issuance of non-voluntary licenses to patents under certain circumstances and conditions. In **November 2009**, HG-Pharma, a joint venture between the State of Mercuria and private pharmaceutical companies, filed an application before the HCM to obtain a license to manufacture Valtervite.

13. On **17 April 2010**, after a fast-tracked process, the HCM granted HG-Pharma a license to produce Valtervite-based generic drugs until greyscale no longer posed a threat to public health in Mercuria. Royalties would be due to Claimant at 1% of total earnings. In **2009-2010**, royalty rates in Mercuria for drugs concerning non-fatal, incurable diseases fell within 0.5-3% of revenue. In **January 2012**, the NHA's director lauded the budget savings stemming from the use of generic drugs.

14. Between **May and August 2013**, the governments of three neighboring countries of Respondent, all of whom suffering financial struggles, expressed gratitude for the greyscale medicines delivered as humanitarian aid by Respondent. Valtervite was patented in these three states.

15. By **2014**, Claimant's market share in greyscale-containment drugs had shrunk nearly by two thirds. Several of its distributors began conveying their intent to seek more cost-effective alternatives. In **February 2015**, Claimant announced the company would no longer deal in Sanior in Mercuria.

16. On **20 September 2016**, after failed attempts at amicable settlement, Claimant conveyed to Respondent its intent to initiate arbitration under the BIT. On **7 November 2016**, Claimant submitted its Notice of Arbitration ("Notice"). On **26 November 2016**, Respondent submitted its Response to the Notice of Arbitration ("Response").

17. Applicable Treaties

18. Mercuria and Basheera are parties to the TRIPS Agreement, to the Doha Agreement, to the Paris Convention and to the ICESCR. Both states are members of the WTO and have signed the VCLT, but only Basheera has ratified it. Reef, Mercuria and Basheera are parties to the 1958 New York Convention.

SUMMARY OF ARGUMENTS

19. **JURISDICTION AND ADMISSIBILITY.** Respondent respectfully contests the Tribunal's jurisdiction, since, [**I**] Claimant is not a protected investor under the BIT and [**II**] the Award and the Patent are not investments under the provisions of the Mercuria-Basheera BIT. Furthermore, [**III**] Claimant cannot avail itself of the BIT's protection as Respondent has validly invoked the denial-of-benefits clause in Article 2 of the BIT.

20. **MERITS**. Considering the enforcement procedure of the Award, the enactment of Law No. 8458/09 and the concession of the compulsory licence, Respondent urges this Tribunal to conclude that Mercuria did not breach any obligation under the Mercuria-Basheera BIT. Especifically, [**V**] Law No. 8.458 does not configure a violation of the FET or any other obligation under the BIT. Also, [**VI**] Respondent is not to be held liable for the conduct of its judiciary in relation to the enforcement proceedings over the Award. The conduct respected the Fair and Equitable Treatment provided in Article 3.2 of the BIT, since Respondent did not deny justice to Claimant's investments, it met Claimant's reasonable and legitimate expectations and Mercuria Acted in a non-discriminatory and non-arbitrary manner. Finally, [**VII**] the LTA's termination does not amount to a breach of the BIT, since NHA and Claimant had a particular commercial relation that has no attachment to an investment under the BIT.

ARGUMENTS

21. Through this procedure Claimant attempts to re-litigate two proceedings: one decided by a commercial arbitration, and the other judged by the HCM. While the former rendered an award in favor of Claimant[1], which enforcement is being analyzed before national courts[2], the latter refers to the compulsory licensing of Valtervite and was made based in national law[3] respecting all legal procedures[4]. Both decisions were the outcome of trials during which Claimant had ample opportunity to present legal arguments in favor of its claim.

22. Nothing in these judgments offends any of Mercuria's obligations under the BIT. Claimant's Memorial is rife with misrepresentations about Mercurian patent law, Mercurian enforcement procedure, and misstatements of Mercuria's obligation under the BIT and of international law generally. This Tribunal only has jurisdiction to rule on alleged violations of the BIT, yet there were none. In any event, this Memorial will demonstrate that Claimant's alleged "expectations" and its interpretation of the BIT are all unfounded.

PART ONE: JURISDICTION AND ADMISSIBILITY

23. Respondent respectfully submits that this Tribunal lacks, and in any event should not exercise, jurisdiction, contrary to the unmeritorious assertions of Claimant. In particular, [**I**] the Award and [**II**] the Patent are not investments under the BIT. Moreover, [**III**] even if the Award and the Patent are considered investments by this Tribunal, pursuant to Article 2 of the respective BIT, Respondent can deny Claimant the BIT's benefits considering that Atton Boro is controlled by nationals of a third state and has no substantial economic activities in Basheera. Therefore, [**IV**] this Tribunal is not competent to hear Claimant's submissions since it cannot start an arbitration procedure under Article 8(1) of the BIT.

I. THE AWARD IS NOT A PROTECTED INVESTMENT UNDER THE MERCURIA-BASHEERA BIT

24. Mercuria asserts that Claimant's investment does not satisfy the requirements of Article 1(1) of the BIT, since [**A**] the Award cannot be considered as an investment and [**B**] the definition of "investment" itself brought by the BIT.

A. The Award itself is not an investment

[1] Facts, §930.
[2] PO2, §4.
[3] Facts, §§945-950.
[4] PO3, §1580.

25. Respondent urges this Tribunal to declare that the Award is not a valid object in an investment arbitration. Claimant submits that the Award obtained from the commercial arbitration procedure against the NHA is a protected investment under the BIT[5], however, the nature of an award in and of itself does not allow it to be a valid object in an investment arbitration.

26. Awards are *de facto* and *de jure* functional equivalents of court judgments, being an instrument capable of recognition and enforcement in national courts[6]. It has four main functions: (i) it concludes a dispute; (ii) it determines the parties' rights and obligations and dispositions of claims; (iii) it may be confirmed by recognition and enforcement; and, (iv) it has potential for review or challenge[7]. In all cases, national courts have the right to request an annulment procedure and ask that the enforcement of the award is denied. However, it is not possible to refuse the fact that an award, whether enforced or not, does embody real economic and/or commercial value yet it is not an investment itself[8].

27. In *GEA Group case*, claimant had its ICC award rejected by national courts which found the repayment agreement to have been concluded by unauthorized persons and thus invalid. After several unsuccessful appeals, GEA Group, the ultimate beneficiary of the ICC Award, decided to commence ICSID proceedings under the Germany–Ukraine BIT for alleged expropriation, breaches of full protection and security, fair and equitable treatment, arbitrary and discriminatory measures, national treatment and most-favored nation treatment obligations. The tribunal ruled that a commercial arbitration award does not qualifies as an investment in the sense of investment arbitration (and treaties); in the tribunal's words the ICC Award was nothing more than "*a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an 'investment')*"[9].

28. Moreover, Respondent highlights that in the present case, distinctly from the *GEA Group case*, the Award was not rejected by HCM[10], but is in the process of being enforced[11] under Mercurian law[12]. Respondent recalls this Tribunal that Mercuria has an overburdened judiciary that struggles to cater to its population of 67 million people, and slowness of the

[5] Facts, §145.
[6] Lew/Mistelis/Kröll, §24-1.
[7] Lew/Mistelis/Kröll, §24-13; Mistelis, p.66.
[8] *GEA Group*, §§159-161.
[9] *GEA Group*, §161.
[10] PO2, §4.
[11] NOA, Exhibit I.
[12] RNOA, §9.

judicial process although an unwelcomed attribute, is an usual characteristic of the judicial systems of developing countries. As will be previously shown, on top of not being an investment, since the HCM is still judging the admissibility of the Award, Claimant's submission that Mercuria breached Article 3 of the BIT is also unfounded.

29. It should be noted that despite appearing against other investment arbitration decisions concerning the definition of an award as investment, the *GEA Group* case fortifies the orthodox understanding that the definition of an arbitral award as an "investment" will largely depend on a case-by-case analysis of the definition of "investment" contained within the BIT. In that same path, the *Saipem* tribunal explicitly refrained from deciding whether an award constitutes an "investment"[13]. Moreover, the *ATA Construction* and *Frontier Petroleum* tribunals both expressly found that the relevant award fell within the specific definition of investment in the BIT[14]. Ultimately, *GEA Group* tribunal actually reinforces the idea that the investment definition is encountered on the BIT clauses.

30. Such a finding was also in line with the reasoning employed by tribunals in other cases, such as *Mondev International*[15] and *Chevron and Texaco Company*[16] which characterized awards as providing protection to the subsisting interests that the investor continued to hold in the original investment rather than an investment in itself[17].

31. Therefore, the Award itself should not be considered an investment. It can only be characterized as an investment if the BIT declares as much. In the present case, the Award falls short of the investment definition brought by Article 1(1) of the BIT.

B. The Award is not an investment pursuant Article 1(1) of the BIT

32. Mercuria further argues that, even if this Tribunal considers that the Award can be a valid object in this dispute, the claims related to the Award are not protected under Article 1(1) of the BIT. The assessment whether the Award constitutes an investment hinges on a double-barrel test. First, it is considered whether the Award falls within the definition of the term "investment" in the BIT, and then whether it falls within the scope of the term as determined by the majority of investment arbitrations through the *Salini* test.

33. Considering that the commercial Award neither [**1**] fall under the definition of "investment" according to Article 1(1) of the BIT nor [**2**] is an investment under the Salini

[13] *Saipem*, §120.
[14] *ATA Construction*, §75; *Frontier*, §63.
[15] *Mondev*, §81.
[16] *Chevron*, §185.
[17] *White Industries*, §7.6.8; *Chevron*, §§183-185; *Mondev*, §§80-82.

test, this Tribunal has no extra incentives to continue to consider Claimant's improper demands. Moreover, [**3**] it is not possible to defend that the Award is part of Claimant's complete business operation in Mercuria, since Claimant's relation with NHA was a purely commercial transaction.

1. Mercuria-Basheera BIT does not include the Award as a protected investment

34. Respondent concedes that the list presented on Article 1(1) is non-exhaustive one and other assets might be included. The Contracting Parties to the BIT adopted an ample standard including every assets and rights controlled by the investor[18], maintaining a broad concept of the term "asset"[19], however, this list imposes an irreducible core of meaning of investments that are protected under the BIT, illustrating the overall scope of the term with examples[20]. In other words, Article 1(1) is a definition clause and the assets that diverge greatly from the clause delimitation are not protected under the BIT. Before deciding that the asset in dispute is an "investment", the Tribunal must confirm from the non-exhaustive list following the introductory phrase[21]. It is unreasonable to defend that the Award is protected by this article as it does not comply with any definition brought by the subsections of Article 1(1) of the BIT.

35. First, an award is defined as "***the decision*** *or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them*"[22]. Thus, the own definition of an award already excludes it from being an investment itself, since it is the consequence of an arbitration procedure and not a product of an investment.

36. Further, the Award is not compatible with any of the concepts enumerated in Article 1(1), these are:

> *(a) movable and immovable property and any related property rights, such as mortgages, liens or pledges;*
>
> *(b) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;*

[18] UNCTAD Trends, pp.7-8.
[19] Muchlinkski, p.676.
[20] Kenneth, p.115.
[21] McLachlan/Shore/Weiniger, p.172.
[22] Black's Law Dictionary, p.321; emphasis added.

(c) claims to money, and claims to performance under contract having a financial value;

(d) intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, good will, trade secrets and knowhow; or

(e) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

37. The Award clearly does not fall within the categories (a), (b), (d) or (e). With regard to category (c), Claimant might try to frame the Award as a "claim to money" basing its arguments in the *Saipem case*[23]. However, this assertion is fallacious, since, as Mr. Khan emphasis in his opinion on the *Deutsche Bank case*, for any claim to money to constitute an investment under a BIT, it must be used to create economic value and associated with an investment[24]. As such, simply showing that the Claimant has a claim to money will not be enough to qualify it as an investment under Mercuria-Basheera BIT.

38. In this case, the Award does not create an economic value to Mercuria and neither is associated with an investment. It does not create economic value because it is a simple amount of money that one Party needs to pay to the other one.

39. Furthermore, the Award is not associated with an investment. The Claimant's "claim to money" is a debt arising out of the LTA and for this debt to qualify as an investment under the BIT, it must be associated with an investment. The debt thus is associated with the LTA and if the LTA itself constitutes an investment, which is separate and distinct from the debt arising thereunder, the debt might be included in the hall of assets defined as investments. However, the LTA is a contract and a contract without more is not enumerated in the categories which, "*in particular*"[25], are regarded as assets. Therefore, the LTA is not an investment for the purposes of the BIT. The LTA is not associated with a separate investment as required by clause (c), and, therefore, does not qualify as an investment under clause 1(1)(c) of the BIT.

[23] *Saipem Juris*, §§119-128.
[24] *Deutsche Bank Dissenting*, §9.
[25] BIT, Article 1(1).

40. Alternatively, as pointed out by the *GEA Group* tribunal[26], the award and the contract are different and should not be considered as a whole. Thus, even if the LTA could somehow be characterized as "investment" under the BIT, Respondent stress that the fact that the Award rules upon rights and obligations arising out of an investment does not assimilate the Award with the investment itself. The two – the Award and the LTA – remain distinct from each other, and the Award itself involves no contribution to or any relevant economic activity within Mercuria such as to be included in the scope of Article 1(1) of the Mercuria-Basheera BIT. For the same reason, the LTA, as well as the Award, cannot be considered as falling within the terminal provision of Article 1 of the BIT that states that "*Any change to the form in which assets are invested shall not affect their nature as investments*"[27].

41. Hence, the Award does not constitute an investment according to the Mercuria-Basheera BIT and it is not protected by that instrument.

2. The Award does not fulfil the requirements of the Salini test

42. As previously shown[28], the Award – in and of itself – cannot constitute an investment. It is only a legal instrument providing rights and obligations to the Parties on the dispute. To further support this statement, Respondent exposes how the Award fails to comply with the requirements established in the *Salini* case. Respondent notices that the objective notion of investment on the basis of the *Salini* test is not applicable in non-ICSID arbitrations, as many tribunals have held[29]. However, in assessing the existence of an investment, Respondent emphasizes that the criteria for an investment as defined in the *Salini* test – (i) a financial contribution, (ii) a certain duration, (iii) an element of risk, and (iv) economic development in the host State[30] – are, although not binding on this Tribunal, useful guidelines.

43. First, Respondent notes that the scope of the Award is to remedy an alleged lost Claimant suffered due to the LTA termination[31], this being an element of a previous commercial arbitration started by Claimant to challenge NHA's decision[32]. Second, even being an instrument that gives Claimant the right to demand a sum of money from Mercuria, it does not transform the Award into an investment. The duration of the commitment is not particularly significant, since the Award is pending in Mercuria's judicial system waiting to

[26] *GEA Group*, §162.
[27] BIT, Article 1(1).
[28] Section [I.B.1].
[29] *Rurelec*, §364; *White Industries*, §7.4.9; *Mytilineos*, §§117-118.
[30] *Salini*, §52.
[31] Facts, §930.
[32] Facts, §125.

be enforced[33], configuring a normal judicial procedure. Risk there might be indeed, however all enforcement procedures face the same risk of being refuse or accepted. It is an inherent risk of the arbitration process. Even the New York Convention envisages the possibility that the host country may refuse the recognition and enforcement of an award[34]. Finally, the economic development element of the definition is deemed an essential one and, in the present case, it is entirely absent. The Award has not contributed what so ever to Mercuria's economy.

3. The relation between Claimant and the NHA was a purely commercial transaction and does not constitute an investment

44. Finally, Claimant may argue that the Award fulfils the Salini test because one must take into account the whole operation of the foreign company rather than the award itself. Nonetheless, the whole operation of Claimant in Mercuria consists on a commercial transaction between Atton Boro and NHA[35] and the production of specific products, being a pure commercial transaction, not configuring an investment.

45. The Award is intimately linked to the LTA, being a consequence from the private relation between NHA and Claimant. The Award is fruit of a commercial relation sealed by a contract[36] - the LTA –, and decided in a commercial arbitration procedure[37]. It is a normal commercial activity.

46. According to the *Joy Mining* case, that dealt with the non-performance of a contractual obligation by an Egyptian state entity, the tribunal refused to assume jurisdiction over the claim on the basis that it was necessary to draw a fundamental distinction between "*ordinary sales contracts, even if complex, and an investment*", since otherwise "*any sales or procurement contract involving a State agency would qualify as an investment*"[38]. On that case, the definition of "investment" in the relevant UK–Egypt BIT included similar formulation as the present case, containing the terms "*every kind of asset*" and "*claims to money or to any other performance under contract having a financial value*"[39]. The same

[33] PO2, §4.
[34] NYC, Article V.
[35] Facts, §§890-895.
[36] Facts, §890.
[37] Facts, §930.
[38] *Joy Mining*, §58.
[39] *Joy Mining*, §38.

ratio decidendi was followed by the *Global Trading case*, where the tribunal concluded that it lacked jurisdiction as pure economic transactions "*cannot qualify as an investment*"[40].

47. In addition, the *Nova Scotia case* had equal outcome. The dispute involved contractual rights under a coal supply agreement and the investment definition in the Canada–Venezuela BIT included "*money, claims to money, and claims to performance under contract having a financial value*"[41]. The tribunal concluded that "*neither 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*"[42]. The tribunal further notes that even though a BIT function is to promote investment in the host country and that the list of investment brought by the BIT is a non-exhaustive one, there must not be a "*boundless interpretations of the term 'investment'*" since there would result in a great burden to the Contracting States[43].

48. The fact that Atton Boro set up a manufacturing unit in Mercuria in 2005[44], bought land and machinery in 2007[45] and entailed risk in the termination of the LTA[46] does not by any means imply an investment. Risk on the termination of the contract might have existed, but it is not different from that risk involved in any commercial contract, including the possibility of the termination of the LTA. Moreover, the construction, production and supply of the kind of equipment involved in this case is a normal activity of Atton Boro, not having required a particular development of production that could be assimilated to an investment.

49. Hence, as this arbitral procedure aroused from a commercial dispute – the Award –, it is not an investment. Further, even if this Tribunal considers the Award as part of Claimant's entire operation in Mercuria, it cannot still be considered an investment as purely commercial activities, such as the one Atton Boro has in Mercuria, are not protected investments under Mercuria-Basheera BIT.

50. Also, Respond reminds that the courts of the place of arbitration have primary jurisdiction to review an award once it has been made, and to determine its validity. The Award is an object of an enforcement procedure and is not valid objects to start a new arbitration procedure.

---

[40] *Global Trading*, §§56–57.
[41] *Nova Scotia*, §§75–78.
[42] *Nova Scotia*, §82.
[43] *Nova Scotia*, §§81-82.
[44] Facts ,§900.
[45] Facts, §920.
[46] Facts, §930.

2. CLAIMANT CANNOT BRING PATENT RELATED CLAIMS BEFORE THE ARBITRAL TRIBUNAL

51. Despite the international discussion about the suitability of the term "investment" to define intellectual property[47], Respondent does not contest that the Mercurian Patent No. 0187204 is a protected investment under Article 1(1)(d) of the BIT. However, this forum is not the most suitable to appreciate the matter, and, Claimant's attempt to question Mercuria's IP policies should be dismissed by this arbitral Tribunal. Litigation involving patent rights is to be directed to its appropriate *locus*: The Dispute Settlement Body of the World Trade Organization[48]. Annex 1C of the Marrakesh Agreement, article 64, extends the dispute settlement structure of WTO to all TRIPS matters.

52. Article 23 of the WTO's Dispute Settlement Understanding, in turn, states that "*when members seek the redress of a violation of obligations…*" "*Members shall not make a determination to the effect that a violation has occurred, (…) except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*". Therefore, there is no room for doubt: the company's plea lies entirely outside the Mercuria-Basheera BIT; any other comprehension defies reasonable understanding of DSUs legal text and the exclusive jurisdiction of the WTO[49].

53. Economically wise, one could assert the implications between intellectual property and an investment concept. Indeed, according to the BIT, Article 1(1)(d), the "*term investment (…) includes intellectual property rights*". However, one should not dismiss the expressed intent of Atton Boro, which seeks relief based on the TRIPS agreement, claiming that the "*Law N° 8458/09 disregards international covenants such as the TRIPS*".

54. Now, as already stated, if the Claimant wishes to discuss Mercuria's compliance with the TRIPS, this Tribunal is an inadequate one. It is nevertheless essential to underline that Article 1.1 of TRIPS provides that all members are free to determine the appropriate methods to implement the treaty within their legal system and practice.

55. Ultimately, agreeing with the Claimant's view, every single treaty ever signed by Mercuria could be brought before the arbitral Tribunal. Such expansive view make all treaties dispute settlement provisions void. In fact, as seen in *Grand River v United States*[50], FET is a standard of protection that "does not incorporate other legal protections that may be provided

[47] Okediji, p.1126.
[48] Verrill, p.288.
[49] Vadi, p.194.
[50] *Grand River*,§219.

to investors under other sources of law". To hold otherwise would condemn Mercuria to disrespect its obligations before the international community and its controversy mechanisms arrangements[51].

56. Hence, since Atton Boro's submissions are not protected under the BIT, this Tribunal should reject the claimant's claims on the merits.

3. CLAIMANT CANNOT AVAIL ITSELF OF THE BIT'S BENEFITS

57. In any event, even if the Tribunal finds that the Award is an investment within the meaning of Article 1(1) of the BIT, Respondent submits that Claimant's pleas ought to be entirely dismissed, as the BIT's benefits are not available thereto.

58. A corporation's entitlement to the BIT's protection is contingent on a two-tiered analysis. First, it must fulfil the requirements of Article 1(2)(b), *i.e.*, "be incorporated or duly constituted in accordance with the applicable laws of that Contracting Party". Second, it must not be denied the BIT's benefits, which may lawfully occur when the substantial conditions of Article 2 have been met.

59. This increasingly frequent formula[52] combines the traditional country-of-organization standard for corporate nationality[53] with a denial-of-benefits clause, which warrants states the prerogative to sift genuine investors from mere "mailbox companies" having no economic connections[54] to the country wherein they have been incorporated.

60. Despite being constituted in Basheera, Claimant cannot avail itself of the BIT's benefits due to Respondent's denial[55]. Moreover, read in its ordinary meaning, the broad language of the clause – "each Contracting Party reserves the right to deny the advantages **of this Agreement** to…" (emphasis added)" – encompasses the whole treaty, which includes the investor-state arbitration clause (Article 8 of the BIT), thus depriving the Tribunal of its jurisdiction. This conclusion has been consistently confirmed by tribunals faced with similarly drafted clauses[56].

---

[51] Biadgleng, p.26.

[52] Lee, p.107; Skinner/Miles/Luttrell, p.284; Sornarajah, p.329; UNCTAD Definitions, p.83; Voon/Mitchell/Munro, p.54; Zhang, pp.57-58.

[53] *Barcelona Traction*; *Diallo*; *ELSI* (separate opinion of Judge Oda); Shaw, pp. 816-818; Sornarajah, pp.87, 198.

[54] Dolzer/Schreuer, pp.54-55; Gastrell/Le Cannu, p.79; McLachlan/Shore/Weiniger, §5.180; Schill, p.223; Skinner/Miles/Luttrell, p. 272; Ampal-American Juris, §125.

[55] Response, §5.

[56] Ulysseas, §§110-13; Rurelec, §366; Pac Rim, §4.4.

61. Respondent has validly invoked Article 2 of the BIT, because both the [**A**] procedural and [**B**] substantive requirements of the denial clause have been met. Accordingly, the Tribunal ought to declare it lacks jurisdiction to hear the dispute.

A. Respondent complied with the procedural requirements of the denial clause

62. The chapeau of Art. 2 BIT reads that "each Contracting Party **reserves the right** to deny the advantages of this Agreement to…"[57]. The verb "reserves" indicates, in its ordinary meaning, that the denying state must affirmatively exercise its prerogative, a conclusion shared by many tribunals addressing similarly drafted clauses[58]. On the other hand, the clause sets no requirements of prior notification or consultation – as does, *e.g.*, Article 1.113 of NAFTA[59] – meaning that reliance on Article 2 of the BIT hinges primarily on the denying state's will to act thereupon, provided the substantial conditions are met.

63. Respondent unambiguously conveyed its denial to Claimant in the Response[60], thereby [**1**] abiding squarely by the applicable time limit to communicate its exercise of Article 2 of the BIT. Furthermore, [**2**] exercise of the clause yields retrospective effects, meaning it impacts all of Claimant's investments.

1. Respondent has timely effected denial

64. There are no express time limits in Article 2 of the BIT for a state to convey its exercise of the denial of benefits clause. Due to its effect on the jurisdiction of the Tribunal, the only applicable standard may be found in the procedural law, the PCA Rules, whose Article 21, §3, reads: "*a plea that the arbitral tribunal does not have jurisdiction shall be raised* ***not later than in the statement of defence***"[61]. Respondent abode squarely by this deadline, as it affirmatively communicated its reliance on the denial clause in the Response.

65. Upon examining denial clauses, case law has remained divided on this issue. Upon analyzing the ECT, which is not applicable to the present case, ECT tribunals have required the notice to be served either before the dispute arises[62] or the investment is made[63]. On the other hand, non-ECT tribunals have consistently found that a denial clause must be invoked,

---

[57] Emphasis added.
[58] *AMTO*; §62; *Ascom*, §745; *Plama Juris*, §155; *Yukos Juris*, §455.
[59] *Waste Management*, §80. Article 10.12.2 of the CAFTA-DR; Art. 18.2 of the 2004 Canada Model BIT; Article 19.2 of the 2009 ASEAN Comprehensive Investment Agreement.
[60] RNOA, §5.
[61] Emphasis added.
[62] *Ascom*, §745.
[63] *Plama Juris*, §§157-65.

at the latest, in the statement of defense or counter-memorial[64]. The idiosyncrasies of the ECT have been raised in commentary and non-ECT case law to endorse different findings on this matter[65].

66. An interpretation of Article 2 of the BIT under Article 31(1) of the VCLT indicates the deadline to be the submission of the statement of defense. Whilst the clause's text is in itself silent on the issue, the context of the BIT includes Article 8(2)(b), which allows the investor to adopt the PCA Rules for the procedure, as chosen by Claimant[66].

67. Furthermore, to conclude otherwise would place an untenable burden on the denying state. The analysis of the clause's substantive conditions, *e.g.*, substantial business activities in the place of incorporation and foreign ownership or control, is readily available to the investor, but would in turn require an unreasonable effort by states, especially if they have successfully managed to attract a considerable amount of FDI inwards[67]. As noted by the tribunal in *Rurelec*, only when a dispute arises will the state decide whether denial is possible and ought to be effected[68]. Accordingly, Respondent's notice was timely.

2. The notice of denial yields retrospective effects

68. Article 2 of the BIT is silent as to whether the notice of denial yields prospective or retrospective effects, *i.e.*, if it affects investments made prior to the notice or only those established thereafter.

69. Case law on the matter has remained divided[69]. Upon analyzing the ECT, which is not applicable to the dispute at hand[70], ECT tribunals have generally favored prospective-only effects based on the investors' "legitimate expectations"[71]. On the other hand, non-ECT tribunals have underlined the purpose of denial clauses and thereby found them to yield also retrospective effects[72].

70. In the case at hand, a good faith interpretation of Article 2 of the BIT leading to retrospective effects should prevail. The Contracting Parties chose to insert a denial clause, whose very purpose is to entitle states the prerogative to withdraw the BIT's benefits to

[64] *EMELEC*, §71; *Pac Rim*, §4.83-4.91; *Rurelec*, §§376-84; *Ulysseas*, §§172-4.
[65] Gastrell/Le Cannu, pp.95-96; *Pac Rim*, §4.3; *Ulysseas*, §125.
[66] NOA, §§1-3.
[67] UNCTAD Definitions, p.98.
[68] *Rurelec*, §379.
[69] Gastrell & Le Cannu, p.85.
[70] PO1, §11; PO2, §2.
[71] *Liman*, §227; *Plama Juris*, §§161-162; *Yukos Juris*, §457.
[72] *Rurelec*, §376; *Ulysseas*, §173.

foreign-owned companies lacking genuine economic links with their places of incorporation[73], but they also decided not to limit the provision by expressly establishing prospective-only effects. This interpretation is also in keeping with the principle of *effet utile*, an unfolding of Article. 31(1) of the VCLT[74], according to which operative clauses should not be construed as to render it meaningless. Given that the host state is prone to address the possibility of denial after a dispute has sprung[75], to find otherwise would undermine *effet utile* by undermining the clause's very purpose.

71. Additionally, no legal uncertainty stems from retrospective effects. As observed by the tribunal in *Ulysseas*, "the possibility for the host State to exercise the right in question is known to the investor from the time when it made its investment"[76], since the BIT is made public[77] and the investor can assess from the outset whether it falls within the clause's substantive conditions.

B. The substantive requirements of Article 2(1) have been met

72. In addition to being procedurally compliant, Respondent's denial of benefits has a firm substantive legal standing. This can be traced to Article 2(1) of the BIT, which authorizes denial to:

> "*a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized*".

73. As a mere mailbox company set up in Basheera by outside parties for the sole purpose of attracting the BIT's protection, Claimant fulfills all requirements of the clause. More specifically, denial was rightful because: [**1**] Claimant is under foreign ownership or control and it [**2**] maintains no substantial business activities in Basheera.

1. Claimant is under foreign control or ownership

4. Claimant is a wholly owned subsidiary incorporated in Basheera by the ABG. It is uncontested that Claimant's shares are held by intermediaries "**ultimately controlled**"[78] by

[73] Section [II].
[74] Linderfalk, p.219; Villiger, p.428; Shaw, pp.936-937; *Fisheries Jurisdiction*, pp.432, 455; *Right of Passage*, p.142.
[75] Section [II.A.1].
[76] *Ulysseas*, §173.
[77] *Rurelec*, §383.
[78] PO2, §3; emphasis added.

AB&Co, a corporation organized under the laws of Reef that serves as the primary holding company for the ABG[79]. In its turn, AB&Co's shares are held by persons of a "wide variety of nationalities" and its directors come from "several different countries"[80].

5. Upon interpreting similar "foreign ownership or control" provisions in denial clauses, case law has ventured further than the (putative) investor's country of incorporation and placed particular relevance to the "ultimate controller"[81]. As noted by the tribunal in *Plama*, "ownership includes indirect and beneficial ownership; and control includes control in fact"[82]. In this regard, the tribunal in *Rurelec*[83]searched beyond the investor's formal owners and controllers to establish its ultimate controller.

6. In the case at hand, on account of it being unambiguous between parties that Claimant is ultimately controlled by a foreign investor, AB&Co., the first limb of Article 2(1) of the BIT is fulfilled.

1. Claimant has no substantial business activities in Basheera

7. The other requirement to enable denial under Article 2(1) of the BIT is a lack of "substantial business activities in the territory of the Contracting Party in which it is organized". Since its incorporation in 1998, Claimant has rented office space, maintained a bank account and retained a small staff ranging from a maximum of six to a minimum of as low as two employees, whose activities specifically concerned business affairs and errands in South America and Africa[84]. Basheera is located in neither of these continents[85]. Therefore, Claimant carries out no significant commercial activities in Basheera.

8. Applying Article 31 of the VCLT's standards to the issue, the requirement translates, in its ordinary meaning, as business-related engagements which are "material", "significant", "important"[86] or, as defined by the tribunal in *AMTO*, "of substance, not merely of form". It ensues the company must do more than simply pay taxes and conduct shareholder meetings[87]. This is in keeping with the general purpose of a denial clause to restrict BIT protection to investors with genuine economic links with one of the states, and not mere shell companies[88].

---

[79] Facts, §§2, 4.
[80] PO3, p.50.
[81] *Pac Rim*, §§4.79-4.82.
[82] *Plama Juris*, §170.
[83] *Rurelec*, §370.
[84] Facts, §4; PO2, §3.
[85] PO3, p.49.
[86] Black's Law Dictionary, p.1441.
[87] Zhang, p.58.
[88] McLachlan/Shore/Weiniger, §5.180.

9. In *Pac Rim*, the tribunal underlined that the restructuring of the claimant's corporate location from the Cayman Islands to the USA had no bearing on its business activities. The immateriality of its geographical location spoke against the requirement of the investor's activities being substantial in the place of constitution[89]. Likewise, Claimant's commercial endeavours are all outside Basheera and could just as easily be carried out in other jurisdictions.

10. Claimant maintains itself no substantial business activities in Basheera. The fact that the ABG has an "established presence in Basheera's pharmaceutical market"[90] is irrelevant, since Article 2(1) of the BIT concerns the putative investor itself and not the group of companies to which it belongs, as found by tribunals facing similarly drafted clauses[91]. It is uncontroversial that Claimant was incorporated "as a vehicle for carrying on business in South American and African countries"[92] – and not in Basheera, wherein it has no significant commercial activities. Thus, the second limb of Article 2(1) of the BIT is also fulfilled.

11. Since none of Claimant's investments qualify as protected investments under the BIT, it is unreasonable to defend that Atton Boro can evoke Article 8(1) of Mercuria-Basheera BIT to install an investment arbitration under PCA. By these reasons, the Tribunal has no jurisdiction over Claimant's submissions.

12. In reliance on these arguments, Mercuria invites the Tribunal to make findings that it lacks jurisdiction to hear this case, dismissing the claims in its entirety and making a declaration to that effect and making an award of costs in favour of the Respondent on a full indemnity basis.

[89] *Pac Rim*, §§4.73-4.74.
[90] Facts, §4.
[91] *Pac Rim*, §4.76; *Plama Juris*, §169.
[92] Facts, §4.

PART TWO: MERITS

13. THE ENACTMENT OF LAW N° 8458/09 DID NOT VIOLATE THE MERCURIA-BASHEERA BIT

14. Even if the Tribunal were to accept that Claimant made a protected investment under the Mercuria-Basheera BIT, Respondent has nonetheless consistently upheld its international obligations.

15. Respondent hereinafter submits that the enactment of Law N° 8458/09 and the concession of a non-voluntary license to HG-Pharma [**A**] both lie within its sovereign prerogatives, and more precisely, [**B**] are in accordance with Respondent's duty under the TRIPS Agreement. Additionally, [**C**] Respondent's actions in relation to Valtervite's patent by no means amount to direct or indirect expropriation. Indeed, even a diverging understanding would lead to the identical legal consequence: [**D**] Law N°8458/09 and the compulsory license do not offend the fair and equitable treatment standard.

A. The enactment of Law N° 8458/09 and the concession of a non-voluntary license to HG-Pharma amount to a fulfillment of Respondent's sovereign prerogatives

16. Faced in 2002 with a critical upsurge of greyscale[93], a severe, chronic and utterly impoverishing disease, Respondent, as a developing country, was hard pressed to cope with a massive number of Mercurians seeking care from the NHA[94]. Since modern and effective medicines were generally available only at high prices, the NHA engaged private contractors to obtain these drugs at discounted rates, achieving a modest 25% discount in the LTA. Despite Respondent's incessant efforts to prevent and mitigate the occurrence of greyscale[95], the number of patients relying solely on State-sponsored treatment grew far beyond previous assessments, rendering the discounted rate insufficient and unaffordable[96]. Once more, despite Respondent's efforts, Claimant refused to negotiate a new, more reasonable rate. In light of such a factual framework, Respondent could not but allow other suppliers to provide the drug at a more competitive price, as it had not only an "inherent right"[97], but a duty to act within the scope of its sovereign prerogatives as a legal entity of international law.

[93] Facts, §1313.
[94] Facts, §§1298, 1313.
[95] Facts, §§1315-1320.
[96] Facts, §§1298-1374.
[97] WTO/International Health , p.15.

17. In *SPP v Egypt*[98], for example, the tribunal found that a State cannot be held responsible if its acts are in accordance with international rules. Also, the manner in which a State may comply with its international obligations is immaterial for the purposes of compliance therewith, as was the case in *Myers v Canada*[99], when the arbitrators acknowledged that investment treaty tribunals "*do not have an open-ended mandate to second-guess government decision-making*".

18. Therefore, the concession of a license to HG Pharma by Respondent's Courts falls nothing short of compliance with its international duties as a sovereign nation. This is especially so considering how it is also in exclusive conformity with Respondent's goal of granting its afflicted populace access to generic drugs that are at least 80% cheaper to manufacture than their brand-name counterpart[100], thus becoming instruments of paramount importance in the Mercurian fight against greyscale.

A. Law Nº8458/09 and, consequently, the compulsory license are in conformity with the TRIPS Agreement

19. Law Nº8458/09 allows the Mercurian government to grant non-voluntary licenses if "*the patented invention is not available to the public at a reasonable price*"[101]. Claimant's suggestion that such legal measure disregards the TRIPS Agreement ought to be dismissed by the Arbitral Tribunal since Law Nº 8458/09 Law Nº 8458/09 [**1**] lies within the policy space recognized by the treaty and [**2**] converges with both TRIPS' commitments and the Doha Declaration. In any case, [**3**] Respondent's conducted is permitted under article 31 TRIPS and [**4**] the Mercuria-Basheera BIT does not forbid compulsory licensing.

1. The TRIPS Agreement grants ample policy space to all its members

20. As a general provision of the treaty, Article 1.1 TRIPS allows signatories free choice of implementation: regardless of the binding force of the pact, states may whatever strategies and public policies deemed fit to achieve their objectives[102], as "*governments must avoid entering into future investment agreements that overly constrain their regulatory autonomy*"[103].

---

[98] *Pyramids*, §154.
[99] *Myers*, §261.
[100] Facts, §953.
[101] Facts, §1396.
[102] Mayer, p.389.
[103] Thow/McGrady, p.141.

21. Indeed, one may notice that flexibility, rather than stringency, is a definite hallmark of the TRIPS. As a fundamental concern of member states, obligations regarding IP law are to be pondered with the particular needs of developed nations. For instance, it is acknowledged that "*the underlying public policy objectives of national systems for the protection of intellectual property*" and "*the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws (...) to create a sound and viable technological base*"[104].

22. Therefore, Respondent, as known and acknowledged by Claimant itself to be part of "the developing world"[105], could never have breached its obligations under the TRIPS Agreement by merely enacting public policies, within the scope of its policy space, for the benefit of its own populace. In fact, to submit otherwise would be to admit that obligations contracted in the realm of international law may amount to duties akin to those arising out of stabilization clauses, whose crippling effects on a State's autonomy are consistently questioned by scholars[106].

1. Law No. 8458/09 observes both TRIPS and the Doha Declaration on the TRIPS Agreement and Public Health goals

23. In any event, Law Nº 8.458/09 is in strict compliance with all of Respondent's international engagements, including the TRIPS and the Doha Declaration.

24. Article 7 of the TRIPS Agreement guarantees that:

> "*enforcement of intellectual property rights should contribute (...) to the mutual advantage of producers and users (...) in a manner conducive to social and economic welfare". Article 8, in turn, affirms that "members may (...) adopt measures necessary to protect public health and nutrition*".

25. Detailing these provisions, the Doha Declaration provides that the TRIPS Agreement does not and should not prevent member states from taking measures to protect public health[107]. The drafters of the Declaration also asserted that member states have the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted. In this respect, the Declaration further guarantees that "*each member has*

[104] Preamble to TRIPS Agreement.
[105] Facts §110.
[106] Cotula, p.18; Gehne/Brillo, p.32.
[107] Doha Declaration, Article. 4.

the right to determine what constitutes a national emergency or other circumstances of extreme urgency"[108].

26. This is precisely in line with Respondent's conduct throughout the enactment of LawNº8458/09 and the compulsory licensing of Valtervite, as both were grounded upon genuine and legitimate defence of public health and public interest. Indeed, since "*[p]ublic health concerns are commonly believed to be adequate grounds for authorizing compulsory licenses*"[109] and acknowledging that "*[a]ny ground defined by the national patent law for granting compulsory licenses should, as a matter of principle, be regarded as a matter of public interest in line with customary international law*"[110], Respondent's conduct was not only lawful: it was the only means through which the object of the TRIPS, for the purposes of an article 31.1 VCLT interpretation - that a "t*reaty shall be interpreted in light of its object and purpose*" - could in fact be fulfilled.

1. The issuance of a non-voluntary license of Valtervite respects Article 31 of the TRIPS

27. Article 31 of the TRIPS establishes the criteria that a State must observe when drafting a law that allows the use of the subject matter of a patent without the authorization of the right holder[111]. In the present case, all of them were fulfilled by Law Nº 8.458/09, as demonstrated below.

28. Firstly, as per Article 31(a), the "*authorization of such use shall be considered on its individual merits*". Such provision was clearly observed by Respondent since the enactment of Law Nº 8.458/09 emerges as a public policy measure directed to a specific context and to reach a particular demand for medication. It can be thus concluded that it is not a general provision, but rather restricted to the greyscale epidemic upsurge.

29. Secondly, in compliance with Article 31(b), the Compulsory License was authorized only after the NHA had made prior unsuccessful attempts to obtain authorization from the right holder on reasonable commercial terms. In 2008, the NHA approached Claimant seeking further discounts attuned with the epidemic's prospects and the ensuing budgetary

[108] Doha Declaration, Article 5.
[109] Gibson, p.391.
[110] Correa, p.349.
[111] TRIPS, Article 31, caput.

implications, which were unfortunately disregarded by Claimant when it dismissed Respondent's pleas and refused to make significant concessions[112].

30. In any event, as per Article 31(b), the TRIPS allows states to waive prior negotiation efforts in cases of "national emergency". Under Paragraph 1 of the Doha Declaration, the definition of an "emergency" is conspicuously broad and should be established by the affected state, including, inter alia[113], diseases.

31. Furthermore, the enactment of Law Nº 8.458/09 and the subsequent compulsory license also meet the requirements of Article 31(c) and 31(d), because the scope and duration of the Law were limited to the purpose for which it was authorized, i.e., the need for a drug to deal with an epidemic that was not available at a reasonable price, at no impairment for other pharmaceutical companies to obtain license for and manufacture Valtervite.

32. Thirdly, any use of the subject matter of a patent shall be authorized predominantly for the supply of the domestic market of the member state authorizing such use.

33. This requirement should be read in light of article 31bis, which provides that: "*1. The obligations of an exporting Member under Article 31(f) shall not apply with respect to the grant by it of a compulsory license to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s)*".

34. Hence, although the enactment of Law Nº 8.458/09 lays its motives on a national emergency, exportation of the medicine to other countries struggling with an identical epidemic does not violate the TRIPS Agreement.

35. The fourth criterion establishes that the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.

36. Royalties at 1% of earnings were fixed in the licensing process. It is easily seen that this retribution is adequate if international standards are taken into account. The Canadian guidelines on compulsory licensing for export, praised by the World Health Organization as a "*reasonable and appropriate*" method, for instance, provides a royalty scale rate that considers the UNHDI: the royalty percentage for developing countries such as India, Cambodia, Egypt and South Africa is then, respectively, 1.15%, 1.08%, 1.31% and 1.33%[114].

37. Finally, Respondent has not abdicated its TRIPS prerogatives as a member state since the BIT does not prevent Respondent from resorting to compulsory licensing. In this case, any

[112] Facts, §916.
[113] Taubman *et al.*, p.181.
[114] Remuneration guidelines, p.84.

other interpretation would make empty the treaty texting and, consequently, the will of the parts.

A. Respondent's actions in relation to Valtervite's patent do not amount to expropriation

38. Firstly, it is clear that Respondent's conduct does not amount to direct expropriation, since it would involve a governmental taking of property[115] or a transfer of "at least some essential component of property"[116] to a beneficiary. Since compulsory licensing does not imply a transfer of a legal title, it cannot be understood as a kind of direct expropriation[117].

39. Secondly, the Tribunal should also recognize that there was not any indirect expropriation either. Indirect expropriation is a policy measure, which without allocating assets to third parties or the government, results in a deprivation of ownership, a *de facto* expropriation[118]. Therefore, and following the international customary law on the subject, any enquiry related to indirect expropriation ought to be effects rooted[119].

40. Thus, compulsory licensing might add up to an indirect expropriation. Claims must, however, demonstrate undue deprivation of ownership reckoning the following standards: the economic impact of the government action, the extent to which the government action interferes with investment backed expectations and the character of the government action. Those criteria derive from international customary law[120]. Since 2004 they are also described by Annex B of the US Model BIT which intends to be consistent with transnational consensus on the matter[121] .

41. It is of extreme relevance to remember that each of the mentioned (*supra*) factors shall be evaluated in a "case-by-case, fact-based inquiry" as the US Model itself provides[122]. Aware of the impossibility of *a priori* conclusions, in view of Mercuria's public policy and its particularities, one can easily see that the enactment of the Law Nº8.458 does not constitute an indirect seizure of property because Respondent's action did not violate the investor's legitimate expectations. As already seen, the non-voluntary license does not constitute in a

[115] Lin, p.155.
[116] *Enron*, §243, *Sempra*, §280; Newcombe/Paradell, p.324.
[117] Pantopoulou, p.36.
[118] *Tecmed*, §113.
[119] *Pope*, §99.
[120] Andrew, p.34; Gibson, p.394.
[121] US Model, p.41.
[122] US Mode, p.10.

taking of property, because royalty retribution rights were granted to Claimant according to international standards[123].

42. Furthermore, even if compulsory licensing may undermine the economic value of a product, "*an adverse effect on the economic value of investment alone does not stand to establish expropriation*"[124].

43. The government action did not violate the investor's legitimate expectations. It is well established that the legitimate expectations of investors are founded in the legal order of the host state as it is in the moment of the investment[125]. At the time of Claimant's entrance in Respondent's market, the TRIPS agreement bound the nation already.

44. Therefore, the possibility of a legal change regarding the IP policies, within the lawful instruments provided in the TRIPS agreement, ought not to be a surprise for Claimant. Actually, a pharmaceutical company that relies on its patents to profit is aware of the fact that a state might submit its assets to compulsory licensing, as article 31 of TRIPS allows. Patents do not confer absolute rights and cannot create any expectation that the exclusivity given is absolute[126]. Thus, eventually losing its monopoly because of a compulsory licensing is just another business risk, and investment treaties do not ensure entrepreneurs their success[127] nor protect them from the inherent risks of their activities.

45. As if it were not enough, the Mercuria-Basheera BIT does not contain any specific provision able to create legitimate expectations to the investor with respect to its IP norms. It is impossible to directly translate the broad language of a treaty, which provides fair and equitable treatment, into "hard and fast rules[128]".

A. Respondent's action do not offend the Fair and Equitable Treatment standard

46. In no circumstance Respondent breached its FET obligation, since [**1**] the enactment of national law is a prerogative of the country and FET does not limit this right and [**2**] the compulsory license respected national procedures and took into consideration the crucial situation of Mercuria's population health.

1. The FET does not prevent lawmaking

[123] Facts, §143.
[124] LIN, p.158.
[125] Dolzer/Schreuer, p.134; Gami, §93.
[126] Ruse-Khan, p.27.
[127] *Maffezini*, §64.
[128] Diehl.

47. The FET clause does not prevent lawmaking or – what would be more inconceivable – requires an investor's approval in order to a nation pass its new legislation. There is no such a thing as a "vitrification of the legal order" caused by a BIT[129].

48. Hence, FET coincides with the international minimum standard as recognized by tribunals[130] and the binding interpretation on NAFTA[131]. This standard of protection consists of an umbrella concept[132] composed of several guarantees, including justice, due process, due diligence and non-discriminatory measures[133].

49. Considering the concept, a breach to the FET standard occurs when states act with bad faith or willful neglect of duty[134]. Clearly, this is not the case. Nor does the investor make such a claim. The provision for use of patented inventions without authorization of the patentee proceeded accordingly both TRIPS agreement and Mercurian law[135]. Moreover, Law N° 8458 is not discriminatory since it does not target the investor in particular, or a specific group of investors, - but is a legal reform that touches the intellectual property framework as a whole.

1. The compulsory license granted to HG Pharma was reasonable considering the factual context

50. It is imperative to restate the particular context that surrounds Mercuria and its citizens: it is a developing country struggling with an epidemic. Therefore, interpretation of a BIT legal text cannot ignore the boundaries of reasonability. Conscious of this need, in *Saluka v. Czech Republic*[136], the tribunal expressly conceded that a case analysis "requires a weighing of the Claimant's legitimate and reasonable expectations on one hand and the Respondent's legitimate regulatory interests on the other".

51. In *Duke Energy v. Ecuador*[137] the tribunal acknowledged that

> "*the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also*

[129] *Casualty*, §258; Sornarajah, p.357.
[130] *CME*, §611.
[131] Notes of Interpretation.
[132] *Cargill*, §268; *Glamis*, §618.
[133] Newcombe/Paradell, p.432.
[134] *Genin*, §367.
[135] Facts, §§1375-1420.
[136] *Saluka*, §306.
[137] *Duke Energy*, §340.

the political, socioeconomic, cultural and historical conditions prevailing in the host State."

52. Indeed, in *Genin v. Estonia* the Tribunal reckoned the fact that the host nation was a "renascent state", in view of Estonia recent entry into the capitalist system[138]. Therefore, arbitrators found that the context in which Claimants knowingly chose to invest conditioned investors' expectations and should be accounted for a FET analysis.

53. In the present case, Claimant knew the circumstances of the host state from the beginning, considering that the background of greyscale disease and the country vulnerability has never been hidden[139]. Therefore, it could expect that regulatory measures such as the one taken by Respondent, by granting a license for the production of greyscale medicine to another supplier, could be necessary.

V. RESPONDENT IS NOT LIABLE IN RELATION TO THE ENFORCEMENT PROCEEDINGS OF THE AWARD

54. Under the guise of the FET, Claimant has alleged that the conduct of HCM in relation to the enforcement proceedings of the Award breached the BIT, specifically Article 3[140], and that Respondent ought to be held responsible for committing an internationally unlawful act.

55. Article 27(1) of the PCA Rules states that the parties "*shall have the burden of proving the facts relied on to support its claim or defence*". Therefore, in the present case, Claimant has the burden of "bringing sufficient proof that he did not receive treatment amounting to FET"[141].

56. Although the BIT standards promote and protect the beneficial economic cooperation between sovereign States[142], both tribunals and commentators usually emphasize that it cannot be viewed in isolation from an political social, or economic changes.[143] They also agree that the FET standard "*is not a laundry list of potential acts of misconduct . . . and can only be assessed when looking at the totality of the state's conduct*"[144], and still "*cannot be reached in the abstract; it must depend on the facts of the particular case*"[145].

---

[138] *Genin*, §348.
[139] Facts, §§1295-1370.
[140] PO1, p.27.
[141] Tudor, p.138.
[142] BIT, §2.
[143] *Feldman*, §112; *National*, §180.
[144] *Micula* §517.
[145] *Mondev*, §118.

According to this, it is noteworthy that Tribunals find it possible to violate a strand of the FET without violating the fair and equitable as a whole. In LG&E v Argentina the Tribunal stated that "*[...] characterizing the measures as non-arbitrary does not mean that such measures are characterized as fair and equitable*"[146]. Consequently, Claimant has the burden to prove not only that one strand of FET may have been violated, but that Respondent's conduct as a whole violates the FET standard considering all the facts and elements.

Contrary to Claimant's arguments, Respondent hereby clarifies that it is not responsible for committing an internationally unlawful act in relation to the enforcement of the Award since Respondent has not breached the BIT, as it treated Claimant's investments fairly and equitably.

The broad concept of FET imposes obligations beyond customary international requirements of good faith treatment[147]. However, the concept faces the lack of a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily.[148] In this context, a number of arbitral tribunals have recently attempted to give meaning and content to the standard of FET in international investment law. However, the decisions and reasoning of many recent tribunals as to the standard's scope and content are fragmented, inconsistent and conflicting.[149]

In this sense, Tribunals have identified a certain number of recurrent elements which they consider as constituting the normative content of FET, and fit them in four categories: vigilance and protection, due process including non-denial of justice, lack of arbitrariness and non-discrimination and transparency and stability, which includes the investors' legitimate expectations[150].

Respondent treated Claimant's investments in a fair and equitable manner since [**A**] Respondent did not deny justice to Claimant's investments; [**B**] Respondent met Claimant's reasonable and legitimate expectations; and [**C**] Respondent acted with transparency, in a manner that was not arbitrary nor discriminatory.

A. Respondent did not deny justice to Claimant's investments

[146] *LG&E*, §162.
[147] *CME*, §156; *Azurix*, §361; *Aguas del Aconquija*, §7.4.7.
[148] Schill, p.263; Schill/ILJ, pp.2-3.
[149] Picherack, p.256.
[150] Reinisch, p.118.

Denial of justice, in the same manner that FET, does not have an unique definition and "cannot be determined by the application of a formula"[151], however Judge De Visscher established that:

> "***The mere violation of internal law may never justify an international claim based on denial of justice****. It may be that the* ***defectiveness of internal law, the refusal to apply it, or its wrongful application by judges****, constitute elements of proof of a denial of justice, in the international understanding of the expression; but* ***in and of themselves they never constitute this denial***"[152].

Over Claimant's allegations that Respondent has denied justice by failing to afford the investor viable and timely recourse to enforce the Award[153], Respondent rejects it since [**a**] the delay was not unreasonable and undue; [**b**] Respondent's conducts respected the NYC; [**c**] Respondent followed the rule of law.

1. Respondent's delay to enforcement proceeding was not unreasonable, but justifiable

Undue delay is commonly used as a way to characterize the denial of justice[154]. However, the point is not the delay *per se*, but whether this delay is justifiable or not. In the present case, the delay is justifiable [**a**] considering Respondent's social and economic situation. Furthermore, [**b**] the NHA's conduct in relation to the hearings do not violate due process of law.

a. Respondent's social and economic situation

Mercuria is a developing country with an overburdened judiciary[155]. The delay in its judiciary is a reality as it was shown in some hearings when the matter had to be adjourned due to several cases listed on the same day[156]. Against the backdrop of judicial backlog, eight years for enforcement proceeding is not an unusual duration.

---

[151] *Chevron Opinion*, §12.
[152] De Visscher, p.376; emphasis added.
[153] NOA, §13.
[154] UNCTAD Fair and Equitable, p.80; *Mondev*, §269; *Flughafen Zürich*, §376; *Azinian*, §102; Dolzer/Schreuer, p.163.
[155] RNOA, §9
[156] NOA, §§9, 15, 20, 24, 40.

Moreover, most countries do not provide for specific time limits within which foreign awards can be recognized and enforced[157]. For instance, Polish courts allow applications for enforcement within 10 years from the date when the award is issued, but impose no time constraints on recognition[158]; in South Africa, the relevant limitation period to recognize and enforce an award or an foreign judgment is 30 years[159]; and in India, who has the same judicial situation[160], established a procedure for foreign Award's enforcement proceeding in which it should undergo a two-step process that has a limitation period of fifteen years[161]. Also, in most of cases Tribunals do not consider eight years enough time to configure denial of justice[162]. As explicitly noticed by the *White Industries* tribunal:

> *"**while the duration of the proceedings overall**, as well as the delay by the Supreme Court in hearing and determining the jurisdiction appeal, **is certainly unsatisfactory in terms of efficient administration of justice, neither has yet reached the stage of constituting a denial of justice**"* [163].

Therefore, it is illogical to support a breach of Mercuria's duty under the BIT based solemnly on its overloaded juridical system. Only the timeframe Claimant avails to configure a violation of FET is not sufficient to prove a breach of any international obligation.

i. b. The NHA's conduct in relation to the hearings does not violate due process of law

Although Claimant may suggest that the HCM was collaborating with the delay tactics used by the NHA, Respondent submits that since the NHA's conduct in relation to the hearings do not violate due process of law, Respondent could not have penalized it. Respondent also alleges that in the case at hand there was not a "clear and malicious misapplication of the law"[164] since all the procedures rules were followed.

The tribunal in *Waste Management* defined a violation of fair and equitable treatment as:

[157] Smeureanu, fact 3.
[158] ICC Guide, p.307.
[159] Prescription Act.
[160] Pandat, p.74.
[161] Section 44, AC Act.
[162] *El Oro*, p.191; *White Industries*, §10.4.22
[163] *White Industries*, §10.4.22; emphasis added.
[164] *Azinian*, §103; Vandevelde, pp.90-91.

> *"involv[ing] a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a* ***manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process****"*[165].

In conclusion, the main thrust of the due process requirement in investment treaty arbitration is to establish procedural rights for investors in administrative proceed.[166]

In the present case, since the NHA is an organ of the State, and therefore has stronger bureaucracy, it is reasonable to infer that it is entitled to longer procedural terms[167]. Moreover, as the delay was not motivated by misapplication and Claimant failed to prove it, once that the mere allegation do not constitute any kind of prove, Respondent cannot be accused for denying justice.

a. 2. Respondent's conducts respected the New York Convention

It is necessary to elucidate that, in contrast to what Claimant argued[168], Respondent acted in accordance with the NYC. Although Article 3 of the NYC provides a general obligation for states to recognize Convention awards as binding and to enforce them in accordance with their domestic rules of procedure, Respondent clarifies that the delay on the present case was only about jurisdiction matters[169] so that the international obligations and the domestic rules of procedure were respected.

b. 3. Respondent followed the rule of law

At this point, Respondent clarifies that eight years for enforcement proceedings was due to the complexity of issue on Court's jurisdiction, in way that it cannot be considered denial of justice, since mere delay on enforcement proceeding cannot constitute a denial of justice[170]. The inexistence of discrimination, misapplication of the law and bad-faith also indicates that the eight years duration was reasonable.

Thus, it is impossible to constitute denial of justice since there was not a deny of justice in criminal, civil or administrative adjudicatory proceedings. In contrast, Respondent always

[165] *Waste Management*, §98.
[166] Schill/ILJ, p.19.
[167] Brazilian Code, Article 183.
[168] NOA, §10.
[169] NOA, p.10.
[170] *Oostergatel*, §290; *Vannessa Ventures*, §226.

enabled and still enable all the judicial and administrative means for Claimant in defending their rights, and that is the reason why Claimant cannot plead denial of justice, once that there was not an exhaustion of local remedies.

The exhaustion of local remedies is a consolidate requirement in case law and legal writings to characterize denial of justice. The only exception to this rule was established in *Chevron*, but on that case the denial of justice come from an specific obligation to provide effective means of enforcing rights in the BIT's stated in legal device. Although, this interpretation was so specific for the case that the tribunal in *White case*, despite all Claimant's allegation that the case at hand was in the same parameters of the Chevron, refused the denial of justice.

In the present case, the interpretation given in *White case* should be the same, considering that the BIT do not provide the obligation of providing effective means since (i) BIT just recognize the importance of it, and (ii) Preamble cannot create obligation between the parties.

1. B. Respondent met Claimant's reasonable and legitimate expectations

Tribunals have agreed that FET "protects the reasonable expectations of the investor at the time it made the investment."[171] However, it is important to elucidate that these expectations must be reasonable and legitimate in light of the circumstances[172]. The tribunal in *Saluka* also advertise that "[i]n order to determine **whether frustration of the foreign investor's expectations was justified and reasonable**, the host State's legitimate right subsequently to regulate domestic matters in the **public interest must be taken into consideration as well**"[173].

Also, in *Tecmed* the tribunal apparent reliance on the foreign investor's expectation as the source of the host State's obligation[174]. According to them, **the obligation of the host State toward foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have**. Moreover, on their opinion a **tribunal which sought to generate from such expectations a set of rights**

[171] *National Grid*, §173.
[172] *Saluka*, §304; *Duke Energy*, §340.
[173] *Saluka*, §302.
[174] *Tecmed*, §67.

different from those contained in or enforceable under the BIT might as well exceed its powers and if the difference were material might do so manifestly[175].

In the present case, Claimant knowing that Respondent is a developing country with an overburdened judiciary, could not argue that he had legitimate expectation that a supposed matter would be judge without any delay, specially when the matter has public interest. Therefore, it leads to the obviously conclusion that a court's conduct can only be deemed unfair or inequitable because of delay on proceeding when there is clear and convincing evidence of egregious violation of due process and/or manifest arbitrariness that resulted in a total failure of the judicial system and not a mere expectation that was not even legitimate. Thus, Claimant failed again to the burden to prove this violation.

2. C. Respondent Acted in a non-discriminatory and non-arbitrary manner

Despite overlap with the standard of fair and equitable treatment, the criteria for such measures are "*sufficiently distinct to form the basis of a separate standard of treatment*"[176]. The CIJ also defined arbitrary. On their interpretation arbitrary consist on "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*"[177].

The discriminatory fashion, however, can be based on "*race, religion, political affiliation, disability, and a number of other criteria*," although "*the most frequent problem is discrimination on the basis of nationality*"[178]. In this manner the non-discrimination "*requires a rational justification of any differential treatment of a foreign investor*"[179].

Also, in *Waste Management* tribunal understood that a Respondent's act can be discriminatory when it is arbitrary, grossly unfair, unjust or idiosyncratic[180].

In conclusion, since (i) all the delay in enforcement proceedings can be explained, and (ii) nothing about Respondent's delay constitutes a willful disregard of due process, or surprises a

[175] *Tecmed*, p.47.
[176] Schreuer 3, p.192.
[177] *ELSI*, §15.
[178] Schreuer, p.193.
[179] *Saluka*, §460.
[180] *Loewen* , §135.

sense of judicial propriety, and more was arbitrary, grossly unfair, unjust or idiosyncratic, Claimant's allegation about the discriminations cannot succeed.

57. THE TERMINATION OF THE LTA BY RESPONDENT'S NATIONAL HEALTH AGENCY DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3.3 BIT

On November 25, 2004, Claimant and the NHA entered into the LTA for the supply of Sanior, a drug mainly used for greyscale treatment[181]. The NHA allegedly incurred in a breach of the LTA when it terminated the Agreement.

Such action shall not be considered a breach of the BIT under Article 3.3 because: [**A**] Claimant is not entitled to the benefits of the BIT; [**B**] the NHA acted solely in a commercial capacity; and [**C**] the claim was already decided by the competent dispute settlement forum.

A. Claimant is not entitled to the benefits of the BIT

Following the execution of the LTA, the NHA started placing orders for Sanior[182]. The orders were placed according to the terms of the LTA, that is, a large scale supply of Sanior at a fixed discount rate.

The NHA invited the Claimant, a company whose control and management were concentrated in Reef[183], to submit a proposal. The terms of the agreement was extensively negotiated between the NHA and the Claimant[184], always in a commercial capacity. even filed a commercial arbitration procedure against the NHA for noncompliance of the agreement[185].

The BIT entered into by Kingdom of Basheera and the Republic of Mercuria, in which Claimant supports its claims, states in Article 1.2.b) that an investor is "*any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of that Contracting Party*". The same document, however, provides in Article 2.1 that a Contracting Party may deny the benefits provided in the document to a "*legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized*".

[181] Facts, §891.
[182] Facts, §870.
[183] Facts, §845.
[184] Facts, §890.
[185] Facts, §930.

Should Article 1.2.b) BIT have been independently examined, Claimant could have been considered an investor. That is not the case in this issue. The BIT must be interpreted as a whole. Article 2.1 BIT provides an exception on the extension of the benefits of the treaty to any company whose economic connection to the contracting State is none but the place of its incorporation[186]. The mere fact that Claimant is incorporated in Basheera, therefore, should not be enough to trigger the application of the BIT[187].

Thus, the benefits of the BIT cannot be extended to Claimant, under Article 2.1 BIT.

B. The NHA acted solely in a commercial capacity

The LTA was entered into by its parties as a result of the request for a proposal by NHA to the Claimant and an extensive negotiation process[188].

While negotiating and during the execution of the LTA that governed the relationship between Claimant and the NHA, there have been no interference of Mercuria's central government, nor acts of the NHA as an extension of that government. The decision to terminate the agreement was the expression of the NHA acting as a purchaser.

In order to invoke the responsibility of a State, Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that under international law, the conduct of any State organ shall be considered an act of that State under international law. State organ, in turn, "*covers all the individual or collective entities which make up the organization of the State and* ***act on its behalf***"[189] (emphasis added).

The NHA may even be considered an organ of the government of Mercuria, but it was not acting on its behalf when it entered into the LTA, a commercial contract.

Therefore, the respondent cannot be held responsible for the acts of the NHA regarding the LTA and its commercial relationship with Claimant.

C. The claims were already decided by the competent dispute settlement forum

[186] Dolzer/Schreuer, p.55.
[187] *Venoklim*, §156.
[188] Facts, §890.
[189] Draft ILC, p.40; emphasis added.

The LTA provided for arbitration seated in Reef as the means to resolve all disputes arising out of or in connection with the commercial relationship between Aton Boro and the NHA[190], pertaining to the annual purchases of greyscale treatment drugs[191]. The adoption of such a dispute resolution clause enshrines the will and consent of the parties under the LTA to derogate from any and all means of dispute resolution that do not fall within the scope defined therein.

On the other hand, the Mercuria-Basheera BIT adopted on Article 8 arbitration under the UNCITRAL Rules as means of settlement of disputes between the Contracting parties.

The termination of the LTA by the NHA caused Claimant to invoke arbitration under the LTA. The tribunal held the NHA responsible for wrongful termination, and the award is being duly executed in the Mercurian courts. Years after the decision, Respondent is faced with accusations by Claimant arising from the same facts in other dispute resolution forum.

Having more than one option of arbitration to pursue, if the party chooses to do so, it cannot pivot and take the other route[192]. It prevents conflicting decisions and "bis in idem". In the Pyramids case[193], a tribunal held that claimants cannot rely on remedies that would produce more than one enforceable remedy. That is, however, exactly what Claimant is trying to do.

After pursuing the commercial approach and having its claims decided by a tribunal, Claimant aims to pursue the investment approach to its claims and have them decided again.

Therefore, the claims were already decided by the competent dispute resolution forum and should not be subject to further decisions by this tribunal.

[190] Facts, §126.
[191] Facts, §§895-899.
[192] Rubino-Sammartano, p.318.
[193] *Pyramids*, §16.

PRAYER FOR RELIEF

The Respondent, the Republic of Mercuria, respectfully requests this Tribunal to find that:

(1) It lacks jurisdiction over the claims in relation to the Award;

(2) Claimant cannot avail itself of the BIT's benefits;

(3) Respondent cannot be held responsible for the enforcement proceedings of the Award;

(4) Claimant cannot rely on the protection of Article 3.3 BIT.

Respectfully Submitted on September 25, 2017

By

Team Khan

On Behalf of Respondent

Republic of Mercuria