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ARBITRATION UNDER
THE MERCURIA-BASHEERA BIT,
THE PCA ARBITRATION RULES 2012
(AND THE OFFICIAL RULES AND INSTRUCTIONS OF THE FDI MOOT)

BETWEEN

ATTON BORO LIMITED
(Claimant)

AND

THE REPUBLIC OF MERCURIA
(Respondent)

PCA CASE NO. 2016-74

Memorial for Respondent

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25 September 2017

LIST OF AUTHORITIES

Abbreviation	Authority
	Assembly Official Records Fifty-fifth Session, Supplement No. 10 (A/56/10) (2001).
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, Decision on Jurisdiction, ICSID Case No.ARB/03/29, (14 November 2005).
Chevron	*Chevron Corporation and Texaco Petroleum Company v Ecuador* Partial Award on the Merits of 30 March 2010
CMS	*CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, (12 May 2005).
	Consortium Groupement LESI - DIPENTA v Algeria, Award, ICSID Case No.ARB/03/8, (10 January 2005).
David Minnotte	*David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, para. 193 (May 16, 2014).
Duke Energy	*Duke Energy Electroquil Partners & Electroquil S.A.v.Ecuador*, Award (2008) para. 340.
El Paso	*El Paso Energy International Company v Argentina*, Decision on Jurisdiction, ICSID Case No.ARB/03/15, (27 April 2006).
Impregilo	*Impregilo SpA v Pakistan, Decision on Jurisdiction*, ICSID Case No.ARB/03/3, (22 April 2005).
Ioan 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.
Joy Mining	*Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, (6 August 2004).
Lauder	*Ronald S. Lauder v. Czech Republic*, Ad Hoc Arbitration (UNCITRAL Rules), Award of 3 September 2001.
LG&E	*LG&E Energy Corp., LG&E Capital Corp., and LG&E International,*

	Inc .v. Argentine Republic, ICSID Case No. ARB/02/1.
Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID No. ARB(AF)/98/3, Award (26 June 2003).
	Maximilian Clasmeir, *The Protection of Arbitral Awards in the Global Context of Investment Treaty Interpretation*, Kluwer Arbitration (Jan 2016).
Mondev	*Mondev International Ltd. v. Unites States,* ICSID Case No. ARB (AJ)/99/2, Award of 11 October 2002.
	Nikhil Teggi, *Legitimate Expectations in Investment Arbitration: At the end of its life-cycle*, Kluwer Law International (2017).
	Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, Kluwer International (2017).
	J. Paulsson, *Denial of Justice in International Law* (Cambridge U. Press 2006), at 204-205.
	Peter Tomka, *Chapter 34: Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties*, Kluwer Law International (2015).
Romak	*Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280 (26 November 2009).
	Responsibility of States for Internationally Wrongful Acts. United Nations Report. Art. 25 (2005).
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 , Decision on Jurisdiction (2001).
Sempra	*Sempra Energy International v Argentina, Award*, ICSID Case No ARB/02/16; IIC 304 (2007), (28 September 2007).
SGS v. Pakistan	*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, (6 August 2003).
SGS v. Philippines	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, (29 January 2004).
	The Internationally Wrongful Act Of A State, International Law Commission Report on the work of its fifty-third session, General Assembly Official Records Fifty-fifth Session, Supplement No. 10

	(A/56/10) (2001).
Total S.A.	*Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01 (2013).
Toto	*Toto Construzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction 7 June 2007
	TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].
Waste Management	*Waste Management, Inc. v. Mexico ("Number 2")*, ICSID No. ARB(AF)/00/3, Award (30 April 2004).
White Industries	*White Industries Australia Limited v. The Republic of India,* UNCITRAL, Award of 30 November 2011
	Zachary Douglas, *The International Law of Investment Claims* (CUP, 209).

LIST OF ABBREVIATIONS

Award	Arbitral award rendered in January 2009 on the basis of the arbitration clause in the LTA
Atton Boro	Atton Boro Limited
BIT	Agreement between the Republic of Mercuria and the Kingdon of Basheera for the promotion and reciprocal protection of investments, ratified on 10 March 1998
ILC Articles	Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001
Kingdon of Basheera	Basheera
LTA	Long-Term Agreement concluded between the NHA and Atton Boro on 20 July 2004
NHA	National Health Authority
Supreme Court	Mercurian Supreme Court
Republic of Mercuria	Mercuria
Republic of Reef	Reef

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STATEMENT OF FACTS

1. Respondent – The Republic of Mercuria experienced a momentous public health crisis following an alarming increase of greyscale infections. Greyscale first emerged in Central and South America in the early 1980s. The disease was named greyscale because of the cracking and flaking of the skin observed on patients' bodies. Other symptoms included progressively stiffening muscles, swollen limbs, and severe joint pains. Greyscale is a severe, chronic, and incurable disease which had already spread in forty-three different countries. When Mercuria witnessed an upsurge in the prevalence of greyscale in 2002, the government emphasized to the medical community the importance of reporting all cases of greyscale. The findings quickly revealed that the disease posed an imminent threat to the working-age population in Mercuria.

2. In 2003, the National Health Authority (NHA), an entity operating independently from the State, highlighted in its annual report that the number one imminent public health threat in Mercuria was the increasing incidence of greyscale among working-age individuals across the country. The NHA Report urged Mercuria to preemptively take drastic measures to combat this threat as it could spiral into a national crisis within a decade. It also revealed the fact that the treatment currently available in Mercuria was only effective if the infection was detected at very early stages and it required patients to take five to seven pills every day. In fact many parts of the world had already moved to the novel fixed-dose (FDC) treatment contained in a single pill.

3. In response to the impending national crisis, the government of Mercuria acted decisively by launching a nationwide campaign focused on the prevention and mitigation of greyscale. The campaign was comprised of a massive public information campaign launched through the media, government, and NGOs. It also consisted of the attempted procurement of medicines at discounted rates.

4. The success of these campaigns was instantaneous. The NHA's annual report in 2006 estimated that nearly 65% of all adults were getting themselves tested every six months, as compared to just over 17% in 2003. However, the increase in testing quickly revealed that the incidence and prevalence of greyscale greatly exceeded even the most liberal estimates projected by the NHA. Subsequently, a sharp increase in the number of confirmed cases of persons living with greyscale was observed – from 20,485 in 2003 to a total of 266,298 cases as of 2006. The number of estimated cases of greyscale among the Mercurian working-age population also

increased rapidly. While 216,900 persons were estimated to be infected by greyscale in 2003, this number rose to 578,390 in 2006. There was a great likelihood that these numbers could increase even more as a significant proportion of the population had yet to be tested.

5. The NHA estimated Mercuria's needs in treating greyscale and invited offers from pharmaceutical companies for the supply of an FDC medication at a discounted price; given its status as a developing nation. In May 2004, the NHA made an offer to Atton Boro Limited (Atton Boro) for the supply of its FDC drug, marketed under the brandname of Sanior. Following negotiations, a Long-Term Agreement (LTA) was signed between the NHA and Atton Boro on 20 July 2004. Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate with Atton Boro guaranteeing satisfactory performance in producing and supplying the medication.

6. Atton Boro, a wholly owned subsidiary of Atton Boro Group, was incorporated in Basheera on 5 April 1998. Atton Boro Group is a drug discovery and development enterprise with Atton Boro and Company, a corporation organized under the laws of the People's Republic of Reef, acting as its primary holding company. Atton Boro Group synthesized a compound called Valtervite, which claimed to improve treatment for greyscale patients. In 1997, Atton Boro and Company secured patent protection in Reef. Shortly thereafter, Atton Boro and Company obtained patents in fifty different jurisdictions; including Mercuria, which granted patent status on February 21, 1998. Barely two months after obtaining the patent in Mercuria, Atton Boro Group incorporated Atton Boro in Basheera. The subsidiary was created to be a vehicle for carrying on business in South American and African countries. For this purpose, a number of patents were assigned to Atton Boro – including the Mercurian patent for Valtervite. Atton Boro's dealings involved long-term, public-private collaborations with States and State agencies for the manufacture and supply of essential medicines. Atton Boro entered Mercuria's market by concluding several such agreements with the government and the NHA. For example, a comprehensive HIV/AIDS Partnership was established between the NHA and a consortium of pharmaceutical companies let by Atton Boro Limited. The program had allowed 30,000 new patients to obtain access to ARV treatment while reducing costs of treatment by as much as 50% for all existing patients.

7. Shortly after signing the LTA, Atton Boro set up a manufacturing unit for Sanior in Mercuria; delivering its first consignment by June 2005. A majority of greyscale patients in

Mercuria successfully transitioned from the multiple-pill therapy to the FDC treatment. However, even at a 25% discounted rate, a single FDC pill costs 27USD, and the annual cost of FDC medicine per patient is nearly 10,000 USD. Purchasing the medications at the initial rate became financially unsustainable for the government of Mercuria. In fact, as of 2005, over 10,000 of the total number of greyscale patients were dependent solely upon public health schemes to obtain medicines for treatment. The number of such patients is estimated to have risen to over 100,000 in 2006. At the 25% rate, it would cost 1 billion USD – nearly a third of the overall health budget for the NHA and 500% of the greyscale program budget – to provide treatment of FDC for only a single year to just the poorest 100,000 affected persons. Additionally, even patients who did not fall within the poorest group struggle with the costs of treatment. Because greyscale is a chronic and incurable disease, the costs would need to be subsidized far into the future; with additional subsidies being continuously needed for newly infected patients as well. The NHA also expressed its concerns that such disparity between need and access would negatively affect Mercuria's ultimate goal of securing universal, free healthcare for its population.

8. As the number of patients coming into care grew exponentially, the order value for Sanior doubled with each quarter of 2007. The NHA was soon forced to ask Atton Boro to renegotiate the price for Sanior, as it had gravely underestimated the number of greyscale cases in Mercuria. Yet, in spite of the national crisis that had befallen Mercuria, Atton Boro only accepted to accord an additional 10% discount. As Mercuria would now need to supply medicines for nearly twice the number of patients, such an insignificant discount could not mitigate these unexpected expenses. Consequently, the NHA was forced to reject this offer. On 10 June 2008, the NHA terminated the LTA due to unsatisfactory performance by Atton Boro.

9. Atton Boro challenged the termination of the LTA by invoking arbitration in accordance with the LTA's dispute resolution clause. In January 2009, an arbitral tribunal seated in Reef passed an award (the Award) in favor of Atton Boro. On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. As soon as the proceedings were filed, the NHA requested that the Court decline enforcement of the Award because it was contrary to public policy. The enforcement proceedings of the Award are still pending.

10. In light of these facts, the Republic of Mercuria was forced to take a number of measures itself, which were necessary to contain the national health crisis related to the rapid spread of

greyscale. On 10 October 2009, the President of Mercuria promulgated national legislation for its intellectual property law; introducing a provision for the use of patented inventions by other parties in very specific instances. According to this law, an interested party could submit an application to the High Court of Mercuria for grant of a non-voluntary license under the following circumstances:

> (1) The reasonable requirements of the public with respect to the patented invention have not been satisfied; or
> (2) The patented invention is not available to the public at a reasonably affordable price; or
> (3) The patented invention is not worked in the territory of Mercuria.

11. Based on this legislation, the Court had to also consider the ability of the applicant to work the invention to the public advantage. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court under the new provision, seeking grant of a license to manufacture Valtervite – the active ingredient in Sanior. The Court heard the matter and granted a temporary compulsory license, until greyscale was no longer an imminent threat to public health in Mercuria. Despite the fact that Mercuria was enduring a grave public health crisis, the Court decided to impose a royalty fee on total profits to be paid to Atton Boro.

PART ONE: JURISDICTION AND ADMISSIBILITY

12. Pursuant to Art. 1(1) and Art. 3(3) of the Bilateral Investment Treaty between the Republic of Mercuria and The Kingdom of Basheera (the BIT), this Tribunal does not have jurisdiction over the claims submitted by the Claimant, Atton Boro. This fact is supported by the following contentions:

(1) The Award is not an investment pursuant to the definition set forth in the BIT;
(2) Any acts of the NHA are not attributable to Mercuria;
(3) This Tribunal lacks jurisdiction over the breach of the LTA by virtue of Art. 3(3); and
(4) Atton Boro's claims are inadmissible under Art. 2.

I. The Tribunal does not have jurisdiction over any claims related to the enforcement of the Award because an arbitral award is not an investment within the meaning of the BIT.

13. Under Art. 8(1) of the BIT, the Tribunal has jurisdiction over "[a]ny dispute between an investor of one Contracting Party and the other Contracting Party arising out of or in relation to this Agreement . . . ." In order to arise out of the agreement, the investor, in this case Atton Boro, must have a qualifying investment in Mercuria, as defined by Art. 1 of the BIT. Atton Boro's claim regarding the enforcement proceedings of the Award does not fall under the definition of investment in Art. 1, and is therefore outside the jurisdiction of the Tribunal. Under this provision, the term "investment" is defined as:

> [A]ny kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws . . . .[1]

14. Claimant contends that the Award is a form of investment; however, substantial evidence points to the contrary. Article 31(1) of the Vienna Convention provides,

> as the main rule for treaty interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[2]

[1] BIT, Art. 1.
[2] Vienna Convention, Art. 31(1).

15. Claimant has not discharged its burden of proving that this Tribunal has jurisdiction *rationae materiae* in this case. Specifically, Atton Boro is not an "investor" with an "investment" in Mercuria that is entitled to the protections in the BIT. Determining the true meaning of Art. 1 is a matter of interpretation. Pursuant to the general principles of interpretation set forth in Articles 31 and 32 of the VCLT[3], reasoning in previous cases and proceedings, and the plain meaning of the language used support the assertion that an arbitral award is not a form of investment as contemplated under the BIT.

16. The plain language of the BIT in Art. 1 uses the term "territory" to clearly indicate that the two State parties intended to give a clear geographical limitation to what could be considered as an investment. The Award was not made "in the territory of the other Contracting Party," since it was rendered in Reef – not in Mercuria.

17. Respondent contends that, in any case, the Award has to meet an independent definition of the term investment. In fact, the enumeration of examples given by Art. 1 is not exhaustive. Consequently, there must be an objective limit to the scope of the term investment; given not only by the letter, but also by the object and purpose of the BIT. Thus, even outside the scope of ICSID arbitration, an independent definition of the term investment must be met. This interpretation is reinforced by the fact that Art. 8 of the BIT lists ICSID arbitration as one possible option for dispute resolution – a fact that cannot be overlooked by the Tribunal. Such an approach has been followed by other arbitral tribunals outside the scope of the ICSID arbitration, such as the *Romak* case.[4]

18. The Award, obtained outside of the Contracting States, does not meet this independent definition. Where an independent definition of investment is required, an operation is usually considered to be an investment once it meets the following requirements:

> (1) The investment has a certain duration;
> (2) There is a regularity of profit and return;
> (3) There is an assumed risk that goes beyond that of a common contractual relationship;
> (4) The investment entails a substantial commitment; and
> (5) The contracting party has made contributions in the host country which have an economic value: such as loans, materials, labor and services.[5]

[3] Vienna Convention, Articles 31; 32.
[4] *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, 26 November 2009.
[5] Maximilian Clasmeir, *The Protection of Arbitral Awards in the Global Context of Investment Treaty Interpretation*, Kluwer Arbitration (Jan 2016).

19. In *Romak*, the Claimant advocated for the tribunal to apply the broad definition of investment within the BIT. The arbitral tribunal rejected construction of the term "investment" based solely on the "ordinary meaning" of the term contained within the BIT, because it was inconsistent with the given context and ignored the object and purpose of the BIT.[6] The arbitral tribunal instead applied an independent definition of the term "investment." The arbitral tribunal stated that in such cases the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord the term "investment" an extraordinary and counterintuitive meaning. Romak was found by the arbitral tribunal to have assumed the risk of possible non-payment after delivery, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship.[7]

20. Similar to *Romak*, Atton Boro's Award derives from a contractual relationship for the production and delivery of pharmaceutical drugs. The risk of non-payment by a private company is the ordinary commercial risk assumed in a contractual relationship. Atton Boro's economic activity did not involve the risk normally associated with an investment, and did not own an investment within the meaning of the BIT. Atton Boro's rights were embodied in and arise out of a commercial contract.

21. Zachary Douglas sets out a more general test which is applicable to all investment treaty claims. The applicable legal test as to what constitutes an investment is summarized by Douglas' Rules 22 and 23, as follows:

> Rule 22: The legal materialization of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host State or is recognized by the rules of the host State's private international law to be situated in the host State or is created by the municipal law of the host State.
>
> Rule 23: The economic materialization of an investment requires the commitment of resources to the economy of the host State by the claimant entailing the assumption of risk in expectation of a commercial return.[8]

Under Douglas' test, the Claimant still does not meet the definition of investment since the Award was not situated or attained in the Contracting States.

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[6] *Romak*, at para. 183.
[7] *Id.* at para. 205.
[8] Zachary Douglas, *The International Law of Investment Claims* (CUP, 209) V, p. 161.

22. In another example, ICSID arbitrations apply what is called the Salini Test to determine what constitutes an investment. The Salini Test is comprised of the following four requisite elements needed for a finding of an investment:

> (1) A contribution of money or assets;
>
> (2) A certain duration over which the project was to be implemented;
>
> (3) An element of risk; and
>
> (4) A contribution to the host state's economy.

Atton Boro's Award attained in Reef was for a contract dispute that does not independently meet even a single element under the Salini Test.[9]

23. Thus, the plain meaning of the language in the BIT confirms that the Award does not qualify as an investment. The context and purpose of the BIT, in combination with a substantial number of secondary sources, corroborate this finding. For the aforementioned reasons, Respondent respectfully submits to the Tribunal that the Award is not an investment within the meaning of the BIT.

II. The actions of the NHA are not attributable to the Republic of Mercuria.

24. The NHA is a distinct and independent entity from the State, Mercuria. Just as the NHA does not represent the State – nor can its acts be attributed to the State, because of its commercial and private function – the acts, or failures to act, of the State cannot be considered in connection to the performance of the parties under the LTA or BIT. The private and public function of these various instruments are thus separate and distinct.

A. The NHA is not an organ of the State.

25. The NHA operates independently from the Republic of Mercuria, and is organized by a trust – established by the National Health Authorities Act – that is funded with national taxation and some private contributions. In effect, the NHA constitutes a public sector corporation.

26. The NHA made an offer to Atton Boro to become its supplier of an FDC treatment for greyscale, Sanior. The LTA between the NHA and Atton Boro was negotiated and agreed upon with no direct participation by Mercurian state officials. The pertinent rules on attribution for the

[9] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul. 23, 2001).

purpose of State responsibility under international law are defined in the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) – widely recognized as customary in international law.[10]

27. Articles 4 and 5 of the ILC Articles strongly support the assertion that the NHA's actions are not attributable to Mercuria. Article 4 stipulates as follows:

> [T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[11]

28. Article 5 further provides that:

> [T]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[12]

29. Article 8 of the ILC Articles also attributes to the State the conduct of private persons acting on the instructions of the State in carrying out the wrongful conduct. The wrongful conduct is attributed to the State if the person or group of persons is in fact "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[13] There is no evidence in the record to show that the NHA was acting on State instructions. Mercuria's Ministry of Health requested the NHA conduct a study and report on the long-term strategic supply of FDC greyscale medicines to aid in ending the nation's health crisis. Following this report, the Ministry of Health invited companies to apply for an opportunity to manufacture the greyscale drug. The NHA – as a separate entity – was attempting to find outside help in combating the greyscale epidemic. However, the NHA was not acting under instruction from the Ministry of Health nor, by proxy, the government of Mercuria. Rather, Mercuria aided the NHA in its quest to combat greyscale on a grand scale by extending an invitation to enter into

[10] *The Internationally Wrongful Act of a State*, International Law Commission Report on the work of its fifty-third session, General Assembly Official Records Fifty-fifth Session, Supplement No. 10 (A/56/10) (2001).
[11] *Id.*
[12] *Id.*
[13] *Id.*

a commercial contract for production and supply of FDC greyscale medicine. The NHA vetted, negotiated, and chose which company to partner with, independently from Mercuria.

30. The mere fact that a State establishes a corporate entity is not a sufficient basis for the attribution of subsequent conduct of the entity. In *Bayindir*, the ICSID tribunal found the National Highway Authority to be a distinct legal personality.[14] The Pakistani National Highway Authority Act of 1991 established the corporation as,

> a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may in its own name sue and be sued.[15]

While the ICSID tribunal found links between the National Highway Authority and some sections of the Government of Pakistan, this did not mean that the two were not distinct. Further, State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with government.[16]

31. Similar to *Bayindir* discussed above, Mercuria established the NHA through an act of legislation to be a separate distinct entity. This point is further illustrated by the ongoing proceedings for enforcement by Atton Boro against the NHA as its own legal entity. Since the NHA is a separate legal entity, and the acts in question are those of the NHA as a party to the Contract, the Tribunal has no grounds for attribution by virtue of Article 4.

32. Thus, the NHA does not qualify as a State organ under the Articles of the ILC, and acted wholly independent from the government of Mercuria. For the reasons set forth herein, Respondent respectfully submits that the NHA is a separate entity and not a party to the BIT.

B. The NHA's acts in relation to the LTA are purely commercial in nature.

33. All claims submitted before this Tribunal resulted from a common commercial contract and do not arise to treaty-based claims under Article 5 of the ILC Articles.[17] The NHA acted in a purely commercial capacity when concluding and subsequently terminating the LTA. As the tribunal in *Lauder* explained, the test to determine the distinction between contract and treaty-

[14] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, Decision on Jurisdiction, ICSID Case No.ARB/03/29, para. 119 (14 November 2005).
[15] *Id.*
[16] *Id.*
[17] International Law Commission Report, *supra* note 10.

based claims relies on the test of triple identity.[18] To the extent that a dispute might involve the same parties, object and cause of action it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues, and to draw any jurisdictional conclusions from a distinction between them. Claimant's purely contractual claims do not pass the jurisdictional test of treaty-based tribunals.[19]

34. As discussed above, the dispute is between Atton Boro and the NHA – not Mercuria. Atton Boro alleges breach of contract claims under the LTA between the two parties. This is further demonstrated by the initial arbitration invoked against the NHA in Reef. The claims were for breach of the LTA, and Mercuria was not a party to the proceedings. A common commercial contract dispute between two non-governmental entities does not rise to the standard of a treaty violation. The object and cause of action are separate from the treaty and fall under the LTA.

35. Respondent submits, for the sake of argument, that even if there was an investment in this case, the absence of a treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.

III. The Tribunal does not have jurisdiction over the breach of the LTA by virtue of Art. 3(3) of the BIT.

36. Respondent respectfully submits that this Tribunal does not have jurisdiction over Atton Boro's purely contractual claims, even by virtue of Art. 3 of the BIT. Further, Claimant has already invoked a dispute resolution mechanism in the LTA. Finally, Art. 3(3) is not applicable since there is no privity of contract between Atton Boro and Mercuria.[20]

A. The Tribunal cannot entertain Claimant's purely commercial claims even by virtue of Art. 3 of the BIT.

37. The threshold to establish that a breach of contract constitutes a breach of a treaty is a very high one.[21] Tribunals have held time and again that breaches of contract are not automatically treated as breaches of international treaty by virtue of umbrella clauses, such as the

[18] *Lauder*, at para. 292.
[19] *Id.*
[20] *Id.*
[21] *Impregilo*, at para. 267.

one found in Art. 3 of the BIT[22] – despite the breadth of these clauses.[23] Holding such a notion can be quite destructive in terms of the distinction between national and international legal order,[24] as every breach of contract does not necessarily amount to breach of a treaty.[25] For reasons discussed above, Atton Boro's claims are purely commercial in nature and do not rise to the level of a treaty violation.

38. According to the *Vivendi* Annulment decision, the test of whether the claim sounded in contract or treaty turned on the claim's "essential" or "fundamental basis."[26] Several tribunals have adopted a similar approach to *Vivendi*. In *SGS v. Pakistan*, the ICSID tribunal found SGS's claims sounded solely in contract claims which did not include any element of, or amount to, violation of a substantive BIT standard.[27] The ICSID tribunal was unable to transmute SGS's contract claims into BIT claims. Akin to *SGS v. Pakistan*, the *Joy Mining* tribunal ruled the claimant's claims were simply contractual and did not give rise to a BIT violation.[28]

39. The *Sempra* tribunal fully adopted the view articulated in *SGS v. Pakistan* that contract and treaty claims must be distinguished.[29] This is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause. Contractual breaches arise from the conduct of an ordinary contract party, rather than involving conduct that only a sovereign State function or power could effect.[30] None of the alleged LTA violations involved elements of State functions. The NHA in its sole capacity contracted with Atton Boro, and began a nationwide campaign to fight greyscale. The NHA's pharmaceutical development did not require or receive aid via Mercuria. Therefore, none of Atton Boro's claims are attributable under the BIT.

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[22] *Société Générale de Surveillance SA v Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No.ARB/01/13, paras. 165-166 (6 August 2003).
[23] *El Paso Energy International Company v Argentina*, Decision on Jurisdiction, ICSID Case No.ARB/03/15, paras. 66-86 (27 April 2006).
[24] *Id.,* at para. 126.
[25] *Consortium Groupement LESI - DIPENTA v Algeria* , Award, ICSID Case No.ARB/03/8, para. 25 (10 January 2005).
[26] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, paras. 96 and 102, (3 July 2002).
[27] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, para. 147, (6 August 2003).
[28] *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, para. 53, (6 August 2004).
[29] *Sempra Energy International v Argentina*, Award, ICSID Case No ARB/02/16; IIC 304 (2007), para. 303, (28 September 2007).
[30] *Id.*

B. Art. 3(3) is not applicable since there is already a dispute resolution mechanism in the LTA, and it has already been pursued.

40. Respondent submits that even if there were treaty claims entirely distinct from the contract claims in this case – which is denied – it would be wholly inappropriate and impractical for this Tribunal to hear such claims until the contract claims have been resolved by the contractual mechanism. Respondent draws upon *SGS v. Philippines*, in which the tribunal decided to stay the treaty-based proceedings in view of the proceedings that were already pending in Philippine courts.[31] The tribunal thus gave effect to the premise that a breach of the umbrella clause would require that a breach of the underlying investor-State contract was not remedied in accordance with the dispute settlement mechanism the parties chose.[32] Similarly, the parties in this case agreed to a dispute resolution mechanism under the LTA. Further, there are proceedings pending in the Mercurian courts. While international law requires full compensation for injury, it does not call for more than full compensation. The Tribunal must stay the proceedings until the Mercurian court proceedings have concluded.

C. Article 3(3) is not applicable since there is no privity of contract between Atton Boro and Mercuria.

41. Art. 3 of the BIT promises that the State will "observe any obligation" – referring to potential contracts between the State and the investor. In *CMS*, the ICSID tribunal observed major difficulties associated with a broad interpretation of umbrella clauses.[33] Specifically, findings that,

> [c]onsensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.[34]

42. The LTA was concluded between Atton Boro and the NHA, and as aforementioned, the NHA's actions are not attributable to Mercuria. Thus, there is no privity of contract between the

[31] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, para. 29, (29 January 2004).
[32] *Id.*
[33] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, para. 95 (12 May 2005).
[34] *Id.*

parties to the present dispute regarding the LTA. As a consequence, a violation of the LTA – assuming that it exists – cannot be imported through the umbrella clause.

III. Atton Boro's claims are inadmissible under Art. 2 of the BIT because Atton Boro does not have substantial business activities in the territory of incorporation.

43. Even if the Tribunal finds that it has jurisdiction over the current claims, the claims are inadmissible under Art. 2 of the BIT, which contains an explicit denial of benefits clause.[35] Specifically, this clause states that Mercuria may deny benefits of this agreement to a legal entity if:

> (1) [C]itizens or nationals of a third state own or control such entity; and
> (2) [T]hat entity has no substantial business activities in the territory of the Contracting Party in which it is organized.[36]

Because Atton Boro is wholly owned and controlled by Atton Boro Group, a corporation organized under the laws of Reef, and does not have substantial business actives in the territory of the Contracting party, Basheera, Atton Boro is denied the benefits of the BIT.

44. Atton Boro does not dispute its ownership by citizens of Reef.[37] Furthermore, they have not alleged substantial business activities in Basheera. Atton Boro is merely a "mailbox company" located and incorporated in Basheera while conducting business in other countries. Atton Boro Limited was incorporated for the sole purpose of conducting business in the region; including South American and African counties. Atton Boro's business activities in Mercuria, and other South American and African countries, are not sufficient to establish a presence in Basheera specifically, as required by Art. 2 of the BIT.

45. Atton Boro alleges that their business activities (renting a small office space, opening one bank account, and hiring two people) are sufficient to establish a presence in Basheera's pharmaceutical market. However, Atton Boro does not control any patents issued by the Basheera government, like they do in Mercuria. Furthermore, Atton Boro does not have any manufacturing or production sites for any of its varied pharmaceutical businesses within Basheera. Finally, Atton Boro has not conducted any of the pre-production experimentation required for the manufacturing of the drugs, including pre-clinical studies, clinical trials, or

[35] BIT, Art. 2.
[36] *Id.*
[37] Statement of Uncontested Facts, paras. 2,4.

regulatory clearances, within Basheera. All pre-production and manufacturing of Valtervite, and Atton Boro's other products, is conducted in neighboring countries or by the parent company Atton Boro Group – manifestly insufficient to establish substantial business activities in Basheera.

46. Because the BIT does not provide a definition of "substantial business activities," the phrase should be understood in accordance with its ordinary meaning.[38] Ordinarily, "substantial" means "of considerable importance, size, or worth."[39] Furthermore, the BIT was entered into for the purposes of "promot(ing) greater economic cooperation" and "stimulat(ing) the flow of private capital and the economic development of the Contracting Parties."[40] Together with the ordinary meaning of substantial, the purpose of the BIT indicates that "substantial business activities" should be of considerable importance to, and benefit the worth of, the Contracting Party where the business is incorporated. Atton Boro's limited business activities within the territory of Basheera are neither substantial by ordinary meaning, nor substantial enough to stimulate the capital and economic development of Basheera.

47. Prior tribunals have found similar mailbox and holding companies to be lacking substantial business activates in the state of incorporation. In *GAI*, the claimant maintained offices, held shareholders' and Board of Directors' meetings, and prepared minutes from the meetings within the territory of incorporation. However, these activities were merely the minimal legal requirements to be incorporated in Delaware and did not signify substantial business activities in the territory.[41] This means that merely having an office in the territory of incorporation is insufficient to establish substantial business activities. Atton Boro's activities beyond maintaining an office only include opening a singular bank account and hiring two employees. This is not such a significant difference that Atton Boro can be said to have more substantially increased the worth of Basheera than GAI did for Delaware.

48. In *PAC RIM*, it was definitively established that the business activity in the territory had to be committed by the Claimant only – not the collective acts of a group of companies.[42] Therefore, Atton Boro may not allege the business activities of Atton Boro Group or other Atton

[38] Vienna Convention, Art. 31.
[39] https://en.oxforddictionaries.com/definition/substantial
[40] BIT, Preamble.
[41] *GAI*, paras. 215, 217.
[42] *PAC Rim*, para. 4.66.

Boro subsidiaries in Basheera are substantial enough to grant admissibility to the claims;[43] regardless of the specifics of Atton Boro Group's presence, the activities would not be attributable to Claimant here, and prevent the invocation of Art. 2 of the BIT. The Claimant in *PAC RIM* was also found to be a mailbox company; employing only two managers within the territory. The tribunal there stated that the outcome of the case might have arguably been different if the Claimant was a traditional holding company with an office, board of directors, and other normal business activities, but did not affirmatively declare the admissibility claims of holding companies.[44] Because Atton Boro and Pac Rim both only had two employees in the territories of incorporation, neither claim is admissible.

49. For these reasons, Atton Boro does not have substantial business activities in the territory of the Contracting Party, Basheera. Additionally, Atton Boro is owned and controlled by citizens of a third-State, Reef. Therefore, Respondent submits that Atton Boro's claims are not admissible under the BIT and should be dismissed by the Tribunal.

[43] Statement of Uncontested Facts, para. 4.
[44] *PAC Rim*, para. 4.74.

PART TWO: MERITS

I. Mercuria did not violate the BIT in enacting Law No. 8458 and granting a license for Valtervite to HG Pharma.

50. Claimant submits that enacting Law No. 8458 and granting a license for Valtervite was a violation of its legitimate expectations. This claim is unsubstantiated, as the Republic of Mercuria did not make any specific representations to Atton Boro in order to incite its investment. In fact, an investor may not invoke the doctrine of legitimate expectations unless it can prove that it has relied on specific legal or enforceable rights in order to make its investment. Additionally, Mercuria had the legitimate rights to reform its legal framework in order protect an essential interest against an imminent threat – such measures should have been expected by any reasonable investor.

51. In the alternative, if the Tribunal finds that Mercuria has breached its treaty obligations, the public health threat faced by Mercuria allowed the State to invoke a necessity defense. Mercuria's state of necessity defense is available under Art. 12 of the BIT, and under customary international law. Mercuria cannot be liable for any violations in enacting Law No. 8458 and granting a license to HG-Pharma, as it was forced to implement such measures in response to a national crisis.

A. Mercuria did not violate Atton Boro's legitimate expectations when enacting Law No. 8458 or in granting a license to HG Pharma.

52. Mercuria's expectations may not be considered legitimate for the mere fact that these expectations are not based on any specific representations made by Mercuria to incite Atton Boro's investment.[45] The doctrine of legitimate expectations arises only when an investor relies on specific legal or enforceable rights.[46] In addition, Mercuria has a legitimate right to

[45] Nikhil Teggi, *Legitimate Expectations in Investment Arbitration: At the end of its life-cycle*, Kluwer Law International (2017).
[46] *David Minnotte*, para. 193.

promulgate legislation to protect its national interest.[47] A State is justified to change its laws and regulations for a public policy purpose.[48] Mercuria was faced with a serious public health crisis; thus it would be unreasonable for any investor to expect that Mercuria would not reform its laws in order to exercise its police powers. Furthermore, the BIT did not provide any assurances that the Contracting Parties' laws and regulations would remain absolute, particularly during a national crisis. Consequently, Atton Boro should have contemplated Mercuria's right to exercise its police powers.

53. In order to rise to the standard of legitimate expectation, specific representations and assurances need to have been precise and specific with regard to the investment.[49] In *White Industries*[50], a tribunal had to determine whether reliance on representations made by Indian Officials, that "it was safe to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system" resulted in a breach of legitimate expectation. The tribunal concluded that the "vagueness and generality" of the statements could not have given rise to reasonable legitimate expectations. Similarly, the statement of the President of Mercuria that "Mercuria will do away with red tape and roll out the red carpet for investors," is also too vague to constitute specific representations.

54. More generally, in previous cases, arbitral tribunals considered that expectations of investors arising from representations must meet a high standard in order to qualify as legitimate expectations.[51] In particular, legitimate expectations cannot be construed as stabilizing a legal system.[52] Since Mercuria did not provide any specific representations or assurances to Atton Boro with regard to the investment, it cannot be expected to "freeze its laws and regulations." [53]

55. The *Glamis* award extensively discusses the concept of legitimate expectation. *Glamis* concerned a Canadian company's proposal to develop a gold-mining operation on an area of land protected under the 1976 Federal Land Policy and Management Act. Concerns about the potential impact of the project on the environment and on Native American cultural resources had already been expressed. The government initially approved the project, but the Department

[47] Nikhil Teggi, *supra* note 46.
[48] *Id.*
[49] David Minnotte, *supra* note 47.
[50] *White Industries Australia Limited v. The Republic of India*, UNCITRAL (2011).
[51] Nikhil Teggi, *supra* note 48.
[52] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01 (2013).
[53] *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.

of Interior later withdrew its approval. Simultaneously, a series of legislation was passed requiring all future open-pit metallic mines to be backfilled. The claimant argued that the actions taken by the government were arbitrary and discriminatory; violating its legitimate expectations.

56. The tribunal considered the following factors in order to review this case:

> (1) whether a quasi-contractual relationship existed between the State and the investor;
> (2) whether the State had purposely and specifically induced the investment.

The tribunal reasoned that the claimant should have considered the fact that it was operating in a climate that was becoming more sensitive to the environment, and the government did not make any specific commitment to induce the claimant to continue with its project. Accordingly, the tribunal rejected the argument that the government had breached its legitimate expectation. [54]

57. The case at hand bears robust similarities to *Glamis*. For one, Mercuria did not make any specific representations to Atton Boro. In fact, the contract was between the NHA and Atton Boro – not Mercuria. Merely because the NHA was partially acting on the recommendation of the Ministry of Health when it invited offers from pharmaceutical companies for long-term strategic supply of FDC drugs does not suffice to establish that specific assurances were provided to Atton Boro.

58. Moreover, Atton Boro should have considered a State's need and power to change its laws for public policy reasons. Investors must take into account,

> all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.[55]

As an investor, Atton Boro should have considered and weighed all the risks associated with making an investment. [56] Case law substantiates the inference that investors are expected to do their due diligence.[57] In particular, Atton Boro should have considered two factors which clearly indicated the possibility of change in Mercuria's laws. First, in 1998, a publicly released statement from the Minister of Health concerning Mercuria's five-year health plan (1999-2004) indicated that the country was moving toward the goal of universal health care. In fact, Atton

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[54] White Industries, *supra* note 51.
[55] *Duke Energy Electroquil Partners & Electroquil S.A.v.Ecuador*, Award (2008) para. 340.
[56] Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, Kluwer International (2017).
[57] *Id.*

Boro led the consortium of pharmaceutical companies that took part in the NHA's Comprehensive HIV/AIDS Partnership. This program had allowed 30,000 new patients to obtain access to ARV treatment while reducing cost of treatment by as much as 50% for all existing patients. Second, Atton Boro received the NHA's invitation to supply its FDC drug after the Minister of Health had announced during a press conference that the prevalence of greyscale exceeded even the most liberal estimates projected. The Minister of Health also expressed that "the government would take measures it deemed necessary to ensure that patients of greyscale could avail treatment." For the reasons set forth herein, it would have been unreasonable for Atton Boro not to consider the fact that Mercuria could be changing its laws in order to achieve its well-defined public health goals.

59. Finally, Atton Boro has no standing to bring claims relying on obligations contained in the TRIPS Agreement before a tribunal deciding an investment dispute as those obligations exist only between member States, and disputes arising out of them fall within the exclusive jurisdiction of the World Trade Organization's Dispute Settlement.[58] In the alternative, if this Tribunal decides to apply the conditions of TRIPS to this dispute, Mercuria should still prevail as it has complied with the conditions set out in TRIPS for granting compulsory licenses. Art. 31 of TRIPS defines requirements for issuing compulsory licenses. The article also points that that some of the requirements may be waived in the case of a national emergency or in cases of public use.[59] Mercuria's new legislation has met the conditions set out by TRIPS Art. 31 for the following reasons:

> (1) Each application for licenses will be considered on its individual merits;
>
> (2) The Court will consider whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions;
>
> (3) The scope and duration of the license was limited to the purpose for which it was authorized — HG-Pharma was granted a license to manufacture solely for the duration of the public health threat;
>
> (4) The Court would take into account the applicant's ability to work the invention to the public advantage; and

[58] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[59] *Id.*

(5) HG-Pharma would be required to pay a royalty fee to Atton Boro.

60. Consequently, Atton Boro's claims alleged reliance on TRIPS is unsubstantiated.

B. Mercuria did not violate the BIT since the contested measures were necessary to prevent a national health crisis.

61. Assuming arguendo that Mercuria has breached its treaty obligations, the public health crisis experienced by Mercuria allowed it to take measures contrary to the treaty. Mercuria cannot be liable for any violation by enacting Law No. 8458, and granting a license to HG-Pharma as it was forced to implement such measures in order to assuage an imminent public health crisis. Mercuria' state of necessity defense is available under Art. 12 of the BIT and as customary international law.

C. There can be no violation of the BIT by Mercuria because the contested measures are covered by Art. 12 of the BIT.

62. Even if the Tribunal concludes that there has been a breach of the obligations set out in the BIT, Mercuria is protected under Art. 12 of the BIT and the customary international law doctrine of the necessity defense. Atton Boro's alleged allegations are patently unreasonable, as no provisions in the Mercuria-Basheera BIT preclude Mercuria's regulatory or legal framework from evolving. Art. 12 of BIT demonstrates the parties' true intention to preserve their legitimate rights to exercise their police powers. Art. 12 reads:

> Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.

63. Thus, the plain language of the BIT explicitly introduced the possibility that any one of the Contracting Parties would be justified in taking necessary measures to address a national crisis. When the tribunal in *LG&E v. Argentina* reviewed Argentina's necessity under the BIT, it considered whether the conditions that existed in Argentina justified invoking the protections of the treaty; determining also whether the measures taken by the State were necessary to preserve public order or to protect its "essential interest."[60] Analogously, the seriousness of Mercuria's public health crisis justified its actions – the incidence of greyscale infections had drastically

[60] *LG&E,*

increased in Mercuria and in other countries. Such measures were necessary to preserve the population's access to an effective treatment, which would in turn wane the exponential threat of greyscale. The ensuing section will address in further detail the fact that conditions in Mercuria necessitated the measures taken to contain the crisis.

D. Even if the Tribunal finds that there has been a violation of the BIT, such violation is covered by the necessity defense under customary international law.

64. Customary international law recognizes a State's compelling interest to protect the welfare of its citizens. [61] Art. 25 of the ILC Articles recognizes that a national emergency, or circumstances of extreme urgency, may warrant authorization of a compulsory license by a governmental entity. [62] According to Art. 25 of the ILC, the defense of necessity may be invoked if:

> (1) It is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (2) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[63]

65. Art. 25(2) of the ILC does not apply to this case since the international obligation in question does not eliminate the possibility of invoking necessity, and the State did not contribute to the situation of necessity.[64]

66. *LG&E*[65] illustrates tribunals' propensity to accept the necessity defense. In this case, three United States companies brought actions for measures taken by Argentina during their economic crisis. Those measures included actions to undo the pegging of the Argentina currency to the US dollar, to calculate gas tariffs in the former currency, and to stop tariff adjustments. It may have different legal bases and be authorized subject to different executive, administrative or judicial procedures. The tribunal considered whether the necessity defense was available to the Respondent under the laws of Argentina, the BIT, and customary international law. The tribunal reached the decision that Argentina was faced with a national crisis which necessitated adopting "measures to maintain public order and protect its essential security interests."

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[61] Peter Tomka, Chapter 34: *Defenses Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties*, Kluwer Law International (2015).
[62] Responsibility of States for Internationally Wrongful Acts. United Nations Report. Art. 25 (2005).
[63] *Id.*
[64] *Id.*
[65] LG&E., *supra* note 61.

67. The enactment of Law No. 8458/09 and the issuance of a temporary license to HG-Pharma to manufacture Valtervite was Mercuria's only means to safeguard its essential interest. Mercuria was faced with an unprecedented proliferation of greyscale infections – an incurable, chronic, and severe illness. Mercuria had to respond swiftly as the number of cases continued to increase. Failing to minimize the transmission of such a crippling infection would have been devastating for the people of Mercuria.

68. At first, Mercuria sought to address this crisis by immediately taking standard public health measures which consisted of case reporting, but the results quickly revealed that greyscale was severely affecting its most essential age-groups – the working-age population. The number of confirmed cases of persons living with greyscale rapidly increased in only a short three-year window: from a little over 20,000 in 2003 to a nearly 300,000 cases as of 2006. The number of estimated cases of greyscale among its working-age population increased at an even more alarming rate. While 216,900 persons were estimated in 2003, this number rose to 578,390 in 2006. There was a great likelihood that these numbers could increase exponentially, as a substantial proportion of the population had yet to be tested. Additionally, an incredible number of greyscale patients depended solely on public health schemes to obtain medicines for treatment.

69. In response to this imminent danger, the Ministry of Health immediately directed the NHA to invite offers from pharmaceutical companies for the strategic supply of FDC greyscale medicine. An agreement was signed with Atton Boro, which stipulated that the NHA would purchase Sanior from Atton Boro at a 25% discounted rate. Regrettably, it became apparent very quickly that this would not be a viable solution for Mercuria. In fact, owing to the high prevalence of the disease, continuing to purchase the medicine at this rate became financially impossible for a developing country like Mercuria. At the 25% rate, it would cost 1 billion USD, or nearly a third of the overall health budget and 500% of the greyscale program budget, to provide drugs for a single year of FDC just to the poorest 100,000. Consequently, it is evident that a country like Mercuria did not have the financial means to continue to purchase it at this rate.

70. Yet, issuing a compulsory license was not the first recourse taken in an attempt to solve the growing problem. Instead, the NHA attempted to negotiate with Atton Boro for a new discounted rate. Nonetheless, despite the widely known crisis, Atton Boro refused to negotiate

beyond a meager 10% discount; knowing that the NHA could not afford to continue on these terms and, thus, that the greyscale epidemic would continue to ravage the Mercurian population.

71. Mercuria's actions did not seriously impair Atton Boro's essential interest. Atton Boro was still the owner of the Valtervite patent – it was not divested of its property. The Court did not grant an indefinite license to HG-Pharma – the license was granted only for the duration of the public health crisis. Additionally, HG-Pharma was required to pay a royalty fee to Atton Boro for the use of the patent. The royalty imposed was fully reasonable since it was within the range of royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases (0.5%-3% of revenue). HG-Pharma fully intended to pay that royalty fee, but it could not make the required payment since Atton Boro refused to provide its bank details.

72. As evidenced above, the issuance of a compulsory license was Mercuria's only recourse. It was necessary for the State to take these measures in order to protect its essential interest against a serious and imminent threat – the continued, rapid spread of the incurable greyscale disease amongst its people.

II. The conduct of the Mercurian Judiciary in relation to the enforcement proceedings of the Award did not violate Art. 3 of the BIT.

73. Respondent submits that Atton Boro's claim in relation to the enforcement of the Award fails to satisfy the high standard for constituting an internationally wrongful act on the part of the national court. Atton Boro was well-aware that Mercuria is a developing nation with an overburdened judiciary struggling to cater to its population of 67 million people. In this context, a court's conduct can only be deemed unfair or inequitable under the BIT when there is clear and convincing evidence of an egregious violation of due process and/or manifest arbitrariness that resulted in a total failure of the judicial system: i.e. a denial of justice. Atton Boro's claim is based solely on pendency or mere delay of proceedings, and therefore must fail.

A. The Judiciary accorded Atton Boro fair and equitable treatment in the enforcement proceedings and thus there was no denial of justice.

74. The Mercurian Judiciary's conduct regarding the enforcement of the Award in no way violated Art. 3 of the BIT. Art. 3, particularly Art. 3(2), essentially codifies the customary

standard in international law of fair and equitable treatment into the BIT. By way of Art. 3(2), the investments and returns of investors of each Contracting Party must at all times be afforded fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Here, Atton Boro tenuously claims that they were not afforded protection against denial of justice due to undue delay and unfair treatment in the course of the enforcement proceedings. However, Atton Boro has provided neither clear nor convincing evidence to support this claim, and the facts at hand plainly demonstrate that the actions of the Judiciary have not risen to the level of an internationally wrongful act.

75. Claimant Atton Boro alleges that the length and character of the Mercurian Judiciary concerning enforcement of the Award constitutes an effective denial of justice which failed to provide Atton Boro any effective means of asserting its rights. This allegation is patently false and unsupported by either the facts or circumstances surrounding this proceeding.

76. First, Atton Boro must take the conditions of the host State as it finds them. Atton Boro is fully-aware that Mercuria is a developing nation with an immense population of ~67 million people. An expectation that the Judiciary's or the NHA's litigation actions, or the duration of the proceedings, could somehow be expedited in favor of Atton Boro given the conditions in Mercuria is illegitimate. In any case, the standards by which the Mercurian Judiciary is judged must consider the totality of the circumstances of the host State. Therefore, while the actions of the Judiciary arguably may be attributable to Mercuria, the tests for finding a breach of the fair and equitable treatment standard by way of a denial of justice carry a heavy burden.

77. For example, the *Mondev* tribunal set-forth a test for denial of justice based on the idea that,

> [it] is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads . . . to justified concerns as to the judicial propriety of the outcome.[66]

78. Further stating that, taking into consideration all of the available facts, the decision was "clearly improper and discreditable," resulting in "unfair and inequitable treatment." This standard is repeated by the tribunal in *Chevron*, wherein the tribunal held that "the test for establishing a denial of justice sets . . . a high threshold"; requiring "serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."[67]

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[66] *Mondev*, para. 127.
[67] *Chevron*, para. 244.

79. Clearly, the threshold for denial of justice is high, and the circumstances at hand do not come close to satisfying the requisite elements. In line with the arbitral tribunal in *White Industries*, Respondent submits that this Tribunal should take into account the following elements in determining whether there has been a denial of justice which breaches the fair and equitable treatment standard:

> (1) The complexity and sensitivity of the proceedings, as well as the significance of the issues at stake;
> (2) The need for swiftness in the resolution of the case, including whether the claimant may be compensated for loss by any delays;
> (3) The conduct of the litigants involved, including the diligence of the claimant in prosecuting the proceedings;
> (4) The behavior of the courts themselves; and
> (5) the circumstances of the host State.[68]

i. The complexity and sensitivity of the proceedings, as well as the significance of the issues at stake.

80. The complexity of the issue at hand is evident, and the actions of the Judiciary properly reflect as much. Beyond the surface level complexity of the Award itself, the hotly contested issue regarding which Mercurian court holds jurisdiction over arbitral award enforcement proceedings has been a foremost reason behind the delays.

81. As the record shows, the Supreme Court made multiple rulings and a subsequent clarification which directly affected the progress of the enforcement proceedings. In fact, it was Atton Boro which moved to transfer the enforcement proceeding to a different court, the Commercial Bench, in line with what it read the Supreme Court to have held. This motion was granted, yet ultimately reversed after the NHA moved to transfer the case for lack of jurisdiction based on more recent Supreme Court decisions. That motion was eventually granted after the Supreme Court clarified that the Commercial Bench did not have jurisdiction over arbitral award enforcement proceedings. Throughout, and because of, this battle over jurisdiction, there were multiple hearings and extensions granted which led to delays spanning two years. Thus, the complexity of the issue regarding jurisdiction in the enforcement of arbitral awards clearly hampered the progress of the proceedings.

[68] *White Industries*, para. 5.2.13.

82. Beyond complexity and in terms of the sensitivity of the enforcement proceedings, the Judiciary was correct in giving the intricate matter its due process by allowing extensions and amendments given the significance of the issues and ramifications of the outcome.

83. Enforcement of an arbitral award is a sensitive subject for Mercuria given the possible wide-ranging effects on the developing nation. In enforcing an arbitral award handed down by a foreign-seated tribunal, any adjudication must give the matter its rightful due process lest the Judiciary hamper the delicate economic prospects of Mercuria. This is due to the perception of the host State as either a promising or a hostile economic partner. If Mercuria develops a reputation as a country that is unwilling to fully cooperate with foreign investors and uphold its obligations under BITs, international treaties, or commercial contracts, then the country risks stunting its economic growth. As such, the Judiciary must be sure to give such matters their full consideration and cannot expedite or otherwise deny either party the opportunity to fully develop its arguments, in order to facilitate the most just outcome. Thus, the Judiciary must focus on the importance of correctly adjudicating arbitral award enforcements due to ramifications of – not only this particular case – all such cases, based on the sensitivity in the consequences of its rulings.

84. On the other hand, the Award also presents a significant outcome for Atton Boro. Given the amount of the Award and the claims contended, the matter is obviously of extreme importance to Atton Boro. As such, the Judiciary would be wrong to expedite proceedings without giving proper consideration to the arguments of both sides. It is here especially that Atton Boro cannot contend that a shocking or egregious wrong has been committed, because the Judiciary fairly handled the proceedings. If the Judiciary were to not give the matter its due consideration, then Atton Boro would be faced with an appeal, and likely reversal, of the enforcement for lack of jurisdiction and/or other improprieties.

85. Therefore, the Judiciary was right in giving the matter of the enforcement proceedings its due process by allowing extensions and amendments from both parties; to do otherwise would be manifestly unjust to the NHA and, indeed, Atton Boro. Furthermore, the importance of such proceedings involving international economic relations for Mercuria cannot be understated. Atton Boro's contentions thus are nothing more than an attempt to procure favorable treatment beyond any legitimate expectation.

ii. The need for swiftness in the resolution of the case, including whether the claimant may be compensated for loss by any delays.

86. As the *White Industries* tribunal correctly noted, the second element regarding the need for swiftness in the resolution of the case only,

> has been an issue in the context of proceedings and applications before human rights courts where there is particular need for the urgent resolution of the case.

Here, as in that proceeding, those considerations do not apply. However, if the Tribunal unfortunately finds otherwise, the need for a swift resolution and whether Atton Boro may be compensated for any delays in the proceedings is still unfounded.

87. As will be explained more completely below, seven years is not an unreasonably lengthy delay; particularly given the circumstances surrounding the proceedings – e.g. the rulings affecting jurisdiction – and in the host State of Mercuria. There was a substantial backlog after the Supreme Court clarification. Atton Boro cannot expect to receive priority treatment over the many other cases being handled by an already overburdened Judiciary – their case was treated just like any other. Thus, Atton Boro must accept that it was given full, fair and equitable treatment by the Judiciary in this sense.

88. Furthermore, Atton Boro may not be compensated for any delays in the proceedings and, indeed, is not in a worse situation than if the Judiciary somehow expedited the enforcement of the Award. Atton Boro is a billion dollar company that has not unjustifiably suffered economic losses due to any delays. The generic pills produced by its competitors are already on the market and circulating amongst the affected population, and Atton Boro's lost market share will not be recouped by a swift resolution – any alleged damage has already been done and could not be further inflicted by a delay in the enforcement of the Award.

iii. The conduct of the litigants involved, including the diligence of the Claimant in prosecuting the proceedings.

89. Regarding the conduct of the litigants involved, including the diligence of the Claimant in prosecuting the proceedings, there is no evidence to support Atton Boro's claims that the NHA employed illegitimate delay tactics by asking for adjournments or applications that were clearly lacking in merit. In fact, the Respondent submits that it was Atton Boro's litigation strategy which contributed directly to the delayed proceedings.

90. Atton Boro claims that the NHA employed delay tactics and submitted meritless motions – this claim is demonstrably false. As the record shows, extensions and leaves for amendments and other motions were filed and granted for both parties throughout the enforcement proceedings. Every extension and leave sought by the NHA was legally sound and cannot legitimately be considered meritless. Effectively, it is the litigation strategy of Atton Boro which led to the lengthiest delays; regarding the jurisdiction of the court following the string of Supreme Court rulings. Had Atton Boro not objected to the jurisdiction of the court, the application could very well have been heard on the merits and been disposed of. Obviously, the NHA's jurisdiction based objections were correct given the outcome, and it is Atton Boro's strategy which held-up the proceedings. These delays were further lengthened by Atton Boro's multiple requests for additional oral submissions and extensions.

91. Any delay caused by the NHA's conduct was justified given the circumstances and certainly does not rise to the substantial level necessary for a breach of Art. 3 of the BIT. The NHA did miss a handful of court dates, however, this can be expected given the limited resources for the NHA as compared to a billion dollar corporation. Additionally, the vast majority of these absences were excused for legitimate reasons, such as hearings in front of the Supreme Court, and counsel being out of town or unwell.

92. Beyond the substantive actions of the parties themselves, there were innumerous situations and circumstances beyond the power of either the NHA or the Judiciary which led to further delays. Amongst other reasons which fail to reach the level of shocking impropriety by the Judiciary resulting in a breach of fair and equitable treatment and a denial of justice, for example, there were multiple delays caused by lengthy arguments in other cases which forced dates to be pushed back.

93. Claimants make the contention that the Mercurian Judiciary prevented "any effective means to Atton Boro of asserting its rights." However, the truth of the matter is that Atton Boro's failure to exhaust all local remedies in seeking enforcement of the Award in the Mercurian courts directly and inexorably prevents them from claiming any denial of justice under international law.

94. In order to sustain a claim of denial of justice, the Claimant must first have exhausted all available procedural remedies before local courts.[69] As one noted scholar put it, denial of justice

[69] J. Paulsson, *Denial of Justice in International Law* (Cambridge U. Press 2006), at 204-205.

results from the failure of a national legal system to provide justice.[70] The scholar makes the important inference from this systemic element that because a denial of justice happens only where "there is no reasonably available national mechanism to correct the challenged action," exhaustion of local remedies becomes an inherent and material element of every denial of justice claim.[71] This rule was exhorted by the *Waste Management* tribunal as being substantive in nature, stating that "the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim."[72]

95. However, even if this Tribunal agrees with the minority viewpoint, expressed by tribunals such as the one in *Loewen*, that the exhaustion of local remedies rule is only a procedural requirement, the fact that Atton Boro failed to come close to doing so still weighs heavily in favor of the Respondent when taken into consideration with all of the other available evidence.[73]

96. Nonetheless, here, Atton Boro did not allow the Judiciary even the ability to rule on the merits of the enforcement proceeding by leaving to file this arbitration. As will become evident in subsequent arguments, there were not undue delays in the proceedings, nor was Atton Boro treated unfairly by the Judiciary. As such, Atton Boro's filing of this arbitration without seeing the enforcement proceedings through to resolution amounts to a failure to adhere to the judicial system and totally exhaust all local remedies. In filing this arbitration before the Judiciary could decide the case on the merits, Atton Boro skipped through almost the entirety of the system: not allowing a judgment to be rendered, and not appealing said judgment to the court of appeals, or Supreme Court, if necessary.

97. The *Loewen* tribunal stated that there exists an,

> obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.[74]

Adding that determining whether remedies are reasonable must be made in light of the investor's situation, also taking into account financial and economic circumstances.[75] While Atton Boro submits otherwise, the Judiciary was undoubtedly effective, adequate, and reasonably available,

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[70] *Id*. at 111.
[71] *Id*. at 100.
[72] *Waste Management, Inc. v. Mexico* ("Number 2"), ICSID No. ARB(AF)/00/3, Award (30 April 2004), para. 97.
[73] *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID No. ARB(AF)/98/3, Award (26 June 2003), para. 156.
[74] *Id*.
[75] *Id*.

for the reasons detailed below. Furthermore, the Mercurian judicial system was reasonably available, as Atton Boro's situation is stable and steadfast, both financially and economically – any additional time needed for the judicial proceedings to play out would not jeopardize their financial stability. Thus, by seeking recourse outside of the Mercurian enforcement proceedings prematurely and without due cause, Atton Boro failed to exhaust all local remedies and is, instead, seeking to circumvent the Judiciary by filing for this arbitration. Claimants' conduct has therefore directly attributed to the alleged "failure" of the Judiciary; contravening the BIT, the Mercurian justice system, and international law.

98. As Atton Boro did not fully exhaust the local remedies in the Mercurian Judiciary, it is their conduct that has, if at all, effectively denied themselves justice. The NHA acted reasonably and diligently given the circumstances and cannot be said to have conducted nor contributed to a denial of justice where Atton Boro unduly seeks to circumvent the Mercurian judicial process.

99. Thus, the Judiciary did not treat either party unfairly, because its actions regarding entertaining the NHA's requests and motions were evidently of merit and cannot be considered mere delay tactics. Further, the Judiciary similarly granted Atton Boro's requests equally. Finally, any undue delays can only be attributed to Atton Boro's conduct in its litigation strategy and ultimately in failing to exhaust all local remedies as is customary under international law.

iv. The behavior of the courts themselves.

100. The Claimant rests this claim most heavily upon the contention that the Mercurian Judiciary failed to accord fair and equitable treatment to Atton Boro in the enforcement proceedings, which resulted in a denial of justice for the Claimant. However, Claimant's contention is again entirely unfounded and, factually, contradicted by both the record and international law. The Judiciary did not cause any undue delay, nor was either party to the enforcement proceedings treated unfairly.

101. The Mercurian Judiciary did not unreasonably delay, or enable the NHA to delay, the enforcement proceedings regarding the Award. In reality, all that happened is that Atton Boro's claim was handled just like any other piece of litigation in the Mercurian courts. The behavior of the Judiciary throughout the course of the enforcement proceedings cannot possibly be said to have resulted in unfair and inequitable treatment, as both parties were given due process in regards to their respective requests.

102. First, the courts heard Atton Boro's application practically immediately – within two weeks. This standard continued throughout the duration of the enforcement proceedings, with the Judiciary holding all hearings, even with extensions, within a matter of months, if not weeks at times. In actuality, the only time that Atton Boro's request for a hearing within a short time was not granted was when the Court had an "overwhelming caseload following the transfer of enforcement applications" after the Supreme Court's clarification regarding jurisdiction over arbitral award enforcement proceedings. Even then, the next hearing was scheduled a mere two months later. Atton Boro cannot complain of unfair treatment here. More aptly described, Atton Boro is simply seeking prioritized treatment over the overwhelming number of cases in front of the already thinly-stretched Judiciary.

103. Second, regarding Claimant's contention that the Judiciary indulged every delay tactic employed by the NHA, by granting adjournments for the asking and entertaining of applications that were clearly lacking in merit, is itself without any merit. The Judiciary clearly acted even-handedly in dealing with requests from both parties – not in any way favoring the NHA, or treating Atton Boro unfairly. Besides the simple fact that requests for extensions and leave to amend were continuously granted to both parties equally, the most evident example is found in the Court granting Atton Boro's request to transfer the case to the Commercial Bench.

104. Most importantly, after hearing arguments from both sides, the Commercial Bench subsequently denied the NHA's objection to its jurisdiction; ruling in favor of Atton Boro. How Atton Boro can now claim that the Judiciary failed to accord them fair and equitable treatment is beyond reason.

105. Additionally, the Judiciary neither violated Mercurian procedural law nor failed to accord fair and equitable treatment to Atton Boro regarding the actions of the NHA. As aforementioned, requests for extension were granted evenly to both parties and rulings on the merits of the requests split both ways.

106. Furthermore, any attempt by the Claimants to argue that the Judiciary was unfair or created undue delays by way of the NHA's actions necessarily must fail. It must be presumed that Claimants' contention here depends on the argument that the NHA's absences amount to a breach of Mercurian procedural law. However, the Judiciary's responses were always correct and, in any case, could not possibly be found to amount to a shocking or egregious impropriety which effectively denied Atton Boro justice. In most instances, the NHA's absences were

reasonable and excused: e.g. counsel was unwell, etc. Nonetheless, even when the NHA failed to provide adequate reasons for not being present, the Judiciary always, at the very least, took note of Atton Boro's objections, and in multiple instances threatened the NHA with adverse measures; including recording that the Court would hear the matter *ex parte* if the NHA failed to appear to the next hearing. The NHA even tendered a formal apology the Court after one such incident. The Judiciary made it explicitly clear that the NHA would not be granted any further extensions in the proceedings. Clearly the actions of the Judiciary were in accordance with Mercurian procedural law and did not accord Atton Boro unfair treatment. As such, there is no substance to the contention that the Judiciary unfairly indulged "every delay tactic employed" by the NHA.

107. Finally, the behavior of the Judiciary cannot be said to have amounted to an excessive and undue delay which breached fair and equitable treatment and a denial of justice to the Claimants. As already explained in detail, Atton Boro's claim that the Mercurian Judiciary effectively denied justice through its actions during the enforcement proceedings is patently false. In addition, Atton Boro cannot make a cognizable claim that the length of the enforcement proceedings were somehow unfair and unequitable, because the seven-year duration was entirely reasonable and well-within the standards of both the local courts and in international law regarding enforcement of arbitral awards.

108. The Judiciary provided Atton Boro equal treatment in that there was nothing peculiar about the enforcement proceedings in this case, as compared to all others. Ignoring the fact that the Judiciary's actions regarding granting of requests and the like were reasonable in and of themselves, the duration of the enforcement proceedings were in line with those of other cases before the courts. There is no evidence to support the contention that Atton Boro was afforded inequitable treatment as opposed to any other litigants.

109. The seven-year duration is neither unheard of nor customarily considered excessive to the point of a denial of justice without more than the length itself; particularly given the circumstances. For example, the arbitral award enforcement proceedings in the oft-cited *White Industries* case continued for over nine years without a clear end in sight, yet that tribunal still found that this did not suffice to constitute a denial of justice.

110. In the seminal *Chevron* case, the denial of justice argument was based on a delay of between 13-15 years; essentially double the seven-year delay found here. Further, in *Chevron*,

the tribunal did not find any evidence that the claimant had contributed to the delay. In fact, the timeline of the enforcement proceedings shows no "prolonged periods of complete inactivity on the part of the [Mercurian] courts."[76] To the contrary, the Judiciary consistently acted promptly and without unnecessary delay – Atton Boro's actions directly contributed to any delays.

111. While other tribunals have found shorter durations to breach the fair and equitable treatment standard, the situation is heavily dependent on the facts of the case and circumstances of the host State; looking to the average enforcement of particular courts in similar situations and with similar fact patterns. In *Toto*, an ICSID tribunal held that there was a denial of justice because the length of the proceedings had continued on well past the average enforcement period in that specific court – up to five years. However, this can be distinguished here, in that the enforcement proceedings for the Award were not unusually long nor unduly excessive given the situation of the courts and the facts surrounding the proceedings: e.g. the Judiciary did not act egregiously in granting the requests of the parties, the courts were heavily backlogged with similar cases, and the case was handled just like any other. As is customary in international law, the Tribunal must also consider the circumstances of the host State when determining whether any actions were unfair or inequitable.[77] Thus, Claimant's contention that the Mercurian Judiciary caused undue delay is unfounded, contradicted by the facts, and, further, contravene to the customs of international law.

v. The circumstances of the host State.

112. This Tribunal must at all times consider the evidence in terms of the circumstances of the host State. Mercuria is a developing nation with a population of nearly 70 million, suffering from a widespread health crisis amongst working-age nationals, and changing laws/procedure that can be neither foreseen nor controlled by the Judiciary.

113. The record clearly demonstrates that the Judiciary was already struggling to cater to its massive population in the developing nation. These problems were further confounded by the overwhelming case-load inherited after the Supreme Court's rulings and clarification regarding which court has proper jurisdiction over arbitral award enforcement proceedings. A review of arbitral tribunal decisions and opinions suggests that congestion and backlog in the courts can be relevant factors that must be contemplated when making the determination of whether a period

[76] *Chevron*, para. 256.
[77] *Toto*, paras. 141-142.

of delay is reasonable given the circumstances.[78] While backlog of the judiciary, in and of itself, cannot be a dispositive defense for delays in enforcement proceedings,

> international law draws a line between a delay tantamount to an effective refusal to judge, which exposes a State to liability, and an explicable delay, which is justified under the circumstances.[79]

114. The delay at hand cannot be considered an effective denial of justice, because the delay is entirely explicable given the multitude of reasons discussed throughout this section. Pertinently, Respondent does not contend that the backlog which resulted from the Supreme Court's rulings on jurisdiction is the sole cause of the delay. To the contrary, the backlog is but one of many reasonable causes for the delay in the proceedings; none of which, either taken alone or as a whole, amount to a breach of the fair and equitable treatment standard and a denial of justice.

B. The enforcement proceeding did not violate Atton Boro's legitimate expectations.

115. Given the evident circumstances in Mercuria, as a developing nation with an immense population suffering from a chronic outbreak of an infectious disease, Atton Boro cannot sensibly argue that it was not aware of the nature of the condition of the State in which it was seeking to make an investment. A sophisticated, international company worth billions of dollars is well-aware of where and with whom it is contracting. Atton Boro must be presumed to have been aware that Mercuria is a developing country with an overburdened judiciary struggling to cater to its massive population – Claimants cannot now contend they had legitimate expectations otherwise.

C. Conclusion.

116. The reasonable delay of the courts given the circumstances does not give rise to a breach of the fair and equitable standard. Therefore, the delay cannot be considered a denial of justice – Claimant will argue that seven years is too long, but there is no set-in-stone number. The Tribunal must consider all of the circumstances and determine on its own right what constitutes an effective denial of justice by way of delayed judicial proceedings that amount to a breach of the fair and equitable standard.

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[78] *Chevron*, para. 263.
[79] *Id.*, para. 180.

117. Atton Boro's claim that the actions of the Judiciary were so shocking and egregious as to amount to a breach of fair and equitable treatment resulting in a denial of justice is not supported by the facts of this proceeding or customary international law. Provided the multitude of reasons outlined herein, Respondent respectfully submits that this Tribunal must find that the innocuous and ordinary actions of the Judiciary in the enforcement proceedings regarding the Award, especially given the circumstances, fall far short of the high threshold that must be met in order to find a denial of justice which breached Art. 3 of the BIT under international law.

III. The termination of the LTA does not amount to a violation of Art. 3(3) of the BIT.

118. As explained fully in section II(B) of this memorial, the NHA is not an organ of the State of Mercuria under Art. 4, it was not exercising governmental authority under Art. 5, nor can its actions be attributed to Mercuria under Art. 8 of the ILC Articles – thus there is no privity of contract between Atton Boro and Mercuria. The NHA's acts relating to the LTA are purely commercial in nature, stemming from a common commercial contract and, as such, do not give rise to treaty-based claims. Furthermore, Art. 3(3) is not applicable here as there is already a dispute resolution mechanism contained in the LTA, which has already been pursued and settled. Therefore, Art. 3(3) of the BIT (the umbrella clause) is not applicable. However, if this Tribunal finds otherwise and holds the umbrella clause applicable as to Mercuria, the Tribunal is not bound by the findings of the commercial arbitral tribunal. Thence, the Tribunal should rule that the termination of the LTA by the NHA was justified under Clause 6 for unsatisfactory performance and, thus, the termination of the LTA does not amount to a violation of the BIT by way of Art. 3(3).

A. Even if the Tribunal finds Art. 3.3 applicable, the NHA lawfully terminated the LTA.

119. The termination of the LTA does not amount to a breach of Art. 3(3) of the BIT, because Clause 6 explicitly provided the NHA with the right to terminate the LTA if Atton Boro did not fulfill its obligations as the Supplier of Sanior by way of satisfactory performance. Thus, given the unsatisfactory performance of Atton Boro, the NHA did not violate the LTA in terminating the contract.

120. Clause 6 of the LTA, titled "Validity of the Agreement" read as follows:

> This Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's *satisfactory performance*.[80]

Pursuant to this clause, the NHA rightfully terminated the LTA due to the unsatisfactory performance of Atton Boro under the contract.

121. Atton Boro's production of the greyscale FDC treatment, Sanior, was not sufficient to meet the economic demands constraining the NHA, and indeed Mercuria, given the widespread and exponentially growing epidemic of the disease. When the LTA was initially contemplated and entered into, the discounted price and rate of production was sufficient to fulfill the needs of the effected populous. However, it quickly became apparent that these needs were changing rapidly; with the estimated maximum number of greyscale cases increasing drastically. The demand for the FDC pill had outgrown the supply shortly into the duration of the LTA. Even at the discounted rate, the annual cost per patient was nearly 10,000 USD. If the NHA was to continue on the terms of the LTA, it would have cost 1 billion USD, nearly a third of the annual health budget and 500% of the greyscale program budget, to provide a single year of FDC to just the poorest 100,000 persons inflicted. With this in mind, the NHA was forced to confront Atton Boro regarding its supply and, particularly, the pricing of the drug.

122. Atton Boro refused to negotiate the price down to a reasonable rate with which the NHA could sufficiently provide treatment for its affected populous. The purpose of the LTA was to help prevent the spread of greyscale and to also provide affordable treatment to the hundreds of thousands of inflicted persons. However, Atton Boro failed to satisfy these goals, and to continue to accept their insufficient performance would have proved ruinous to the people of Mercuria. Therefore, the NHA was justified in terminating the LTA by way of Clause 6 for the unsatisfactory performance of Atton Boro under the contract.

123. Provided the circumstances surrounding the contemplation of and entering into the LTA by both parties, it is clear that the NHA was justified in asserting its contractual right to terminate the LTA through Clause 6. This Tribunal is not bound by the findings of the previous commercial arbitral tribunal in this regard, and thus Respondent submits that the Tribunal should find that the LTA was not violated and there was no breach of Art. 3(3) of the BIT.

[80] Record, p. 29. (Emphasis added).

B. Even if the Tribunal finds Art. 3.3 applicable and finds that the NHA violated the LTA, the NHA's actions were a necessary response to a national health crisis.

124. Finally, even if the Tribunal finds that there has been a violation of Art. 3(3) of the BIT, Mercuria is protected under the BIT under the customary international law doctrine of the necessity defense, as well as by way of Art. 12. Furthermore, Art. 5(2)(b) of the BIT provides that no restitution or even reasonable compensation is due when the investment is affected by a State response "required by the necessity of the situation."

125. The necessity defense is applicable in this situation, as established in section III(B) of this memorial, because the contested measures taken by the NHA in terminating the LTA were necessary to prevent a national health crisis: i.e. preventing the exponentially spreading outbreak of greyscale amongst the working-age population of Mercuria. Under customary international law, codified in Art. 25 of the ILC Articles, the necessity defense may be invoked when undertaking such measures as the only way for a State to protect "an essential interest against a grave and imminent peril."

126. Given the unforeseen and uncontrollable outbreak of greyscale throughout Mercuria, the NHA was entirely justified in unilaterally terminating the LTA under both the BIT and international law. Respondent thus submits that the termination of the LTA does not amount to an actionable breach of Art. 3 of the BIT.

PART THREE: REMEDIES

127. Respondent denies any and all claims and allegations advanced by Atton Boro for all of the aforementioned reasons and respectfully submits to this Tribunal that there have been no cognizable violations on behalf of the Respondent. Thus, the Respondent, Mercuria, hereby requests the Tribunal to:

(1) Find that it lacks jurisdiction over any claims in relation to the enforcement of the Award;

(2) Find that the actions of the NHA are not attributable to the Respondent and that Article 3(3) of the BIT is not applicable in the present case;

(3) Declare that Atton Boro cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;

(4) Where the Tribunal does not grant prayers (1), (2) or (3), declare that no act of Mercuria's violates the substantive protections of the BIT; and

(5) Where the Tribunal does not grant any of the aforementioned prayers, suspend the arbitration proceedings until the Court of Mercuria have rendered a decision in the enforcement proceedings of the Award.