PERMANENT COURT OF ARBITRATION

PCA CASE NO. 2016-74

Between:

ATTON BORO LIMITED

(CLAIMANT)

THE REPUBLIC OF MERCURIA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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LIST OF ABBREVIATIONS

%	Per cent
[ ]	Paragraph
AB	Atton Boro
AB&C	Atton Boro and Company
ABG	Atton Boro Group
Art./ Arts.	Article/ Articles
BIT	Bilateral Investment Treaty
CIL	Customary international law
FET	Fair and Equitable Treatment
i.e.	*Id est* (that is)
Ibid.	*Ibidem* (the same place)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Inter alia	Among other things
LTA	Long Term Agreement
No.	Number
p.	Page
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
UF	Uncontested Facts
UNCTAD	United Nations Conference on Trade and Development
US	The United States of America
v.	Versus
Vol.	Volume
WTO	World Trade Organization
WTO DSB	World Trade Organization Dispute Settlement Body

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Fanali v. Italy	*Duilio Fanali v. Italy,* Communication No. 75/1980, Views of 31 March 1983
Trebutian v. France	*Trébutien v. France*, Communication No. 421/1990, Decision of 18 July 1994

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ICCPR Optional Protocol	*Optional Protocol to the International Covenant on Civil and Political Rights*, entry into force on 23 March 1976
ICSID Convention	*International Centre for Settlement of Investment Disputes Convention, Regulation and Rules* (2006)
New York Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958)
PCA Arbitration Rules	*Permanent Court of Arbitration, Arbitration Rules* (2012)
TRIPS Agreement	*The Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C of the WTO Agreement (1994)
VCLT	*Vienna Convention on the Law of Treaties* (1969)
WTO DSU	*Understanding on rules and procedures governing the settlement of disputes*, Annex 2 of the WTO Agreement (1994)

STATEMENT OF FACTS

1. Atton Boro Limited ("Claimant") was a pharmaceutical company incorporated in Basheera in April 1998, whose name is well known for its pioneering effort to combat critical epidemic diseases that threaten the populations in the developing world. Its principal dealings involved forging public-private partnerships with State governments and State agencies for the supply of essential medicines at a competitive rate.
2. Claimant entered the Republic of Mercuria ("Respondent")'s market by concluding several of such agreements with Mercuria's National Health Authority ("NHA"), the most renowned of which was the 1998-2004 *Mercuria Comprehensive HIV/AIDS Partnership*, whose success was personally lauded by the Minister for Health.
3. In May 2004, the NHA entered into the Long-Term Agreement ("LTA") with Claimant in order to secure a long-term supply for the fixed-dose combination drug ("FDC drug") Sanior, which contained Valtervite, an innovative greyscale treating to which Claimant holds a Patent in Mercuria granted on 21 Februåy 1998 ("the Patent"), in Mercuria at a fixed discounted rate.
4. Claimant quickly set up its manufacturing facility and delivered its first consignment of Sanior in June 2005. Sanior was successfully delivered across Mercuria, and its demand rose progressively throughout the years. To meet the rising demand, Claimant purchased lands and machinery to expand its production scale.
5. In 2008, Claimant offered further 10% discount for the remaining duration of the LTA, but NHA rejected, demanding 40% and threatened to terminate the LTA if not satisfied.
6. On 10 June 2008, NHA unilaterally terminated LTA. Claimant invoked commercial arbitration against NHA in accordance with the terms of the LTA. In January 2009, a Tribunal seated in the People's Republic of Reef ("the Reef's Tribunal") rendered an Award ("the Award") finding the NHA violated the LTA, awarding Claimant $USD 40 million in damages.
7. On 10 October 2009, the President promulgated the Law No.8458/09, which introduced a provision that allowed for the issuance of compulsory license for patented invention ("the CL Law").
8. On 3 March 2009, Claimant filed enforcement proceeding before the High Court. NHA entered an appearance after being absent for a year, to resist the Award on the ground of public policy. The proceeding was delayed for 7 years up until 30 October 2016 and remains pending till this very date.

9. In November 2009, HG Pharma ("HG"), a Mercurian generic drug manufacturer whose 50% of the share was held by Respondent, applied for compulsory license before the High Court of Mercuria ("the High Court"). The Court heard the application through a fast-track process and granted a license for HG to produce generic FDC drug on 17 April 2010, at the meager royalty rate of 1% total earnings to be paid to Claimant.
10. On 10 January 2012, Respondent's Parliament passed the Commercial Courts Act, directing the High Court to constitute Commercial Benches in order to expeditiously dispose of commercial matters. However, on 1 September 2013, the Supreme Court of Mercuria ("the Supreme Court") ruled that the Commercial Bench had no jurisdiction on enforcement proceeding, causing all enforcement applications to be transferred *en masse* back to the regular bench of the High Court.
11. By 2014, Claimant had lost nearly two-thirds of its share in the greyscale medicine market to the generic FDC drug produced by HG, as well as several distributors to which Claimant had long-standing relationship with. Realizing the unsustainability of its business, in February 2015, Claimant announced that it would cease to supply Sanior in Mercuria.
12. On 7 November 2016, Claimant initiated arbitration under the Basheera-Mercuria BIT ("the BIT") by sending the Notice of Arbitration to Respondent.

ARGUMENTS

PART ONE: JURISDICTION

1. First and foremost, Respondent submits that **(I)** This Tribunal has no jurisdiction over any claims relating to the Award issued by the tribunal seated in Reef ("the Award").
2. Furthermore, **(II)** the arbration proceeding between Claimant and the NHA under the LTA precludes this Tribunal's jurisdiction over claims regarding the LTA
3. In any case, **(III)** Respondent has successfully exercised its right to deny Claimant benefits of the BIT. Claimant's claims are therefore inadmissible.

I. THIS TRIBUNAL LACKS JURISDICTION OVER ANY CLAIMS RELATING TO THE AWARD

4. According to Article 8 of the BIT, the PCA Tribunal has jurisdiction over a dispute only when the dispute arises from a protected investment under the BIT. Since the Award is not a qualified investment, any claim relating to it does not fall within this Tribunal's jurisdiction.
5. Claimant may argue that the Award is an investment since it falls into one of the sub-paragraphs listed under Art. 1.1 BIT, for example, "claims to money, and claims to performance under contracthaving a financial value". However, those categories of investments enumerated from sub-paragraph (a) to (e) only serve as non-exclusive examples, hence do not constitute a comprehensive definition of "investment." The term "investments" must have an inherent meaning,[1] entailing a contribution to the host state's economy.[2]
6. Respondent is mindful that Art. 1.1 BIT contains a so-called "transformation clause", stating "Any change in the form of an investment does not affect its character as an investment." However, even if the Award is a transformation of what can be said Claimant's original investment, the former is not automatically qualified as investment. In *GEA v. Ukraine*, the tribunal also dealt with the same BIT "transformation clause" and the same issue – whether an ICC arbitral award rendered pursuant to an agreement between GEA and an Ukraine state-owned company could be qualified as investment. It held that:

> "Even if – *arguendo* – the Settlement Agreement and Repayment Agreement could somehow be characterised as "investments", or the ICC Award could be characterised as directly arising out of the Conversion

[1] *Romak*, [180]
[2] *Romak*, [207]

> Contract or the Products, […] In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT"[3]

7. Applying the approach in *Romak* and *GEA*, the Award issued by the Reef tribunal is not an investment as it is only a legal instrument for disposition of rights and obligations of the parties,[4] which makes no contribution to Mercuria's economic development.

II. THE ARBRATION PROCEEDING BETWEEN CLAIMANT AND THE NHA UNDER THE LTA PRECLUDES THIS TRIBUNAL'S JURISDICTION OVER CLAIMS REGARDING THE LTA

8. According to the principle of *res judicata,* which is well-recognized as a general principle of public international law,[5] this Tribunal should refrain from adjudicating Claimant's claim regarding the NHA's termination of the LTA, since this has already been decided by the tribunal established under the LTA.
9. *Res judicata* applies when the test of triple identity is met: same parties, same request for relief and same grounds for that request.[6] All conditions are met in this case.

A. The parties in the two proceedings are the same

10. An understanding of party identity, although in a *lis pendens* case, was adopted by the Human Rights Committee in *Fanali v. Italy*, in which the Committee held that for Article 5(2)(a) of the Optional Protocol[7] to apply, the same claim would have to be submitted by the same individual "or someone else who has the standing to act on his behalf before the other international body".[8]
11. In the present case, Respondent does not dispute that the NHA is a state organ of Mercuria, therefore it has standing to act on Respondent's behalf before the tribunal seated in Reef. This is also Claimant's allegation in its Notice of Arbitration, stating: "Mercuria breached its obligation towards Atton Boro by unilaterally terminating the LTA".[9] It can be inferred from this statement that Claimant alleged Respondent to be liable for the NHA's termination of the LTA.

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[3] *GEA*, [162]
[4] *GEA*, [161]
[5] *Corfu Channel*, [248]; *Chorzów Factory*, Opinion by M Anzilotti
[6] *Chorzów Factory*, Opinion by M Anzilotti, [1]
[7] ICCPR Optional Protocol, Art. 5.2.a: "The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement."
[8] *Fanali v. Italy*, [7.2]
[9] Notice of Arbitration, [13]

B. Claimant sought the same requests (*petitum*) in the two proceedings

12. For *res judicata* to apply, it is sufficient that the requests sought by Claimant in both proceedings are partially, but substantially identical.[10] International tribunals and commentators have observed that if too restrictive criteria of identity of requests and grounds are used, *res judicata* would rarely apply, because litigants could easily modify their relief requested.[11] For example, the investor may first sought *restitutio in integrum* as relief from the host State and in a later litigation changed the relief of his case into requesting compensation.[12]

13. Although the request made in the present proceeding is a finding of a treaty breach, while the one sought before the tribunal seated in Reef was a finding of a contractual breach, eventually Claimant seeks payment of damages for the termination of the LTA in both proceedings. Particularly in the present proceeding, the Tribunal will have to determine, as a preliminary matter, whether the termination of the LTA was a breach of Respondent's obligation owed towards Claimant, which has already been decided by the tribunal seated in Reef.

C. The Causes of action (*causa petendi*) in the two proceedings are the same

14. It was agreed by many commentators that:

> The doctrine of *res judicata* indicates that if legal claims have already been put in issue and decided by a competent tribunal, that decision is dispositive and the same claim may not be raised again in another tribunal in a *substantially identical* action between the parties.[13] *(emphasis added)*

15. The standard of substantial, instead of strict formal identity of *causa petendi* is also reflected in a numer of international cases. For example, in *Trébutien v. France*, the UN Human Rights Committee found a complaint regarding violation of Arts. 9 and 14 ICCPR to be the "same matter" as an earlier complaint brought before the European Commission of Human Rights, regarding violations of Art. 5 ECHR.[14] This is because the two complaints concerned the same measures, and the provisions in two treaties had similar substantive content, though not identically worded.[15]

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[10] *Fabiani Case*, p. 132; Reinisch, p. 62; Dodge, p. 365
[11] Reinisch, p. 62
[12] Ibid
[13] Lowe, p. 202. See also Schreuer & Reinisch, Leg. Op. in *Czech v. CME*, p. 87; Dodge, p. 366
[14] *Trebutién v. France*, p. 7
[15] Ibid; See also Schreuer & Reinisch, Leg. Op. in *Czech v. CME*, [333]

16. Another typical case is *Southern Bluefin Tuna*, in which the tribunal established under Annex VII of the UNCLOS refused to regard a fisheries dispute that arose both under CCSBT and UNCLOS as two separate disputes, because the two claims arose from identical facts, both concerning the permissibility of Japanese fishing practices, and the CCSBT merely implemented broad principles set out in UNCLOS.[16]
17. It is suggested by the above authorities that where the legal obligations under different instruments are identical, assuming two different causes of action would only be an "artificial" distinction.[17] Applying this rationale, Claimant's claims in both proceedings are based on the same facts and the same measure, which is the termination of the LTA by Respondent. Furthermore, while the BIT is a legal instrument of a different kind from the LTA, Art. 3.3 BIT – the umbrella clause – merely reaffirms Respondent's obligations that it has assumed under the LTA. Therefore, the *cause of action* sought by Claimant in the two proceedings should be found the same.
18. For the reasons above, the arbitration proceedings between Claimant and the NHA under the LTA precludes this Tribunal's jurisdiction over Claimant's claim regarding the LTA.

III. CLAIMANT CANNOT AVAIL ITSELF OF THE BENEFITS OF THE BIT

19. Under Art. 2.1 BIT, Respondent reserves its right to deny the advantages of the BIT to Claimant, if citizens or nationals of a third state own or control Claimant and if Claimant has no substantial business activities in the territory of the Contracting Party in which it is organized, being Basheera.[18] In this case, Respondent has effectively denied Claimant the benefits of the BIT because: **(A)** Respondent has timely exercised the Denial of Benefits clause; and **(B)** The criteria of the "Denial of Benefits" clause are fulfilled.

A. Respondent has timely exercised the Denial of Benefits clause

20. Respondent exercised its right to deny benefits on 26 November 2016 in its Response to the Notice of Arbitration, after Claimant initiated the arbitration. This was a timely objection to the tribunal's jurisdiction made in accordance with Art. 23(2) PCA Arbitration Rules, which states "A plea that the arbitral tribunal doesn't have jurisdiction shall be raised no latter than in the statement of defence". Furthermore, the denial of

[16] *Southern Bluefin Tuna*, [52-54]
[17] *Southern Bluefin Tuna*, [54]
[18] UF, [4]

benefit clause should have a retrospective effect, which means that it can be effectively invoked by Respondent after Claimant has submitted its claims.[19]

21. It is argued by some commentators that the host state cannot be supposed to be aware of the investor's underlying owners or controllers and the extent of its business activites in its home state until the investor notifies the state that a dispute has arisen under the BIT.[20]

22. Many tribunals also found it reasonable for Respondent to activate the Denial of Benefits clause in its statement of defence. In *Ulysseas v. Ecuador*, for example, the tribunal observed that a retrospective application of Denial of Benefits could not infringe the investor's expectations of being protected under the BIT, as the very existence of the clause in the BIT notifies the investor about the possibility of the host state exericsing that clause. The *Guaracachi* tribunal has a different reasoning:

> [Since] the very purpose of the denial of benefits [was] to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits […] it [was] proper that the denial is "activated" when the benefits are being claimed.[21]

23. Following the above rationale, Respondent's exercise of the denial of benefits should take effect upon Claimant.

B. The criteria of the "Denial of Benefits" clause are fulfilled

24. As a preliminary matter, Claimant bears the burden of proof to establish "third state" ownership or control as well as its lack of "substantial business activities" because: firstly, Art. 2.2 BIT states clearly that the burden of proof falls upon Respondent ("if the denying Contracting Party establishes that…") while Art. 2.1 does not; and secondy, only Claimant has the best evidence of its ownership, control and activities.

25. Respondent hereby submits that **(1)** Claimant is controlled by nationals of a third state; and **(2)** Claimant has no substantial business activities in Basheera.

1. Claimant is controlled by nationals of a third state

a. Claimant is controlled by AB&C

26. Respondent will demonstrate that AB&C indirectly controls AB, i.e. through its intermediary ABG; alternatively, AB&C directly controls AB by funding AB's essential business.

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[19] *Guaracachi*, [376]
[20] Jagusch & Sinclair, p. 101. See also Feldman, p. 300; Voon et al., p. 41, 55
[21] *Guaracachi*, [376]

i. Indirect control

27. While Art. 2.1 BIT does not clarify whether the scope of "control" covers direct or indirect control or both, Respondent invites this Tribunal to pierce the corporate veil of AB and finds it to be indirectly controlled by AB&C. Indeed, the majority of tribunals decided to look for the ultimate controller of the investor when dealing with the term "foreign control" in Art. 25.2.b ICSID Convention decided to trace the ultimate controller of the investor,[22] despite the lack of guidence by the Convention on whether to stop at or look beyond the first tier of control. In *AMTO v. Ukraine,* the SCC tribunal also followed the "ultimate control" approach, finding that AMTO was wholly owned by Five Key Invest & Assets Limited Holding JSC, which was in turn wholly owned by the Foundation; as a result, AMTO was controlled by a Russian national.[23]

28. Applying the "ultimate control" test, AB is a wholly-owned subsidiary of ABG, whose primary holding company is AB&C.[24] Furthermore, the shares of AB are currently held ABG affiliates, which are all ultimately controlled by AB&C.[25] The *Aguas del Tunari* tribunal held that:

> one entity may be said to control another entity […] if that entity possesses the legal capacity to control the other entity […] Such legal capacity is to be ascertained with reference to the percentage of shares held.[26]

29. Following this test, AB&C should be regarded as the real controller of AB.

ii. Direct control

30. The tribunal in *International Thunderbird Gaming* held that control of a corporate over another one can be established by, "under certain circumstances, the existence of technology, access to supplies, access to markets, access to capital",[27] or "an expectation to receive an economic return for its efforts."[28] In the present case, AB&C assigned the Mercurian Patent for Valtervite to Claimant in exchange for shares in 1998;[29] it also funds AB in essential businesses, such as building the manufacturing unit and performing the agreements entered into with the NHA.[30] These are important technical and finanicial

[22] *CECFT v. Gabon*, [36]; *TSA Spectrum v. Argentina*, [150-54]
[23] *AMTO v. Ukraine*, [66, 67]
[24] UF, [2, 4]
[25] PO2, [3]
[26] *Aguas del Tunari*, [264]; See also *Mobil v. Venezuela*, [159-60]; *Ulysseas v. Ecuador*, [168]
[27] *International Thunderbird Gaming*, [108]
[28] Ibid
[29] PO3, line 1575
[30] PO3, lines 1573, 1574

support that establishes the link between AB&C and AB. By funding AB's business, AB&C also expects to receive economic return.

31. In conclusion, AB&C controls AB, either indirectly or directly.

b. AB&C is a "third state" national

32. The BIT provides no definition of "national" or "third state". However, Respondent submits that "national" within its common meaning in IIAs can be either a natural person or a juridical person.[31] Besides, the term "third state" is used in Art. 2 as well as Art. 1 in contrast to "Contracting Party", which suggests that a third state is any state but a Contracting Party to the BIT.[32]

33. Accordingly, AB&C is a third state national if it bears the nationality of a non-Contracting Party. The test of nationality can be found in Art. 1.2.b BIT, which defines "investor" as "any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of [a] Contracting Party". Since AB&C is a corporation organized under the laws of Reef,[33] its nationality is Reef, which is not a Contracting Party to the BIT.

2. Claimant has no substantial business activities in Basheera

34. Respondent invites the Tribunal to follow the guide in Art. 31 VCLT, which has been widely regarded as codification of CIL,[34] interpreting the term "substantial business activities" in accordance with its ordinary meaning. Accordingly, "business activities" should be understood as activities conducted with the purpose of making profits.[35] Some commentators also find "substantial business activities" to exist when the company is "engaged in buying, selling, and contracting".[36]

35. In the present case, however, none of the activities that Claimant engage in Basheera are conducted with the aim of earning profits. Rather these activities are merely administrative work, such as managing the portfolio of patents, providing support for regulatory approval, marketing and sales, as well as legal, accounting and tax services.[37] A careful look at these activities show that Claimant has no business life of its own, rather it is incorporated as a vehicle to support its parent company, ABG for doing business in the region of South America and Africa.

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[31] Art. 25 ICSID Convention; OECD, p. 18
[32] *AMTO v. Ukraine*, [62]
[33] UF, [2]
[34] *Guinea-Bissau v. Senegal*, I.C.J. Reports 1991, p. 69-70, [48]
[35] Oxford Dictionary, <http://www.oxfordlearnersdictionaries.com/definition/english/business?q=business>
[36] Jagusch & Sinaclair, p. 20
[37] PO2, [3]

36. For the reasons above, Respondent respectfully asks this Tribunal to find that AB is only a "mailbox" company, organised in accordance with Basheeran law but has no business connection with the State, and is owned or controlled by nationals of a third state. Thus, AB should be denied the benefits of the Basheera-Mercuria BIT.

PART TWO: MERITS

37. Respondent's measures do not violate any substantive protections of the BIT. In particular, **(I)** The enactment of Law No. 8458/09 and issuance of the License did not amount to a breach of the BIT; **(II)** Respondent's judiciary conduct in the enforcement proceeding does not violate Art. 3 BIT; and **(III)** The termination of the LTA does not violate Art. 3.3 BIT (the *umbrella clause*). Respondent will address these defences respectively.

I. THE ENACTMENT OF LAW NO. 8458/09 AND ISSUANCE OF THE LICENSE DID NOT AMOUNT TO A BREACH OF THE BIT

38. The enactment of Law No. 8458/09 and issuance of the license were consistent with the BIT, in particular, **(A)** Respondent accorded Claimant with FET; **(B)** Respondent did not expropriate Claimant's investment; **(C)** Even if Respondent violated the TRIPS Agreement, Respondent did not violate Art. 3.3 BIT.

A. Respondent accorded Claimant with Fair and Equitable Treatment

39. Art. 3.2 BIT requires Respondent to accord foreign investors FET in its territory. The provision states:

> "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."

40. This provision comprises of a general FET clause and a clause specifically prohibiting unreasonable or discriminatory. Although no unified explanation has been reached so far regarding the FET clause,[38] it is feasible to single out certain types of unfair and inequitable State conduct that would constitute a breach of the standard, such as: violating investors' legitimate expectations, undue process of law, discrimination and arbitrariness.[39] None of those have been breached by Respondent.

[38] Dolzer & Schreuer, p. 121; Salacuse, p. 218
[39] Dolzer & Schreuer, p. 133; Salacuse, p. 228-230; UNCTAD Series – FET, p. 62

1. Respondent did not violate Claimant's legitimate expectations

41. Breach of legitimate expectations arises in situations where the host state's conduct creates reasonable and justifiable expectations on the part of an investor to act in reliance on said conduct, such that a subsequent failure by the host state to honor those expectations causes the investor to suffer damages.[40]

42. In the present case, Claimant may argue that Respondent's declarations, including the statement of the Minister for Health and the President, and Respondent being party to the TRIPS Agreement created legitimate expectations that it will not amend the IP Law or grant compulsory licenses, which were later frustrated by its measures. However, Respondent submits that neither (a) International obligations in the TRIPS Agreement nor (b) Mercuria's political statements can be a legitimate source of expectation; furthermore, (c) Any expectation that the IP Law will not be amended or compulsory license will not be granted is not legitimate; and in any case, (d) Claimant's legitimate expectations must be balanced against Respondent's regulatory activities.

a. International obligations in the TRIPS Agreement cannot be a legitimate source of expectation

43. According to Art. 23 WTO Dispute Settlement Understanding (WTO DSU), determination of breaches of the TRIPS Agreement is within exclusive jurisdiction of the WTO Dispute Settlement Body (WTO DSB):

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to*, and abide by, the rules and procedures of this Understanding. (emphassis added)

44. Therefore, Claimant cannot make a claim relying on international obligations in the TRIPS Agreement.

45. More importantly, obligations under the TRIPS Agreement are too general to create any specific representation. The need for specific commitments was stressed in several cases.[41] The *El Paso* tribunal, for example, held that "specificity means individualization, i.e. the promise or representation is addressed to the individual investor and not to the world at large."[42] Similarly, the tribunal in *Metalpar* found that there had been no

[40] *International Thunderbird v Mexico*, [147]; Newcombe & Paradell, p. 280
[41] *Methanex v. US*, (2005), Part IV, Chapter D, p. 5, [7]; *Metalpar v. Argentina*, (2008), [186]; *Continental Casualty*, [261]
[42] *El Paso v Argentina*, Award (2011), [375-7]

"license, permit or contract of any kind" between Argentina and the claimants, and therefore the claimants had no grounds for legitimate expectations.[43] The obligations in the TRIPS Agreement, meanwhile, are binding on between member states and addressed at IP rights holders in general. Therefore, the mere fact that Mercuria is party to the TRIPS Agreement cannot create specific representations that Claimant could legitimately rely on.

b. Mercuria's political statements cannot be a legitimate source of expectation.

46. Claimant may argue that Mercuria has made commitments in several occasions, such as the Statement of the Minister for Health: "a stable, progressive IPR regime is essential to [tackle critical diseases]", "rather than resorting to myopic measures, Mercuria reaffirms its commitment to empower and engage right holders";[44] or the statement of Mercurian President on Tweeter: "Mercuria will do away with red tape and roll out the red carpet for investors".[45]

47. However, those statmenets are containe in non-legally binding instruments. The tribunal in *Continental Casualty* case held that "political statements have the least legal value, regrettably but notoriously so".[46] Accordingly, Respondent's declarations cannot constitute an undertaking that Claimant can legitimately rely upon.

c. Any expectation that the IP Law will not be amended or compulsory license will not be granted is not legitimate

48. Any expectation that the IP Law will not be amended is unreasonable since the nature of the law is to always evolve. This notion is shared by the Tribunal in *Parkerings v. Lithuania* where it was held that "laws will evolve over time, what is prohibited is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power".[47] In this case, what Respondent did was required by the serious public health crisis. Its measure was not unreasonable and necessary to protect its legitimate public objectives, which will be demonstrated in details below. Furthermore, the legitimacy of Claimant's expectations must be assessed in conjunction with "the political, socioeconomic, cultural and historical conditions prevailing in the host State."[48] Given that Mercuria is a developing country where public health has always been ahighest

[43] *Metalpar v. Argentina*, (2008), [186]
[44] Annex 2, [4]
[45] UF, [8]
[46] *Continental Casualty*, Award, [261]. See also *El Paso v. Argentina*, Award, p. 395
[47] *Parkerings v. Lithuania*, [332]
[48] *Duke Energy*, [340]. See also *Methanex v. US*, (2005), Part IV, Chapter D, [10]; *Generation Ukraine v. Ukraine* (2003), [20.37]; *Parkerings v. Lithuania*, (2007), [335-6]

concern,[49] Claimant should have been aware of this situation at the time it made investment in Mercuria[50] and assumed a greater risk of regulatory and legal changes.

49. Regarding the grant of compulsory license, a Panel Report by the WTO explaines that IP rights do not confer positive rights for rights holders to use or exploit the protected invention; rather they are negative rights to prevent certain acts.[51] This fundamental feature of IP protection, according to the WTO, inherently grants Member states freedom to pursue legitimate public policy objectives. As such, Claimant could not reasonably expect that its patent would be given absolute protection and free from state's interference, even for public health purpose, such as by issuing compulsory license.

d. <u>In any case, Claimant's legitimate expectations must be balanced against Respondent's regulatory activities</u>

50. The need to balance investor expectations and the state's legitimate regulatory objectives has been emphasized in a significant number of international tribunals.[52] This need is also enshrined in international covenants on IP rights to which Mercuria and Basheera are parties. The need to perform such a balance is also in line with international IP law. Particularly, the TRIPS Agreement expressly allows for compulsory licenses in Art. 31 as a means of protecting member states' public objectives. The Doha Declaration went a further step, emphasizing the gravity of public health problems[53] and recognizing that the TRIPS Agreement should be interpreted and applied with flexibilities,[54] so as to ensure that member states have due deference in granting compulsory license for public health.

51. Therefore, Respondent's measures cannot be considered as violating the FET standard.

2. <u>Respondent complied with due process of law</u>

52. Breach of due process may include a failure to povide an opportunity to be heard[55] and lack of judicial reviews by the court.[56] Neither of those exists in the present case. Respondent impleaded Claimant as a party before the High Court of Mercuria in the

[49] UF, [6]; Response to the Notice of Arbitration, [9]
[50] UF, [9]
[51] Panel Report, *European Communities–Protection of Trademarks and Geographical Indications For Agricultural Products and Foodstuffs*, WTO Doc. WT/DS/174R (Mar. 15, 2015) [7.210]
[52] *Saluka*, (2006) [304-8]; *Parkerings v. Lithuania*, (2007) [332]; *SD Myers*, Partial Award (2001), [263]; *Continental Casualty*, (2008) [258]; *Vivendi v. Argentina II*, (2007) [7.4.31]; *EDF v. Romania*, (2009) [217-9]
[53] Doha Declaration, [1]
[54] Doha Declaration, [4, 5]
[55] 1929 Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, American Journal of International Law, Special Supplement 131, vol. 23, 1929 (Art. 9); *Metaclad v. Mexico*, (2000) [91]; *Thunderbird v. Mexico*, (2006) [197-201]
[56] 1929 Harvard Research Draft; *Thunderbird v. Mexico*, (2006) [197-201]

matter of the compulsory license granted to HG-Pharma.[57] The law of Mercuria also provides Claimant with the possibility of judicial review by a two-judge bench of the High Court.[58]

3. Respondent's measures were not arbitrary or unreasonable

53. A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejdice or bias, would be considered arbitrary or unreasonable.[59] Thus, the *Enron* tribunal found Argentina's measures taken in the 2000-2002 financial crisis "were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis".[60] In the present case, as the amendment of IP law and issuance of compulsory license were conducted by Respondent to tackle with the greyscale crisis and were not based on any prejudice or bias, they cannot be seen as arbitrary or unreasonable.

4. Respondent's measures were not discriminatory

54. Discrimination against an investor can be based on nationality, race, religion or other criteria.[61] In the present case, the National Legislation enacted by Respondent applies to all patent holders and potential applicants,[62] which means that any patent holder other than Atton Boro may have their patent subject to a compulsory license, and any company other than HG-Pharma can apply for such license. Therefore, Respondent's measures were not discriminatory against Claimant.

55. Claimant may argue that the High Court of Mercuria displayed discrimination as the proceeding to grant the Valtervite patent for HG-Pharma was a "fast-tracked process", being opposed to the enforcement proceeding between Claimant and the NHA, which has lasted for 8 years. However, such argument is groundless since the two proceedings are of different types, the parties are different – they may show different attitudes and engage in different acts before the Court.

B. Respondent did not expropriate Claimant's investment

56. Respondent submits that in no manner did its enactment of Law 8458/09 and granting of compulsory license constitute **(1)** direct expropriation or **(2)** indirect expropriation under Art. 6 BIT.

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[57] PO3, lines 1576, 1577
[58] PO3, lines 1578, 1579, 1580
[59] *Lemire v. Ukraine,* (2010) [385]; See also *Lauder,* (2001) [221]; *Plama Consortium,* [184]
[60] *Enron,* (2007) [281]
[61] Dolzer & Schreuer, p. 176
[62] Annex No. 4, 23C. 1)

1. Respondent's measures did not amount to direct expropriation

57. Direct expropriation means a mandatory legal transfer of title or outright physical seizure of the property, which benefits the State or a State-mandated third party.[63]

58. By nature, a compulsory license is an exception to the exclusive rights of patent owners under IP law.[64] Therefore it does not transfer the title of patent or the physical invention to the licensee.[65] Since HG-Pharma was granted a license to manufacture Valtervite, Claimant has always retained the legal title of its patent and the capacity to use, commercialize and dispose it.

2. Respondent's measures did not constitute indirect expropriation

a. Art. 6.4 precludes the claim of indirect expropriation

59. Expropriation, on the other hand, may take a more inconspicuous form where state interference with investors' legitimate rights can render such rights so practically useless that they must be deemed to have been expropriated.[66] However, the trend in modern IIAs is the balance between public policy objectives and investment promotion and protection.[67] Art 6.4 reflects this growing concern by precluding the finding of indirect expropriation in a few states of exception:

> *Non-discriminatory* measures of a Contracting Party that are designated and applied to *protect legitimate public welfare objectives*, such as public health, safety and the environment, *do not constitute an indirect expropriation* under this Article. (emphasis added)

60. Moreover, as far as public objectives are concerned, "due deference" must be afforded to States in defining the issues that affect its public policy… as well as the actions that will be implemented to protect such values.[68]

61. In the present case, Respondent was facing a grave public health crisis. The rate of greyscale increased drastically within Mercurian population. Only in 3 years from 2003 to 2006, the number of confirmed cases of patients skyrocketed by 13 times.[69] Meanwhile, Valtervite was the only available treatment,[70] a shortage of which would

[63] UNCTAD Series – Expropriation, p. 6; Dolzer & Schreuer, p. 92; Newcombe and Paradell, p. 324-340
[64] WIPO Secretariat, *Interface between exhaustion of intellectual property rights and competition law*, 1 June 2011, fn. 8
[65] Vadi, "Public Health in International Investment and Arbitration", p. 77
[66] Y Frontier, S L Drymer, *Indirect expropriation in the law of international investment: I know it when I see it, or Caveat Investor*, 2004 19 ICSID Review – FILJ, pp. 293-305; Telenor v. Hungary, para. 65
[67] Newcombe and Paradell, p. 124
[68] *Tecmed,* Award 2003, [122]
[69] Annex No. 3, lines 1338-40
[70] PO3, lines 1583-84

quickly aggravate the situation as greyscale is a highly-transmssible disease.[71] In that context, it cannot be denied that access to this medicine is critical for the protection of public health, and Respondent acted responsibly and reasonably. Compulsory license may not be the perfect resort, but it was the best resort Respondent could take after every attempt at negotiating an affordable purchase price with Claimant had turned out futile.[72]

62. It may not be argued that Respondent acted in a discriminatory manner. For any discrimination to exist, with particular regards to an expropriation case, there must be different treatments between that received by Claimant and that received by foreign investors as a whole.[73] Nonetheless, neither Claimant nor the record has furnished any relevant comparison, either other investors from Basheera or any third countries. It can consequently be inferred that Respondent, by taking non-discriminatory measures to protect its public health, did not expropriate Claimant's investment.

b. Alternatively, the degree of taking did not amount to expropriation

63. In establishing an indirect expropriation, one should also take into account the economic impact of the measure. Thus, even if Respondent's measures are held to be not for public objectives, they do not rise to the level of taking that qualifies an expropriation.

64. It is held in many arbitral awards that the measure must result in a total or near-total destruction of the investment's economic value in order to constitute indirect expropriation.[74] The tribunal in *Total v. Argentina*, for example, rejected the expropriation claim on the ground that the claimant "has not shown that the negative economic […] impact of the Measures has been such as to deprive its investment of all or substantially all its value."[75]

65. In addition, the measure must be definitive and permanent. The *Tecmed v. Mexico* tribunal found measures taken by a state to be "an indirect *de facto* expropriation if they are irreversible and permanent".[76]

66. In the present case, however, Atton Boro lost only nearly two-third of its market shares to the generic FDC pill,[77] hence the economic impact is below the level of "a complete

[71] PO3, lines 1584-85
[72] UF, [15]
[73] *ADC v. Hungary*, [442]
[74] *Pope & Talbot v. Canada*, Interim Award 2000, [102]; *Vivendi v. Argentina II*, Award 2007, [7.5.11]; *LG&E v. Argentina*, Decision on Liability 2006, [191]; *Sempra v. Argentina*, Award 2007, [285]; *CMS v. Argentina*, Award 2005, [262]; *Glamis Gold v. US*, Award 2009, [536]; *Total v. Argentina*, Decision on Liability 2010, [196]
[75] *Total v. Argentina,* Decision on Liability 2010, [196]
[76] Award 2003, p. 116
[77] UF, [24]

or near complete deprivation of value".[78] Besides, the compulsory has a temporary duration (until greyscale is no longer a threat to public health in Mercuria).[79] Given the effectiveness of Valtervite – preventing transmission of greyscale from patients to healthy people,[80] the greyscale crisis will eventually be alleviated to be "no longer a threat", at which point the compulsory license expires. Therefore, the compulsory license does not amount to the level of indirect expropriation.

67. In conclusion, Respondent's measures do not constitute an expropriation, either directly or indirectly.

C. Respondent's violation of the TRIPS Agreement, if any, did not violate Art. 3.3 BIT

68. Apart from the FET standard in Art. 3.2 BIT and expropriation claim under Art. 6 BIT, Claimant may not also rely on Art. 3.3 BIT, which provides a way for a contractual violation between an investor and the host state to elevate to a treaty breach.

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

69. This provision cannot be properly invoked because **(1)** Only the WTO has the power to determine whether a member state has upheld WTO obligations; and **(2)** The umbrella clause only covers obligations that bear a specific and direct relation with the investment of the investor.

1. Whether there has been a violation of the TRIPS Agreement falls within the WTO's exclusive jurisdiction

70. According to Art. 23.1 WTO DSU, the WTO DSB has jurisdiction over any disputes arising out of the WTO covered agreements. This article has been widely considered an "exclusive jurisdiction clause",[81] by virtue of which the DSB enjoys exclusive jurisdiction over all WTO agreements, including the TRIPS Agreement.[82]

71. If the Tribunal still holds otherwise, it would lead to potential conflicts with decisions of the WTO DSB. This risk was discussed extensively in *PMA v. Australia*, where Philip Morris Asia Limited, the claimant, protested Australia's plain cigarette packing

[78] *Vivendi v. Argentina II*, Award 2007, [7.5.11]
[79] UF, [21]
[80] PO3, lines 1586, 1587
[81] *United States-Sections 301-310 of the Trade Act of 1974*, 1999, WTO Doc. WT/DS 152/R, Panel Report, [313-15]
[82] Julien Chaisse and Tsai-yu Lin, *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*, Oxford University Press, 2016

legislation. Its argument invoked and based heavily on a series of treaties, *inter alia* the TRIPS Agreement, the WTO Agreement on Technical Barriers to Trade, and the Paris Convention for the Protection of Industrial Property. Consequently, such legal bases faced sharp opposition:

> It is not the function of a dispute settlement provision […] to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction.[83]

72. Therefore, the Tribunal should reject the relevance of the TRIPS Agreement in deliberating the legality of Respondent's conduct under the BIT umbrella clause.

2. The umbrella clause only covers obligations that bear a specific and direct relation with the investment of the investor

73. The purpose of the umbrella clause has been widely seen as ensuring "each Party to the treaty will respect specific undertakings towards nationals of the other Party."[84] Those undertakings are normally embodied in contracts, agreements and the like between the host state and the investor. Obligations under the TRIPS Agreement, however, are of a whole different nature. These are obligations entered into between States, aiming to protect IP rights holders at large, and cannot be considered "specific undertakings" made towards a particular investor. Indeed, so far no international tribunal has ruled that an umbrella clause can elevate an obligation assumed by the state in international conventions to a BIT breach.

74. Therefore, even if Respondent violates the TRIPS Agreement, such violation cannot be turned into a breach of the umbrella clause.

[83] *PMA vs. Australia*, Australia's response to the Notice of Arbitration, 21 December 2011, para. 35

[84] R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, Kluwer Law, 1995, p. 81-82; Newcombe and Paradell, §9.1; Dolzer & Schreuer, p. 166; A.C. Sinclair: "The Origins of the Umbrella Clause in the International Law of Investment Protection", Arbitration International 2004, Vol. 20, No. 4, p. 412

II. RESPONDENT'S JUDICIARY CONDUCT IN THE ENFORCEMENT PROCEEDING DOES NOT VIOLATE ART. 3 BIT

A. Conduct of the High Court of Mercuria did not amount to a denial of justice, and therefore does not constitute a breach of FET standard

75. "Denial of justice" has been widely recognized as a vital element of FET, mostly concerning judiciary conduct of the host state.[85] In general, the term indicates "the failure to respect procedural fairness",[86] which may be demonstrated through (1) denial of access to justice or (2) undue delay in proceedings.[87]

1. The Court's treatment to the parties did not amount to a manifest injustice

76. It has long been established by international triunals and commentators that denial of justice is found only where the court's conduct amounts to a "manifest injustice" or "gross unfairness", and that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of jusitce.[88]

77. In the present case, the High Court's conduct did not display any such injustice. Its conduct duly complied with due process by ensuring that both Claimant and the NHA had adequate opportunities to defend its case. The High Court granted adjournments and extensions to the NHA under reasonable circumstances where its advocate was simply not available.[89] Where the NHA was absent without reason, benches of the Court consistently made clear that the NHA would receive adverse measures should it continue to abuse procedures.[90]

78. On the other hand, Claimant may allege the High Court's Judge to be biased in favor of the NHA when he stated: "private parties ought to be more accommodating of their public counterparts who have limited resources at their disposal. A delay in service of one rejoinder will hardly run a billion dollar corporation into the ground."[91]

79. However, this claim is without merit, as the psychological motives of a judge is irrelevant to the objective test for denial of justice.[92] The Judge's statement was only concerning

[85] Salacuse, p. 241
[86] Salacuse, p. 241
[87] UNCTAD Series – FET, p. 80
[88] 1929 Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, American Journal of International Law, Special Supplement 131, vol. 23, 1929 (Art. 9); *Loewen*, [132]
[89] Notice of Arbitration, Exhibit I, [12, 17, 42, 37]
[90] Notice of Arbitration, Exhibit I, [5, 21]
[91] Notice of Arbitration, Exhibit I, [14]
[92] *Chevron II, Opinion of Jan Paulsson*, [18]; *Loewen*, [132]

Claimant's complaint of not receiving the NHA's rejoinder,[93] and could not be considered as representative of the whole proceeding.

80. With regards to the Supreme Court of Mercuria, its Decision on 1 September 2013[94] was not unreasonable, as it is within Respondent's discretion to adopt procedures for the enforcement of arbitral awards under New York Convention.[95] Moreover, the new procedure adopted in the Decision was in no way discriminatoryagainst foreign arbitral awards,[96] as it applied to all enforcement proceedings.[97]

2. <u>The length of proceeding did not rise to the level of denial of justice.</u>

81. In order to constitute denial of justice, a delay of proceeding must amount to a refusal to judge,[98] which does not exist in the present case. The proceeding did progress as the parties actively made submissions and, despite at a fairly slow pace, has reached the merits stage[99]. This is far from comparable to cases where undue delay was caused by the Court's refusal to judge[100] or by active collusion between a private party and the court,[101] and therefore cannot be considered as denial of justice.

82. In addition, although the proceeding has lasted for 7 years, it cannot be considered undue. In *Jan de Nul*, the proceeding in question which lasted for 10 years was not considered rising to the level of denial of justice, since:

> the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports as during the course of proceeding.[102]

83. The circumstance is similar in the present case as Claimant and the NHA were actively engaging in making submissions. Moreover, Claimant contributed to its own delay by requesting for its application to be transferred to the Commercial Bench, which caused the proceeding to fruitlessly last 19 months[103] longer, as its application was later

[93] Notice of Arbitration, Exhibit I, [14]
[94] UF, [19]; Notice of Arbitration, Exhibit I, [26]
[95] New York Convention, Article III; *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition*, United Nations, p. 82, [19]
[96] New York Convention, Article III; *Loewen*, [135]
[97] UF, [19]
[98] *Chevron I (2010)*, [180]; FV Garcia-Amador, L sohn and R Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) 180; Restatement Third of the Foreign Relations Law of the United States, §711, comm a
[99] Notice of Arbitration, Exhibit I, [39]
[100] *El Oro Mining v. Mexico* (1931), [9]
[101] *Chevron I (2010)*, [183], citing *Antonie Fabiani*
[102] *Jan de Nul*, [204]
[103] Notice of Arbitration, Exhibit I, [18, 29]

transferred back to the Regular Bench of High Court, and the Court had to rehear the submissions regarding NHA's Amendment Application.

B. Respondent is under no obligation provide effective means for Claimant under the BIT

84. Claimant argued in its Notice of Arbitration that Respondent failed to provide effective means to it.[104] Such a claim is however groundless.

85. Despite being the *lex specialis* of denial of justice and requiring a less demanjng test,[105] an obligation to provide effective means can only be invoked if there's a provision expressly providing for it

86. The BIT lacks the provision[106] that expressly imposes the obligation upon Respondent to provide effective means. In the present case, *effective means* is only referred to in the BIT Preamble, which is similar to the approach the US adopted in its Model BIT 2004, removing the *effective means* provision under the rationale that the prohibition of denial of justice under international law provides adequate protection.[107] For this reason, Claimant is not entitled to claim any effective means to enforce its Award under this BIT.

III. THE NHA'S TERMINATION OF THE LTA DOES NOT VIOLATE ART. 3.3 BIT

A. The umbrella clause in the BIT should not be interpreted so far-reaching in scope in favor of Claimant

87. The tribunal in *SGS v. Pakistan* observed that a broad interpretation of the umbrella clause in favor of Claimant would result in the incorporation of an unlimited number of contracts and any breach of those would qualify as a breach of a BIT. Such an umbrella clause would be "so far-reaching in scope, and […] so burdensome in their potential impact upon a Contracting Party".[108] Furthermore, if that view was adopted, the substantive standards in the BIT would become useless, as there would be no need to demonstrate a violation of a treaty to invoke the international responsibility of a State.[109]

88. Although the umbrella clause in Switzerland-Pakistan BIT is worded slightly different from the BIT in the present case, neither particularly indicate contractual obligations in

[104] Notice of Arbitration, [13]
[105] *White Industries*, Final Award, [11.3]
[106] For example, Art. II.7 in US-Ecuador BIT - *Chevron v. Ecuador* (Partial Award, 30 March 2010); Art.4.5 in India-Kuwait BIT - *White Industries v. India* (Final Award, 30 November 2011).
[107] Kenneth J. Vandevelde, *US International Investment Agreements* (2009), pg. 415
[108] *SGS v. Pakistan*, [167]
[109] *SGS v. Pakistan*, [168]

their scope. In order for the clause to elevate contractual breaches into treaty breaches, the article "would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner".[110]

B. The umbrella clause does not automatically turn a breach of the LTA into a breach of the BIT

89. Following the guide in Art. 31 VCLT, interpretation of the BIT must be done in light of its object and purpose, which is reflected in the BIT Preamble. The last point of the preamble reads: "*Desiring* to achieve [the above] objectives in a manner consistent with the protection of health…" Accordingly, Respondent's obligation under Art. 3.3 BIT must be exercised in a manner consistent with the protection of health.

90. On the other hand, greyscale has become a severe crisis in Mercuria. The infected cases rised enomously 13 times in just 3 years.[111] May the disease be not fatal, it is highly-transmissible[112] and targeting mostly people in working age.[113] To make the circumstance worsen, Mercuria is a still a developing country with limited budget for public health systems. Even at the provided discount from Claimant, the cost for medicine was already 1 billion USD, nearly one-third of the overall financial source for health and 500% of the estimated program for treating grey scale, just for free supply for 100,00 poorest.[114]

91. Given such a situation, not terminating the LTA would be contrary to the protection of public health. Therefore, Respondent should be exempted from liability under Art. 3.3 BIT.

[110] *SGS v. Pakistan*, [171]
[111] Annex No. 3, lines 1338-40
[112] PO3, lines 1584-5
[113] Annual Report 2006, National Health Authority of Mercuria, p. 41
[114] Annual Report 2006, National Health Authority of Mercuria, p. 41

PRAYER FOR RELIEF

92. Respondent respectfully requests this Tribunal to find that:

i) This Tribunal has no jurisdiction over any claims relating to the Award issued by the tribunal seated in Reef and claims regarding the LTA;

ii) The arbration proceeding between Claimant and the NHA under the LTA precludes this Tribunal's jurisdiction over claims regarding the LTA;

iii) The enactment of Law No. 8458/09 and issuance of the License did not amount to a breach of the BIT;

iv) Respondent's judiciary conduct in the enforcement proceeding does not violate Art. 3 BIT; and

v) The termination of the LTA does not violate Art. 3.3 BIT.

Respectfully submitted on 18 September 2017.

Team Lacharriere,
On behalf of Respondent,
The Republic of Mercuria.