TEAM PATHAK

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ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

In the Proceeding Between

ATTON BORO LIMITED
(Claimant)

v

THE REPUBLIC OF MERCURIA
(Respondent)

Permanent Court of Arbitration Case No. 2016-74

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

[]	Paragraph
AB Co.	Atton Boro and Company
AB Group	Atton Boro Group
BIT	Bilateral Investment Treaty
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
House of Lords	House of Lords of the United Kingdom
i.e.	*Id est* (that is)
ILC Articles	Responsibility of States for Internationally Wrongful Acts 2001
ILC Draft	Draft Articles of Responsibility of States for Internationally Wrongful Acts with commentaries 2001
LTA	Long-term Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NHA	National Health Authority
No.	Number
PCA Arbitration Rules	Permanent Court of Arbitration Arbitration Rules 2012
The Claimant	Atton Boro
The Respondent	The Government of Mercuria
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
US Court	Court in United States of America
v.	Versus
VCLT	Vienna Convention of the Law of Treaties

STATEMENT OF FACTS

1. On 11 January 1998, the Republic of Mercuria ("**Mercuria**") and the Kingdom of Basheera ("**Basheera**") concluded an Agreement for the Promotion and Reciprocal Protection Investments (the "**BIT**"). Mercuria is a developing country with the desire to boost its economy with foreign investments. To that end, President of Mercuria has publicly assured foreign investors of rolling out the red tape for investors on his popular Twitter account.

2. Greyscale, a non-fatal yet contagious disease which targets at the working-age individuals, has had a history in Mercuria since 1985 and was proved to be a national health crisis from 2003 to 2006. 216,900 persons were estimated to be infected in 2003 and the number drastically increased to 578,390 in 2006. Patients suffering from it experience symptoms of stiffening muscles, swollen limbs and severe joint pain. Due to the ineffectiveness of the traditional multiple-pill therapy, Mercuria was faced with an imminent threat to its public health and socio-economic stability. Against that backdrop, the National Health Authority ("**NHA**") was set up by the Central Government to provide universal healthcare for Mercurian. Since then, NHA has been operating independently and engaged in programmes to promote prevention of diseases like greyscale.

3. Atton Boro and Company **("AB Co.")** is incorporated in the People's Republic of Reef ("**Reef**") and is the primary holding company of Atton Boro Group **("AB Group")**.

4. On 21 February 1998, shortly after the conclusion of the BIT, AB Co. obtained a Mercurian patent **('the patent')** for Valterite, an active ingredient in its greyscale-treatment drug, Sanior with a view to entering into the Mercurian market. To reap the benefits under the said BIT, on 5 April 1998, AB Co. directed its subsidiary AB Group, to incorporate a wholly owned subsidiary in Basheera, named Atton Boro Limited ("**the Claimant**") as AB Co.'s vehicle for supplying drugs in Mercuria. To camouflage foreign control on the Claimant, AB Co. transferred the patent to the Claimant indirectly through AB Group. As the Claimant was set up merely for conducting pharmaceutical businesses in Mercuria, it carried out minimal business activities in Basheera, such as renting an office, complying with tax obligations, opening a bank account and employing a few employees.

5. To ensure smooth operation of its vehicle, AB Co. funded the Claimant to set up its manufacturing unit in Mercuria and to perform agreements with the NHA. To monitor the Claimant's daily operation in Basheera and Mercuria and its proper use of the aforesaid funding, AB Co. has even placed both Basheeran and Mercurian in its board of directors.

6. In 2003, acting on the recommendation of the NHA's annual report on working-age greyscale patients across the country, the Ministry of Health made a global offer to a whole range of pharmaceutical companies for long-term supply of fixed-dose combinations ("**FDC**") greyscale medicines.

7. Following the success of a previous Product Development Partnership with the Claimant, in May 2004, NHA privately offered the Claimant for the supply of its FDC drug, Sanior. Having engaged in a protracted negotiation with the NHA to the exclusion of Mercurian officials, the Claimant agreed to supply the drug pursuant to a Long-Term Agreement dated 20 July 2004 ("the **LTA**"). Under the LTA, the NHA would purchase the drug from the Claimant at a 25% discount from the drug price at the time NHA placed its purchase order. In particular, Clause 5 of the LTA stipulated the minimum guaranteed annual order-value and Clause 6 provided that the LTA would be valid for ten years so long as the Claimant has performed satisfactorily. Despite a 25% discount rate, the price of Sanior was still extortionate – the annual cost of Sanior per patient amounted to nearly USD 10,000.

8. In early 2008, due to the exponential increase of patients, NHA could no longer afford to pay such an outrageous price for the drug. To sustain its operation to provide public healthcare services to Mercurian, NHA had no choice but to renegotiate a new price for the drug with the Claimant. However, even knowing that the NHA could not finance the drug to the large population and Mercuria's public health and economy at large would then be at jeopardy, the Claimant acted with an unreasonable disregard to business realities and its corporate responsibility and offered merely an additional 10% discount on its inordinate original price. Facing the highway robbery by the Claimant, NHA invoked Clause 6 and terminated the LTA.

9. The Claimant commenced an arbitration against the NHA under the forum selection clause in the LTA. The contractual dispute between the NHA and the Claimant has been

conclusively dealt with after an award ("**Award**") in favour of the Claimant has been passed by the Reef tribunal in January 2009.

10. On 3 March 2009, the Claimant filed enforcement proceedings before the High Court of Mercuria. The NHA requested the Court to decline enforcement of the Award on the ground that it was contrary to public policy. Proceedings were delayed owing to adjournment applications by both parties. On a few occasions, the judge was unable to hear on the case owing to lengthy arguments of other cases.

11. In 2012, Mercuria passed the Commercial Courts Act directing commercial cases to a specially constituted Court. Relying on a Supreme Court judgment upholding on merits an award enforcement decision of the special Court, the Claimant applied to transfer the case to the special Court. While Supreme Court in that decision had not expressed its view on whether special Court had jurisdiction in enforcement proceedings, the judge acceded to the Claimant's request and transferred the case to the special Court.

12. In 2013, Supreme Court decided in a judgment that the special Court had no jurisdiction to hear any enforcement proceedings of arbitral awards. Notification was posted on High Court website to reiterate the decision and to avoid further confusion. The case was therefore, transferred back to the normal bench. Thereafter, both parties continued to make adjournment applications. The parties' attempt of amicable settlement has been unsuccessful and the enforcement proceeding is still ongoing at this moment.

13. In 2009, Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09). Anyone is entitled to apply to the High Court for a non-voluntary grant of licence after satisfying the Court the conditions specified in the legislation. In considering any application, the Court is bound to strike a balance between the investor's rights and the public interest. The decision of High Court, including the amount of remuneration fixed, is subject to review by an appellate body.

14. In a proceeding to which the Claimant was impleaded as a party, HG-Pharma, a Mercurian generic drug manufacturer, applied for a grant of Valtervite. In the end, the High Court granted the non-voluntary licence pursuant to the legislation.

15. The High Court ordered a 1% royalty fees to be paid to the Claimant and HG-Pharma is entitled to manufacture Sanior with Valtervite until Greyscale is no longer a threat to public health. However, the Claimant refused to accept the royalty fees offered by HG-Pharma.

16. Upon failure of amicable settlements, on 20 September 2016, Mercuria (**"the Respondent")** was notified of the Claimant's intent to initiate the present arbitration.

SUMMARY OF ARGUMENT

JURISDICTION

17. This Tribunal lacks jurisdiction to hear all claims raised by the Claimant because Claimant's benefits under the BIT have been denied under BIT Article 2(1). Firstly, the denial is valid *rationae temporis* as the denial complies with the time limit prescribed in PCA Arbitration Rules and UNCITRAL Arbitration Rules and it operates retrospectively. Secondly, the denial is valid *rationae materiae*. Being a vehicle incorporated solely for entering into Mercurian pharmaceutical market, the Claimant was controlled by AB Co. - a third state's national, and had no substantial business activities in Basheera.

18. Alternatively, this Tribunal does not have jurisdiction to hear any claim relating to the Award because the Award is not an "investment" as defined under BIT Article 1(1). Viewing the Award separate and distinct from the LTA, the Award is not an "asset" within the meaning of Article 1(1) because it fails to satisfy the intrinsic meaning of 'investment'. Thirdly, there is no basis for this Tribunal to treat the Award as being held "in accordance with Mercurian law" and "within the territory of Mercuria" because the enforcement proceeding is still pending in Mercurian court. If, *arguendo*, the Award is viewed together with the LTA, the Award is still not an investment because the LTA itself is not an investment contract due to the absence of investment risks and contribution by the Claimant. Lastly, the transformation clause under Article 1(1) does not apply because the LTA is not an investment and the Award is a standalone property rather than a transformation product of the LTA.

MERITS

19. In any event, there is no meritorious claim on TRIPS as this Tribunal should not entertain such claim and the Respondent has complied with TRIPS article 31 at all time. Respondent's enactment of the new legislation and the granting of the non-voluntary license met the standard of fair and equitable treatment. Respondent accepts there was a delay in the enforcement proceedings but denies any egregious judicial conduct that warrants this Tribunal's sanctions.

20. BIT Article 3(3) is not violated, primarily because Article 3(3), on proper construction, does not cover contractual obligations. If Article 3(3) does cover contractual obligations, it merely covers obligations arising from investment contracts. Since the LTA is not an investment contract, Article 3(3) does not cover LTA obligations. Alternatively, Article 3(3) only give the Tribunal jurisdiction over contractual claims that manifest a sovereign act. The termination was in purported exercise of contractual powers under the LTA as opposed to sovereign powers. Further, since the Respondent is not a party to the LTA, Article 3(3) only applies to the extent that NHA's acts could be attributed to the Respondent. Under the ILC Articles, NHA's conduct could not be attributed to the Respondent because NHA was not a state organ or a state entity that acted under governmental authority or state control. Lastly, the contractual claim has already been conclusively dealt with under the forum selection clause in the LTA and the principle of *lex specialis* should apply in construing Article 3(3) against covering LTA obligations.

21. By reason of the aforesaid, the Claimant is not entitled to any compensation and the Claimant should bear the cost of the present proceedings.

PART ONE: JURISDICTION

22. Article 23(1) of the PCA Arbitration Rules and Article 23(1) of the UNCITRAL Arbitration Rules provide that arbitral tribunal has the power to rule on its own jurisdiction.

23. The Respondent argues below that this Tribunal lacks jurisdiction to hear all claims raised by the Claimant because Claimant's benefits under the BIT have been denied (***Section B).*** Further and alternatively, the tribunal does not have jurisdiction to hear any claim relating to the Award because the Award is not an 'investment' as defined in the BIT (***Section A)***.

I. THE TRIBUNAL HAS NO JURISDICTION OVER CLAIM RELATING TO THE AWARD

24. In the Notice of Arbitration, the Claimant claimed that, *inter alia,* Mercurian court's delay in enforcing the Award eviscerated its investment in Mercuria[1]. However, this claim has erroneously assumed that the Award is an 'investment'.

25. BIT Article 1(1) defines 'investment' as:

> '*any kind of asset held or invested…by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's [Mercurian] law and, in particular, though not exclusively, includes:*
>
> *… (c) claims to money…*
>
> *… (e) rights, conferred by law or under contract, to undertake any economic and commercial activity…*'

A. The Award should be viewed alone

26. First and foremost, the Award should be viewed separate and distinct from the LTA. Award is the result of an arbitration where the tribunal redefines the parties' liabilities by reference

[1] Notice of Arbitration, [13].

to both contractual rights of parties and extra-contractual factors (i.e. whether the claimant comes with clean hands and whether third party has acquired rights). As such, an Award would not 'crystallise' economic rights of the parties and chances are those rights may not be enforced at all. Even if the parties' rights are enforced, quantum of an Award may not be quantifying outstanding contractual rights of the claimant, such as where reliance losses instead of expectation losses are awarded or if the claimant has failed to make reasonable mitigation. Being a product combining parties' contractual rights, judicial discretion and the effect of extra-contractual factors, an Award is different in nature from the parties' right under a contract.[2] It follows that the Award should be viewed alone.

27. Given the standalone nature of the Award, the Respondent argues in three respects that the Award could not fall within the definition of 'investment'. Firstly, (a) the Award is not an 'asset' within the meaning of Article 1(1). Secondly, (b) the Award is not held or invested in accordance with Mercurian law. Finally, (c) the Award is not held or invested in the territory of Mercuria.

a. <u>Award is not an 'asset' within the meaning of Article 1(1)</u>

28. First and foremost, under Article 1(1), categories (a)-(e) are illustrations of 'asset'. While Award is always a subject matter of investment dispute in the jurisprudence and Contracting Parties to the BIT could easily include 'Award' in its illustrations of asset, Article 1(1) has not expressly stipulated Award to be an asset. This militates against the inference that this BIT intends to cover an Award.

29. On the surface, an Award might seemingly fit into 'claims to money' or 'any kind of asset'. However, read in context and in accordance with the purpose of the BIT, such wordings could not cover the Award.

30. The purpose of the BIT is to stimulate economic cooperation, flow of private capital and economic development of the Contracting Parties.[3] Adopting a literal reading of 'claims to money' and 'any kind of asset' would encompass claims arising from personal debts,

[2] *GEA v Ukraine*, [162].
[3] BIT, Preamble.

personal injuries and personal assets (i.e. cashes). Protection of such would undermine the aforesaid purposes. Thus, a literal reading should not be adopted.[4]

31. When the natural and ordinary meaning of words is ambiguous, the Tribunal should turn to the circumstances of the conclusion of the BIT.[5] Given that historical development of the modern system of investment protection was not intended to cover every property right[6], 'claims to money' or 'any kind of asset' must be read restrictively.

32. Article 1(1)(a) to 1(1)(e) are merely non-exhaustive illustrations of 'investment'. It follows that there must be other categories of assets and the intrinsic meaning of 'investment' should be the benchmark against which to determine whether non-listed properties constitute an 'investment'.[7]

33. Applying the principle of *ejusdem generis*, the House of Lords stated in *The Thames and Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co* that:

> *'words, however, general, may be limited with respect to the subject matter in relation to which they are used'.*[8]

Provided that the subject matter here is 'investment', this Tribunal should read down those general words to be 'claims to money satisfying the intrinsic meaning of investment' and 'any kind of asset satisfying the intrinsic meaning of investment'.

34. Three common criteria can be distilled from the divergent approaches taken by Tribunals in identifying the existence of an 'investment'[9], namely contribution, duration and investment risks.[10] These criteria form the intrinsic meaning of "investment".[11]

35. Investment risks are risks relating to the investment climate in the host State (i.e. political

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[4] McLachlan, [6.46].
[5] VCLT, Article 32.
[6] Schreuer, 60.
[7] *Romak v Uzbekistan*, [180].
[8] *Thames v Hamilton,* 490; Kim, 415.
[9] *Fedax v Venezuela*, [43]; *Salini v Morocco*, [52]; *CBOS v Slovakia*, [78]; *Jan v Egypt*, [91]; *Joy Mining v Egypt*, [53]; *MHS v Malaysia*, [107-145]; *Saba v Turkey*, [121]; *Nova v Venezuela*, [84]; Pollan, 34-35; Grabowski, 295-7.
[10] Schreuer, 75.
[11] *Romak v Uzbekistan*, [207]; McLachlan, [6.31]; *Nova v Venezuela*, [80-4].

instability) and must be distinguished from ordinary commercial risks.[12] Risks that exist in normal cross-border commercial transactions, such as variation of exchange rates, failure to enforce contractual rights in a court and risk of non-performance, could not constitute investment risks.

36. The enforcement of the Award only entails the risk that the Claimant could not enforce their rights in the court, which exists in every other commercial transaction. Thus, the Award does not bring the Claimant any investment risks.

37. On the basis that the Award fails to meet the intrinsic meaning of 'investment', it is neither an 'asset' nor a 'claim to money' under Article 1(1) of the BIT.

b. Award is not held in accordance with Mercurian law

38. Secondly, the Award is not held in accordance with Mercurian law, for it is not judicially recognised or enforceable in Mercuria.

39. The New York Convention applies to the recognition and enforcement of international award save in the circumstances provided under Article V. Where the enforcement of the Award could affect the interests of a large social group and is incompatible with the principle of constructing the economic, political and legal system of the State[13], the Tribunal has relied on Article V(2) to refuse recognition and enforcement of the Award.[14]

40. In Mercuria's battle against greyscale, there is still a significant proportion of the vulnerable population remains untested[15] and more scientific research has to be carried out to study the effectiveness of Valtervite in preventing the transmission of greyscale in light of the divergent scientific conclusions today.[16] Where the amount of the award is as high as 40 million[17], its enforcement would largely reduce the resources available for NHA to undertake medical research and conduct testing workshops. Provided that NHA's

[12] *Romak v Uzbekistan*, [230].
[13] *United World v Yakor*, 41-42.
[14] Born, 3394 - 3731; ICCA, 106-110; UNCITRAL Secretariat, 240-246
[15] Annex 3, line 1349.
[16] Procedural Order No.3, line 1586.
[17] Notice of Arbitration, [9].

resources are crucial to Mercurian's fight against greyscale, the well-being of the large Mercurian population and the restructuring of Mercuria's social and economic order, enforcement of the Award would very likely be contrary to public policy.

41. Given that the enforcement proceeding in Mercuria is still ongoing and it is highly arguable that the Award would not be recognised and enforceable under the New York Convention, it is too premature for this Tribunal to confer a legal status on the Award.[18] Further and alternatively, as an international tribunal, this Tribunal should defer to the Mercurian court on the question of whether public policy of Mercuria warrants the recognition and enforcement of the Award. Hence, the Award should not be decided by this Tribunal as being held in accordance with Mercurian law.

c. Award is not held in the territory of Mercuria

42. Finally, by virtue of the fact that the Award is arguably unenforceable in Mercuria, the Award is not held in the territory of Mercuria.

43. In *Bayview v Mexico*, US court granted the investor a right to water in Mexico which was found to be unenforceable under Mexican law. The Tribunal held that the investor must show that the right was enforceable in Mexico to establish an investment 'within the territory of Mexico'[19].

44. As such, the conclusion that the Award is held in Mercuria would be a corollary of the position that it is enforceable in Mercuria. As long as the enforcement proceeding in Mercuria is still pending, there is no basis for this Tribunal to treat the Award as being held 'within the territory of Mercuria'.

B. If, *arguendo*, the Award is viewed together with the LTA, the Award is still not an investment because the LTA is not an investment contract

45. Inasmuch as 'asset' and 'claim to money' should be construed restrictively, Article 1(1)(e)

[18] Redfern, [8.36].
[19] *Bayview v Mexico*, [112-117].

should cover only rights arising from contracts satisfying the intrinsic meaning of investment **('investment contract')** but not from all kinds of contracts.[20]

46. For the following two reasons, the LTA could not meet the intrinsic meaning of 'investment' and, therefore, is not an investment contract.

    i. Firstly, the LTA entails no investment risks. Clause 5 of the LTA stipulates the minimum guarantee annual order-value, assuring the Claimant of a stable annual return under the LTA regardless of investment climate (i.e. political instability or economic recession) in Mercuria. Clause 6 of the LTA provides that the LTA would be valid for 10 years so far as the Claimant performed satisfactorily.[21] This guaranteed that the LTA would not be terminated at the whim of NHA and there would be sufficient time for the Claimant to recoup any costs it incurred in entering into the LTA.

    ii. Secondly, the Claimant has not made contributions under the LTA. It is uncontested that the monies for constructing the manufacturing unit in Mercuria and performing the LTA are from the foreign controller behind the scene – AB Co. – but not from the Claimant.[22]

C. Transformation clause under Article 1(1) does not apply.

47. Further, Article 1(1) provides that 'any change in the form of an investment does not affect its character as investment'. This does not avail the Claimant because as submitted, the Award is different in nature from the rights under the LTA so it exists as a separate property but not as another form of the LTA. In any event, this Article does not apply because the LTA is not an 'investment' within the meaning of Article 1(1).

48. For the foregoing reasons, the Respondent submits that the Award is not an 'investment' and consequently, the Tribunal has no jurisdiction to hear any claim relating to the Award.

[20] Redfern: [8.38, 8.43].
[21] Facts, [10].
[22] Procedural Order No.3, line 1572.

II. THE CLAIMANT'S BENEFITS UNDER THE BIT HAS BEEN DENIED UNDER BIT ARTICLE 2

49. The Respondent, having timely and rightly invoked Article 2, denied the Claimant of their benefits under the BIT.

50. Pursuant to Article 2(1) of the BIT, the Respondent '*reserves the right to deny'* the Claimant of its benefits under BIT if:

    i. the Claimant is controlled or owned by nationals of a third state; and
    ii. the Claimant does not have substantial business activities in Basheera.

51. Provided that the effect of Article 2 is to deny all BIT benefits, including the benefit of submitting dispute to arbitration[23], invocation of Article 2 is a jurisdictional challenge which, if succeeds, will excuse this Tribunal from hearing the present disputes.[24]

A. The Denial of Benefits is valid *rationae temporis.*

52. Pursuant to Article 23(2) of the PCA Arbitration Rules and Article 21(2) of UNCITRAL Arbitration Rules, jurisdictional challenge should be raised no later than the time filing 'the statement of defence'.

53. In Response to the Notice of Arbitration dated 26 November 2016 - the 'statement of defence' *vis-a-vis* the Claimant's Notice of Arbitration, the Respondent has requested the Tribunal, *inter alia*, to declare that the Claimant cannot take benefits of the BIT pursuant to BIT Article 2.[25] Given that the Respondent has invoked Article 2 in the 'statement of defence', the Respondent has complied with the time limit.

54. Further and alternatively, effect of Article 2(1) is retrospective in that it operates on disputes arising before the Respondent's jurisdictional challenge as much as on ones arising after. Section 28 of the VCLT provides that provisions of the BIT do not apply to

[23] BIT, Article 8.
[24] *Guaracachi v Bolivia*, [381-2]; *Pac Rim v Salvador,* [4.92]; *Ulysseas v Ecuador,* [172].
[25] Response to Notice of Arbitration, [5][10].

acts or facts which took place before the BIT comes into effect. Without express wordings to the contrary, Article 2(1) should operate on all the disputes arising after the conclusion of the BIT.

55. Moreover, Article 2(1) expressly gives the Respondent a prior reservation of right to deny benefits. The Claimant who accepts the offer of arbitration in the BIT must be taken to have accepted Article 2(1) at face value. In any event, the Claimant should be aware of the possibility of such denial before making investments in Mercuria and therefore, retrospective operation of Article 2(1) has not gone beyond Claimant's legitimate expectation.[26]

56. Retrospective operation of Article 2(1) is also warranted by the purpose of the BIT. The BIT aims at promoting foreign investments[27], which necessitates the State to minimise red-tapes *vis-à-vis* foreign investors.[28] In that light, Article 2 must not be construed as requiring the Respondent to monitor owners, controllers and business activities of investors all the time.[29] Giving notification of the denial of benefit to investors with whom it had no dispute whatsoever would also be seen as unfriendly acts, contrary to the promotion of foreign investments.

B. The Denial of Benefits is valid *rationae materiae*

a. Claimant must bear legal burden of proof

57. It has never been decided whether the Respondent invariably has the legal burden of proof in establishing a jurisdictional challenge. In circumstances like the present, it suffices for the Respondent to raise doubts on foreign control/ownership and the lack of business activities and leave the Claimant to prove to the contrary.

58. Article 2(1), when being read in context and in accordance with the purpose of the BIT[30], has placed the legal burden of proof on the Claimant.

[26] *Guaracachi v Bolivia*, [372]; *Ulysseas v Ecuador*, [172].
[27] Preamble, BIT.
[28] Facts, [8].
[29] UNCTAD, 98.
[30] VCLT, Article 31(1).

59. In the BIT, Article 2(1) and Article 2(2) provide two circumstances in which the Respondent may deny investors of their benefits under the BIT. The two Articles are put under the same Article and could be invoked to the same effect (i.e. denial of benefit). Therefore, when Article 2(1) is unclear on the burden of proof, the drafting of Article 2(2) is a useful context against which the Tribunal may draw interference for interpreting Article 2(1).

60. Article 2(2) provides that 'Each Contracting Party reserves the right to deny…, ***if the denying contracting party establishes that*** such investment is …" In stark contrast, Article 2(1) omits such words, providing no special allocation on the legal burden of proof. In light of the principle of *expressio unius est exclusio alterius*, Article 2(1) shifts the legal burden of proof away from the denying contracting party (i.e. the Respondent) to the Claimant.

61. This interpretation could be affirmed by the circumstances of the conclusion of the BIT.[31] Article 2(1) concerns with evidence of foreign control, nationality of controllers and owners as well as business records of the foreign investor. The investor possesses and has knowledge of all the relevant evidence whilst the State is always in the dark. Putting the legal burden of proof on the denying contracting party (i.e. the Respondent) renders the invocation of Article 2 impossible, and defeats the BIT's purpose of promoting reciprocity and deterring mailbox companies.

b. <u>The Claimant was controlled by a national of a third state</u>

62. Reading Article 2(1) in context and in accordance with the BIT's purpose, the Article must be speaking of 'ultimate controller'.[32] By putting 'own or control' as disjunctive criteria, the Article must intend 'control' to bear a different meaning from 'own'. The 'control' limb would be rendered meaningless in the Article if we treat shareholder of the investor (owner) invariably as controller without tracing the 'ultimate controller'.

[31] VCLT, Article 32.
[32] *National Gas v Egypt*, [135]; Nikiema, [2.3].

63. Further, Article 2(1) and the BIT aim at deterring the incorporation of mailbox companies for reaping BIT benefits.[33] If Article 2(1) does not inquire into ultimate controllers, mailbox company set up by a subsidiary in the contracting state which is controlled by national of a third state[34], such as the Claimant, would be able to get around Article 2(1) and destroy the reciprocity intended by the denial of benefit clause.

64. In our case, it is uncontested that 100% of the Claimant's shares were held by AB Group, which were ultimately controlled by AB Group's primary holding company, AB Co.[35]. *De facto* control could be inferred from the fact that the Claimant was dependent on AB Co. both (i) managerially and (ii) financially, and (iii) was incorporated for the sole purpose of conducting AB Co.'s business activities in Mercuria:

i. AB Co., a company incorporated in Reef[36], has a board of directors of various nationality including Basheeran and Mercurian.[37] No evidence has suggested that AB Co. itself conducted any business in Basheera and Mercuria. Inference could be drawn that those directors are to manage the Claimant's businesses in Basheera and Mercuria;

ii. AB Co. funded the Claimant to set up its manufacturing unit in Mercuria and to perform the agreements it entered into with the NHA from 1998 onwards[38];

iii. The Mercurian patent was acquired by AB Co. in February 1998[39], one month after this BIT was signed in January 1998.[40] Two months later, AB Co. assigned the patent to AB Group, which then incorporated the Claimant and assigned the patent to it[41]. The patent was the basis of the Claimant's business activities in Mercuria. These series of events were no coincidence but evidence suggesting that AB Co. held effective *de facto* control over both AB Group and the Claimant.

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[33] McLachlan, [5.180].
[34] Legum, 4-5.
[35] Procedural Order No.2, [3].
[36] Facts, [2].
[37] Procedural Order No.3, line 1571.
[38] Procedural Order No.3, line 1572.
[39] Facts, [3].
[40] Facts, [1].
[41] Facts, [4]; Procedural Order No.3, line 1574.

65. On nationality of AB Co., 'place of incorporation' is the most widely used test in determining nationality of a juridical person.[42] As restated in *Barcelona Traction*[43], where the BIT has stipulated 'place of incorporation' as the relevant criterion for determining nationality, the Tribunal normally declines to pierce the corporate veil to look into nationality of the company's shareholders.[44] This is so even where the majority shareholder owns 99% of the shares.[45] In the words of the Tribunal in ***Saluka v Czech Republic,***

> *'it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add'.*[46]

66. Inasmuch as Article 2 provides the place of incorporation as the sole criterion for determining nationality of juridical person, any attempt to bring into play the nationality of its shareholders is misconceived and contrary to the intention of the BIT.

67. It follows that AB Co.'s place of incorporation, Reef, determines its nationality. This is unaffected by the fact that its shares are held by a mix of entities and individuals of a wide variety of nationality.[47] As AB Co. is a national of a third state, foreign control could be established.

c. <u>The Claimant has no substantial business activities in Basheera</u>

68. To establish the lack of substantial business activities, one must first ascertain the standard of 'substantiality' and the scope of business activities to be looked at.

69. The purpose of including a denial of benefit clause in the BIT is to maintain reciprocity between Contracting States.[48] Thus, if an investor is to enjoy the benefits under the BIT, it must carry out *profit-yielding activities* to make economic contribution to the place in

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[42] *Autopista v Venezuela*, [107]; *SOABI v Senegal*, [29].
[43] *Barcelona Traction.*
[44] *Amco v Indonesia,* [104]; *Tokios v Ukraine*, [40]; *Yukos v Russian Federation,* [415]; Dugan, 308-309; McLachlan, [5.115-6]; Redfern, [8.21]; Sornarajah, 197-198.
[45] *Tokios v Ukraine*, [21-71].
[46] *Saluka v Czech*, [241].
[47] Procedural Order No.3, line 1570.
[48] Penn State, 1302.

which it is organised. In effect, it aims at deterring mailbox companies from reaping benefits under the BIT.

70. In ***AMTO v Ukraine***, the tribunal found the presence of substantial business activities on the basis of employments of staffs involved in AMTO's investment-related activities without considering tax payments and bank statements which had not recorded AMTO's investments in the region.[49] Consistent with the purpose of guarding against mailbox companies reaping BIT benefits, *administrative activities per se could not be regarded as 'substantial business activities.*

71. Moreover, to ensure that benefits under the BIT are only provided to investors that have made economic contribution to the Contracting Party, the Tribunal has *excluded from consideration of business activities attributable to associated but different legal entity.*[50]

72. On the facts, the Claimant has no substantial business activities in Basheera, because:

i. There is no evidence of profit-yielding activities (i.e. dealings and transactions) in Basheera. Instead, the Claimant only furnished to this Tribunal evidence of its administrative activities, such as office leasing, bank account and employment of 2-6 permanent employees.

ii. The Claimant failed to demonstrate the extent to which its administrative activities contribute to their business (if any) in Basheera. For instance, whilst the Claimant's employees were managing portfolio of patents registered in South America and Africa, there is no evidence suggesting that the Claimant holds a Basheeran patent or conducted profit-yielding activities in Basheera with any of those patents. Following ***AMTO v Ukraine***, isolated administrative activities with no nexus with Claimant's investments in Basheera (if any) could not meet the standard of 'substantiality'.

iii. All hard-core business activities conducted by the Claimant are not attributable to itself. The Claimant's employees had provided support for regulatory approval,

[49] *AMTO v Ukraine*, [68-69].
[50] *Plama v Bulgaria*, [169].

marketing, sales, legal accounting and tax services for AB Group but not for the Claimant. Following *Plama v Bulgaria*, this Tribunal should not take into account those activities.

iv. The Claimant has almost one year's time as from 26 November 2016 to gather evidence in relation to its business activities in Basheera. The fragmentary and meagre evidence available to us provides the basis for this Tribunal to infer that the Claimant's operation in Basheera stopped at carrying out administrative activities with no view to investing, earning profits, and contributing to Basheera's economy.

73. To conclude, the Respondent is entitled to deny the Claimant of all BIT benefits pursuant to Article 2(1).

PART TWO: LIABILITIES

III. THERE IS NO CLAIM FOR BREACH OF TRIPS

74. Any claim for breach of TRIPS in this tribunal is of no merit. This tribunal has no jurisdiction to hear the claims on TRIPS since there is a specifically-designed dispute settlement mechanism under TRIPS. In any event, Respondent's actions fulfill obligations arising from TRIPS Article 31, which entitles Respondent to take away patents.

A. This Tribunal has no jurisdiction to hear any claims of TRIPS

75. According to TRIPS Article 64(1),

> *"The provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise…"*
>
> [Article XXII and XXIII state ... Should the consultation fail, the parties shall adopt the dispute mechanism contained in the dispute settlement understanding]

76. Dispute Settlement Understanding Article 6 states that,

> *"If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that a which the request first appears as an item on the DSB's agenda…"*

77. The function of the panel is to decide on the dispute arising from treaties under the World Trade Organisation, such as TRIPS. The panel should objectively assess the facts, apply the relevant agreements, and give rulings.[51]

78. The panel serving as the dispute settlement mechanism under TRIPS is governed by the rules specifically designed by the Dispute Settlement Understanding. Dispute Settlement Understanding Article 21(5) provides that:

[51] fn. Article 11 of Dispute Settlement Understanding.

"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel…"

79. Since this tribunal does not follow the dispute settlement procedures, it is not in any position to hear any claim of TRIPS. If this tribunal claimed [the jurisdiction over claims of TRIPS], it would override and nullify the procedures which were directly at odds with the composition of this tribunal as well as the procedural rules of this arbitration. There are two irreconcilable contradictions between the dispute settlement mechanism and the rules governing this arbitration.

a. Standing to sue

80. The claimant in the present proceeding has no standing to bring any claim on TRIPS under the said dispute settlement procedures. Only Member States to the international agreement can be a party to the dispute under the mechanism[52]. The claimant, being a private investor but not a contracting party to TRIPS, is thus not entitled to bring a claim on TRIPS. (otherwise, private parties may evade the DSU)

b. Right to appeal

81. PCA Arbitration Rules and UNCITRAL Arbitration Rules do not provide any party with a right to appeal this tribunal's decision. On the contrary, TRIPS Article 17 entitles both parties to appeal the decision of a panel to the Appellate Body established by the Dispute Settlement Body.

82. In the appeal proceeding, the Appellate Body shall review the law covered and legal interpretations of the international treaties at issue. The finding of facts by the lower tribunal will not however be disturbed. The procedures governing this arbitration are therefore distinct from those under Dispute Settlement Understanding.

[52] GATT, Art 23.

83. Given the contradictions between the rules governing this arbitration and the Dispute Settlement Mechanism, this tribunal should not claim jurisdiction over the Claimant's complaint in relation to TRIPS. Otherwise, the mechanism will be rendered useless.

B. Alternatively, Respondent complied with TRIPS Article 31

84. Even if this tribunal decides that it has jurisdiction over the claims of TRIPS, the Claimant's allegation that there is a breach of TRIPS is of no merit.

85. TRIPS Article 31 allows for the use of a patent without authorization of the right holder by anyone so authorized by the government legitimately so long if the conditions listed therein are satisfied. The most disputed conditions are a) whether HG-Pharma must have made effort to obtain the patent, b) whether Sanior was predominantly for the supply of domestic market, and c) whether there was adequate remuneration to the Claimant.

86. Respondent's judiciary allowed the grant of the license of Valtervite to HG-Pharma and the Respondent has fulfilled all the conditions.

a. <u>Effort to obtain the patent</u>

87. In the case of national emergency, the patent user is not required to have made efforts to obtain the patent.[53] The non-voluntary license was granted in and for the state of matter which amounted to a national emergency. Accordingly, HG-pharma not making any efforts to obtain the patent is not a breach of TRIPS.

88. Greyscale is a contagious disease threatening the wellbeing of the supporting group of the Mercuria's economy. Despite the seemingly small percentage of patients relative to the entire population, the rate of increase of people suffering from greyscale was remarkable, that the number of patients has increased 3 times within 3 years. The rate was also expected to increase due to the increasing number of patients. If no drastic action were taken, half of the working-age population would suffer from greyscale within 10 years, affecting not only the health of individuals but also the economy of Mercuria. Respondent identified this

[53] TRIPS, Article 31(b).

health problem as a matter of national emergency owing to its potential gravity. According to the Doha declaration, member state has the right to decide what is a national emergency and Respondent has such a right as a party to TRIPS.

b. Supply of domestic market

89. Respondent does not challenge the fact that some Sanior was being exported to three neighbouring states as a form of humanitarian aid. However, Claimant failed to discharge the burden of proving that the amount of Sanior exported was disproportionately excessive. There is nothing to suggest any *mala fide* or any impropriety in the exportation.

c. Adequate remuneration

90. Adequate remuneration needs to be paid by the patent user to the original patent holder. The Mercurian court has ordered 1% royalty fees to be paid by HG-Pharma to AB Limited. The amount of royalty fees meets the internationally accepted standard. According to the royalty guidelines set by the World Trade Organization, four universally adopted calculation approaches yield a result ranging from 0% to 7% royalty fees. 1% royalty fees fixed in this case is within the reasonable range. It also falls within the general practise of the Mercurian Courts which have previously ordered 0.5% to 3% royalty fees to be paid in granting of non-voluntary licences which have never been disputed before and therefore, is in line with the acceptable range.

IV. RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT

91. The BIT did not provide a concrete definition to expropriation. Without prejudice to the arguments above, TRIPS should be taken into account when determining what amounts to an expropriation since it compromises the interest of national health and investors' interests. TRIPS provides a balance of interests, providing that certain actions should not be defined as unlawful expropriation which is accepted as an international standard by member states. As stated above, Respondent complied with TRIPS so the action should not be seen as un unlawful expropriation.

A. Respondent's act falls within BIT Article 6(4)

92. The plain and ordinary reading of Article 6(4) suggests that certain requirements provided therein shall be satisfied before a party can rely on the provision. The requirements are (1) non-discriminatory, (2) designated and applied to protect (3) legitimate public welfare objectives.

93. The grant of the non-voluntary licence is non-discriminatory. There was no evidence before the tribunal that the Claimant's patent was chosen purely on the basis of nationality. Rather, it was because there was an application for the grant of a non-voluntary licence on the Claimant's patent made by HG-Pharma. The High Court of Mercuria granted the licence since it was in the public interest. There was no known medicine comparable to Sanior that was effective in countering greyscale. Accordingly, there was no basis of comparison engendering an irrational differentiation in the treatment.

94. The grant of the licence was designated and applied to protect legitimate public welfare objectives. The term "designated and applied to" implies the requirement of a sufficient causal link between the objective sought and the impugned behaviour. Article 6(4) provides that public welfare objectives include, inter alia, public health. Countering the upsurge in the prevalence of greyscale clearly falls within this object.

95. The licence was for legitimate public welfare objectives. The grant of the licence allowed HG-Pharma to produce the drug necessary in treating greyscale patients at a more affordable price. The price of FDC as noted in the 2006 Annual Report of National Health Authority Mercuria was manifestly beyond the patients' and the Authority's affordability. To ensure that the patients received adequate treatment, the Court granted a licence to HG-Pharma pursuant to its application and the Legislation to produce drugs which provided an alternative priced reasonably. It follows that the grant of the licence accords with the requirement of "designated and applied to protect legitimate public welfare objectives".

96. The enactment of the Legislation together with the grant of the licence were therefore within the scope contemplated in Article 6(4). Thus, it did not constitute an indirect expropriation.

V. THERE IS NO BREACH OF FAIR AND EQUITABLE TREATMENT

97. The promulgation of law No. 8485/09 and the granting of the non-voluntary licence meets the standard of the fair and equitable treatment ("**FET**").

A. Respondent did not breach Claimant's legitimate expectations

98. Respondent never promised Claimant that their patent would not be taken away. There is no legitimate source of such expectation. Even if this Tribunal is to find that certain statements amount to a source of expectation, Respondent is entitled to change the domestic legislation when there are radical changes to social and economic aspects.

B. There is not legitimate source of expectation

99. In *White Industry Australia v India*, it was stated that:

> *"legitimate expectations about the treatment of investments will arise 'based on the conditions offered by the host State at the time of the investment.' [Investment treaty] jurisprudence highlights that, to create legitimate expectations, State conduct needs to be specific and unambiguous. Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances'. The conduct must be targeted at a specific person or identifiable group.'"*[54]

100. In the Separate Opinion of Professor Georges Abi-Saab, it was said that:

> *"to deserve the qualifier 'legitimate', the 'expectations' must be based on some kind of legal commitment… The conduct of representation of the government has to bear the makings of an identifiable legal commitment towards the specific investor, before we can speak of a breach (or frustration) of legitimate expectations, calling for a remedy or compensation. Such a commitment … cannot … be … condensed [out] of … general political statement, pep up talks of encouraging investments…"*[55]

101. President's statement on Twitter cannot form a legitimate source of expectation as it was targeted at the 40-million followers who are not all investors. Without an intention to direct at the patent holders, the statement is not identifiable legal commitment. Twitter, as a social networking website, allows users to spread message to an unlimited number of

[54] *White Industries v India*, [10.3.7]
[55] Separate Opinion, [3-4].

followers while each message can only be up to 140 characters. Such renders Twitter a mere social platform and followers cannot reasonably expect it as a place for government's official announcement. The President only provided a vague statement that "Mercuria would roll out the red carpet". Such ambiguous statement cannot form a source of legitimate expectation.

C. Respondent was neither arbitrary nor discriminatory

102. BIT Article 3(2) provides that investors are protected against arbitrary and discriminatory measures:

> *"2. ... Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment in its territory of investors of the other Contracting Party. ... (emphasis added)"*

103. Although the word 'arbitrary' does not appear in the said Article, the term 'unreasonable' is substantially similar to the term 'arbitrary' as both mean 'something done capriciously, without reason.'[56]

104. However, the enactment of the National Legislation for its Intellectual Property Law (Law No. 8458/09) ("**the Legislation**") and/or the grant of the license for the Claimant's invention are neither arbitrary nor discriminatory.

105. The general principle of what amounts to an arbitrary act of the state is propounded in *AES v Hungary*:

> *"There are two elements that require to be analysed to determine whether a state's act was unreasonable: the existence of a rational policy, and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure*

[56] *National Grid v Argentina*, [197].

adopted to achieve it, There has to do with the nature of the measures and the way it is implemented. (emphasis added)"[57]

106. The two-prong test found by the tribunal in *AES v Hungary* is essentially a proportionality test, which echoes other tribunals' decisions, including that of *LG&E v Argentina*, where arbitrary measures are defined as acts made in the absence of 'a balance of the interests of the State with any burden imposed on such investments'.[58]

107. The tribunal should pay Respondent the margin of appreciation which has been accepted by the tribunal in *Philip v Uruguay*:

"The Tribunal agrees with the Respondent that the 'margin of appreciation' is not limited to the context of the ECHR but 'applies equally to claims arising under BITs,' at least in contexts such as public health. The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors.' As held by another investment tribunal, '[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation.' (emphasis added)"[59]

108. In face of a real public health crisis, it is the Mercuria's sovereign right to exercise its police powers to protect public health. When assessing the reasonableness of a state's decision in such circumstances, this Tribunal should pay deference to the administrative decisions made. Only when the policies are beyond reasonable, should this Tribunal find against Respondent.

109. The enactment and the promulgation of the Legislation has the effect of filling a lacuna in the law of Mercuria to better respond to matters of public interests and national emergency, as in this case the spread of greyscale. It takes into account both the public interests and the investors' patent rights.

110. Section 23(1) of the Legislation sets the first two hurdles for the grant of a non-voluntary licence on a patent. This section demands that three years shall pass from the date of the grant of a patent before an application for grant of a non-voluntary license on

[57] *AES v Hungary*, [10.3.7-10.3.9].
[58] *LG&E v Argentina*, [158].
[59] *Philip v Uruguay*, [399].

that patent can be made. This strict requirement ensures the existence of a period time where the patentee may recoup the capital spent in research and development for the patented invention, safeguarding investors' interests even in light of clear conflicting public interests.

111. The second hurdle in section 23(1) provides for the grounds on which an application for grant of a non-voluntary licence can be based. The first two grounds (a) and (b) can be fulfilled only if the patented invention cannot satisfy the reasonable requirements of the public. The third ground (c) facilitates full use of any patented invention in case it is not utilized when there is a demand in the public. The application for the grant of non-voluntary licence can only be made for the betterment of the public.

112. When considering an application, the Court is bound to take into account various factors in considering whether the licence will be granted. Subsection (4) of the said section lists the relevant considerations, such as the nature of the patent, potential utility of the licence if the application is allowed, and the efforts made by the applicant to obtain a licence directly from the patentee on reasonable terms. The Court is vested with the power to balance conflicting interests of both the public and the patentee before granting the licence.

113. If the Court considers the grant of the licence desirable, it may do so upon certain terms that the Court deems fit according to subsection (3). This enables the Court to arrive at a more equitable and reasonable decision that the applicant may be required to pay royalties to compensate for the impairment that the patentee suffered.

114. The Legislation adopts a policy in pursuant to the protection of both the public interests and patentees' interests. The mechanism stated in section 23 provides the Court with the requisite flexibility to arrive at a just decision, taking into account the need of the Mercurian citizens and the importance of intellectual property protection. The Claimant's allegation that the enactment of the Legislation is arbitrary is therefore, ungrounded.

115. In addition to the above, the Legislation was merely implementing a practice that has gained international acceptance – the grant of licence on a patent in the absence of the approval from the patentee. As alluded above, this practice was recognised in international treaties such as TRIPS. Article 31 of TRIPS provides for the legitimacy of compulsory

licencing subject to certain restraints. Mercuria is a party to TRIPS. The issue of compulsory licencing then in October 2009 through the enactment of Legislation complied with TRIPS.

116. The grant of the licence is not arbitrary either. The grant of the licence is to help tackle the threats that greyscale infection poses on the public health as well as the economy in Mercuria. The gravity of the situation has been highlighted above. Confirmed cases of greyscale increased drastically in the last decades. The rate of increase of new infection was expected to be exponential. The price of the medicine Sanior was far from affordable for the public, even the Mercurian government cannot purchase such expensive medicine.[60] Respondent had an urgent need to respond to the serious health crisis.

117. The application by HG-Pharma was heard before the High Court of Mercuria. There was no evidence suggesting any misapplication of the Legislation. The grant was allowed on condition that 1% royalty, which is acceptable internationally as adequate remuneration, shall be paid to the Claimant. The licence would expire once 'greyscale was no longer a threat to public health in Mercuria'.[61] All these suggest nothing but that the grant of the non-voluntary licence accords with the aim of combating Greyscale. The Court stroke a reasonable balance between the public health interests and the Claimant's property rights.

118. Accordingly, the enactment of the Legislation and the grant of the licence are not arbitrary. Even there is a change in the legal framework, it does not amount to an unreasonable modification of the legal framework.

119. It is crucial to first determine the basis of comparison. The tribunal in *Enron v Argentina* held that to find the existence of discrimination, there must be some "capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors".[62] Other tribunals have also cited Enron in respect of discrimination.

[60] Annex No.3, line 1351-1369.
[61] Facts, [21].
[62] *Enron v Argentina*, [282].

120. However, whether there has been discriminatory act is to be determined on a case-by-case analysis. Different tribunals have time to time hold that comparison between different sectors of the economy with a view to establish discrimination may not be possible.[63]

121. Respondent concedes that a discriminatory intent is not necessary to establish the presence of discrimination. Either the intention to discriminate or the effect of a measure being discriminatory is sufficient to render a measure discriminatory.[64]

122. The case before this tribunal does not in any way suggest the presence of discriminatory intent. Nor is it legitimate for the Claimant to allege that the measures adopted by the Mercuria entail discriminatory effect.

123. The Legislation applies to all patents. Any patent not satisfying the requirements in the legislation may be subject to non-voluntary licences. Any non-voluntary licence may be granted provided that the Court deems fit and that it can strike a balance between public interests and rights of the patentee. It is fair for Claimant to allege that they are the only patentee who loses the full rights vested in the patent. Nowhere in the fact suggests only one non-voluntary licence has been granted since the enactment of the Legislation.

124. The patent applies to the manufacture of Valtervite. It is the only ingredient which is known to be effective in treating greyscale. Drawing comparisons with other medicines which are not applicable at all to greyscale avails Claimant nothing to support their case.

125. Claimant suggests that there are apparently two choices – the multiple-pill therapy and the FDC treatment – and Respondent helped select and appropriate the Claimant's rights related to the Valtervite which is the active ingredient for the FDC treatment instead of the other one. Accordingly, they allege that this constitutes the basis of discrimination.

126. This is an allegation unsupported by any facts. The multiple-pill therapy is effective only to a limited extent and it falls 'far short of global standards of treatment for greyscale'[65]. Nothing also in the fact indicates that the multiple-pill therapy is cheaper than FDC therapy

[63] *El Paso v Argentina*, [315]; Schreuer, 491.
[64] *LG&E v Argentina*, [146].
[65] Facts, [6].

such that the former is more cost-effective and economically efficient. It is very reasonable that the Claimant's investment was chosen to help treat greyscale instead of the multiple-pill therapy.

127. This tribunal is not provided with the judgment allowing the grant of the non-voluntary licence on the patent by the High Court of Mercuria. In the absence of clear facts, the Tribunal should not draw any adverse inference that the Legislation was enacted with a view to discriminating against the Claimant or that the High Court of Mercuria applied the Legislation in a manner that is discriminatory to the Claimant.

128. Therefore, the Claimant fails to prove that both the enactment of the Legislation and the grant of the non-voluntary licence on the Claimant's patent are neither arbitrary nor discriminatory.

D. The Respondent accorded due process to the Claimant

129. The Respondent also accorded due process to the Claimant.

130. It has been clear that both transparency and procedural propriety are vital elements of FET. The tribunal in *Metalclad v Mexico* considered both transparency and procedural propriety to determine the presence of the violation of the FET guarantee.[66]

131. The enactment of the Legislation and the grant of the non-voluntary licence were made in a transparent manner.

132. The Legislation was enacted and promulgated in October 2009. It was duly gazetted. There is nothing in the facts that supports the allegation that there is a lack of transparency in the process. Nor is there any fact supporting the argument that the Claimant was not notified of or did not recognise the enactment of the legislation. The tribunal should not draw any adverse inference that the Respondent state improperly enacted and adopted the Legislation in the absence of solid facts.

[66] *Metalclad v Mexico*, [76] [91].

133. The grant of the licence was made in accordance with the Legislation. The High Court of Mercuria did not apply the Legislation in a manner that prohibited the Claimant to make advance assessment of the legal situation and planning.

134. It follows that both the enactment of the Legislation and the grant of the non-voluntary licence comply with the standard of transparency in FET in the BIT.

135. Due process was accorded to Claimant in relation to the enactment of the Legislation and the grant of the non-voluntary licence to HG-Pharma. As aforesaid, there were no procedural irregularity or inference thereof in relation to the enactment of the Legislation that could be drawn from the facts before the Tribunal.

136. The Claimant was impleaded as a party to the application of the non-voluntary licence granted to HG-Pharma to manufacture Sanior.[67] They were able to put their case before the High Court to argue against the grant of the licence if they deemed appropriate. Even if it were insufficient to protect the Claimant's interest, the opportunity to challenge the validity of the licence and the royalty was in any event possible[68]. The Claimant simply fails to discharge their burden of proofing that they have not been given opportunity to make submissions on the non-voluntary licence.

137. Nothing in this case suggests that the Claimant had been barred from the hearing for the grant of the licence such that it was procedurally unjust for the Claimant. Nor was there evidence hinting that the Court had violated the municipal procedural law or international standards in this area. The Claimant had every chance to channel their stance and represent themselves before the Court. The Legislation and Mercuria's law provided the patentee multiple safeguards. It is neither legitimate nor reasonable for the Claimant to argue that they had not been provided with due process.

138. The Respondent did not breach the Claimant's legitimate expectations. At all times, the Respondent was not arbitrary and did not discriminate against the Claimant. The Respondent accorded due process to the Claimant. There is no breach of FET.

[67] Procedural Order No.3, line 1576-1577.
[68] Procedural Order No.3, line 1578-1580.

VI. RESPONDENT IS NOT LIABLE UNDER BIT ARTICLE 3 FOR THE CONDUCT OF THE JUDICIARY IN THE ENFORCEMENT PROCEEDINGS

139. Claimant's allegation that Mercuria's judiciary conducted the enforcement proceedings unfairly was totally unfounded on the facts. The delay of the proceedings was caused by a number of reasons for which none the Mercurian's Judiciary is responsible. On the contrary, the Judiciary endeavoured to ensure Claimant's application can be heard speedily pursuant to Mercurian law.

140. This Tribunal needs to examine the Judiciary's conduct in the enforcement proceedings by applying a stringent test. A delay in the proceedings is not enough for this Tribunal to hold Respondent liable. Only when there is clearly improper and discreditable conduct that shocks the sense of judiciary propriety[69], should this Tribunal imposes sanction. Claimant accused the Judiciary of deliberately delaying the proceedings, which constituted an egregious conduct[70]. Claimant has spent around 7 years on the enforcement proceedings of an arbitral award which, regrettably is not a short period of time. However, the duration of the proceedings is not decisive[71] while the reason for the delay should be considered by this Tribunal. Respondent's judiciary met and even exceeded the standard of a fair and efficient administration of justice.

A. Respondent had an overstretched judiciary

141. Mercuria is a developing country[72] with an overstretched judiciary. In the enforcement proceedings brought by the Claimant before the High Court of Mercuria, the presiding Judge could not hear the cases on several occasions owing to lengthy arguments in other cases[73], his attendance at workshop[74] and him being on leave[75]. The Court has also explained that it had an overwhelming caseload[76]. The Mercurian judiciary is overstretched and there are not enough judges to hear on the cases. Developing countries

[69] *Mondev v United States*, [127].
[70] *White Industries v India*, [10.4.6].
[71] *White Industries v India*, [11.4.19].
[72] Response to the Notice of Arbitration, [9].
[73] Notice of Arbitration, [9][15][20][24][40].
[74] Notice of Arbitration, [33].
[75] Notice of Arbitration, [3].
[76] Notice of Arbitration, [32].

like the Respondent often face shortage of qualified judges. It is utterly reasonable and fair for the Respondent to maintain a high standard in the recruitment of legal professionals which results in a lack of qualified judges. This is far from egregious and in fact a commitment by the Respondent that trails are heard by experienced and fair judges.

142. This Tribunal should not interfere with the Mercurian's Courts decision as to the absence of NHA counsel. NHA counsel was absent on a few occasions which the Claimant suggests is a breach of procedural laws and should warrant the Court's sanction. The Claimant alleges the Court has indulged the delayed tactics by NHA as it has not taken any action against NHA. Mercurian's Court has warned the NHA of the possibility to proceed the case ex parte should they are absent again[77] so the Court did take action against NHA. The Respondent admits that the Court has given NHA counsel the chance to appear in the proceedings after its absence, which is common and acceptable as it is unreasonable to proceed without offering the absent party a chance to explain. This Tribunal is not the appellate body of Mercurian's Courts and therefore, should not review the decision of them. This Tribunal is not provided with any Mercurian procedural law so it is not appropriate to decide on the Court's ruling as to the absence.

B. Both parties had confusion over the jurisdiction of a newly constituted court

143. Both the Claimant and NHA had confusion over the jurisdiction of a newly constituted court, which is not the fault of the Judiciary. The newly passed 2012 Commercial Court Act set up a specially constituted Court to hear on commercial cases[78]. Both parties disputed to whether the Court has jurisdiction to hear on the enforcement of arbitration award. The Claimant's successful application to transfer of the case from normal bench to the special Court resulted in the delay as it is later ascertained that the special Court does not have jurisdiction to hear on enforcement of arbitral awards[79]. It is utterly unfair for the Claimant to blame the Judiciary for their own confusion over the jurisdiction of a newly constituted Court.

[77] Notice of Arbitration, [5].
[78] Notice of Arbitration, [26].
[79] Notice of Arbitration, [28].

144. The Claimant points finger at the Supreme Court of Mercuria over their own mistake of the jurisdiction. Relying on a judgment by the Supreme Court which upheld the decision by the special Court in an enforcement proceedings of arbitral awards, the Claimant suggests the Supreme Court is inconsistent as it ruled the otherwise in just a few months. However, in the first case, counsel did not challenge the jurisdiction of the new Court so the Supreme Court, exercising the self-restraint of power, remained silent on the issue. In a judgment dated 1 September 2013, the Supreme Court, at the very first time, decided on the issue of jurisdiction. Claimant who misinterpreted the judgment of the Supreme Court should not blame the Judiciary for their own mistake.

C. The Claimant did not object to the Respondent's adjournment applications

145. The Claimant is in no position to complain of NHA's adjournment applications at this stage. In the enforcement proceedings, the Claimant did not object to the Respondent's adjournment applications on many occasions[80]. It is unreasonable to withhold their objection at the proceedings but object to the grant of time extension by NH counsel in this arbitration.

146. The Claimant also made adjournment applications to file reply and amend submissions[81]. Both the Claimant and NHA have sought time extension which cannot suggest any unacceptable conduct by the Mercuria's judiciary.

[80] Notice of Arbitration, [7][12][22][36].
[81] Notice of Arbitration, [11][25].

V. NHA'S TERMINATION OF LTA DOES NOT VIOLATE BIT ARTICLE 3(3)

147. BIT Article 3(3) is not engaged because **(A)** Article 3(3) does not cover contractual obligations. If Article 3(3) does cover contractual obligations, it is not violated because **(B)** LTA is not an investment contract; **(C)** NHA has not acted like a sovereign**; (D)** the Respondent is not a privy to the LTA and NHA's act is not attributable to the Respondent; **(E)** the dispute has already been conclusively dealt with under forum selection clause in the LTA.

A. Article 3(3) does not cover contractual obligations

148. BIT Article 3(3) is an umbrella clause. The effect of umbrella clause is unsettled in jurisprudence, from not covering contractual obligations[82] to covering all kinds of obligations[83]. Reading Article 3(3) in context and in accordance with the purpose of the BIT, the Respondent primarily argues that Article 3(3) does not cover contractual breaches.

149. Article 3(3) states:

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

150. Under general international law, a violation of a contract is not, by itself, a violation of international law[84]. To elevate private contractual claims into international claims is a fundamental departure from the long-standing international law position. It would also impose an exorbitant burden on a Contracting State who would then be responsible for every contract entered into by its state organs or even state entities. To support such a draconian effect of Article 3(3), the Claimant must provide clear and compelling evidence that such was indeed the *shared intent* of the Contracting Parties to the BIT.[85]

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[82] *Salini v Jordan,* [130]; *SGS v Pakistan,* [165]; Dugan, 542-48.
[83] *Eureko v Poland*, [256-7]; *Noble Ventures v Romania*, [53-5]; *SGS v Paraguay*, [94]; Dugan, 548-552.
[84] *SGS v Philippines*, [122].
[85] *SGS v Pakistan*, [167].

151. Insofar as it might be argued that 'any obligation' means Article 3(3) covers all kinds of obligations, this literal reading has taken the words out of context.

152. In this case, the overarching purpose of the BIT is to 'achieve its objectives stated in the preamble in a manner consistent with the protection of health'.[86] However, in certain circumstances, discharging contractual obligations may be antithetical to protecting public health. For instance, where the State is short of budget and it will fail to sustain other public healthcare services if it performs the contract. If Article 3(3) covers contractual breaches, a developing State may be liable to a treaty claim even if it terminates a contract for sustaining its delivery of universal public healthcare services. Given the overarching purpose of health protection of the BIT, it could not be the shared intent of the parties to cover all kinds of obligations.

153. Further, where Article 3(3) covers contractual breaches, investor may nullify any freely negotiated dispute settlement clause in a State contract to launch a lawsuit under the umbrella clause whilst the State could not. Given that the BIT is to promote reciprocity – a balance of interests between investors and the State, the effect of a broad construction of Article 3(3) – all benefits of dispute settlement clause in a State contract would flow to investors – could not be the shared intent of the parties.

154. As rightly pointed out in *SGS v Pakistan*, on proper construction, an umbrella clause could well cover obligations embedded in legislative, administrative or other measures of the State Party.[87] Thus, the interpretation that Article 3(3) does not cover contractual breaches would not render the umbrella clause superfluous, but, instead, represents the shared intent of the BIT parties.

155. If Article 3(3) does not cover contractual obligations, it could not have covered obligations under the LTA and this claim must be dismissed outright.

[86] Preamble, BIT
[87] *SGS v Pakistan*, [166]; Sornarajah, 304.

B. LTA is not an investment contract

156. Alternatively, if Article 3(3) does cover contractual obligations, the Respondent argues that Article 3(3) covers only obligations arising from investment contracts but not any contracts.

157. Wordings 'with regard to investments' in Article 3(3) expressly restrict the scope of the Article to cover only obligations under investment contract. Even if we look at the Preamble, only "rights with respect to investment" are protected under the BIT. Consistent with the context and purpose of the BIT, Article 3(3) does not cover any contractual obligations except ones arising from investment contract.

158. As submitted in [25] above, LTA is not an investment contract but a mere commercial supply arrangement. Thus, Article 3(3) has not covered obligations under the LTA.

C. NHA has not acted like a sovereign in terminating LTA

159. Further and alternatively, if an umbrella clause does cover contractual obligations, it does not give a BIT tribunal jurisdiction over all contractual claims, but only those that manifest a sovereign act – the State acting, as if it were a 'prince', not a 'merchant'.[88] As noted by the Tribunal in *Impregilo v Pakistan*,

> *"Only the State in the exercise of its sovereign authority [...] and not as a contracting party may breach the obligation assumed under the BIT."*[89]

On this basis, Article 3(3) will only allow the Claimant to bring the LTA claim to this Tribunal when NHA was acting under sovereign powers in performing the contract.

160. Here, no sovereign power was exercised by the NHA. In fact, the right purported to be exercised by NHA – to terminate the LTA due to the Claimant's satisfactory performance – was expressly provided under Clause 6 of the LTA. The termination was in purported exercise of contractual powers as opposed to sovereign powers. Therefore, the Claimant

[88] *Pan American v Argentina*, [110]; *El Paso v Argentina,* [79-82]; *Joy Mining v Egypt*, [81]; *Sempra v Argentina*, [310]; Dugan, 552-9.
[89] *Impregilo v Pakista*n, [260].

could not bring this LTA claim under Article 3(3).

D. The Respondent is not a privy to LTA and NHA's act is not attributable to the Respondent

161. If an umbrella clause does cover contractual obligations, privity of contract between the investor and the host State is a requirement for its application.[90] In *Gustav Hamester v Ghana's* reasoning,

> *"A contractual obligation between a public entity distinct from the state and a foreign investor cannot be transformed by the magic of the so-called 'umbrella clause' into a treaty obligation of the State towards a protected investor."*[91]

162. Given that the Respondent is not a party to the LTA, Article 3(3) only applies to the extent that acts of NHA could be attributed to the Respondent.

163. As the BIT is silent on attribution, the governing law is international law set out in Responsibility of States for Internationally Wrongful Acts 2001 drafted by the International Law Commission ("**ILC Articles**") and its Draft Articles ("**ILC Draft**").[92] The Respondent respectfully submits that NHA's act of terminating the LTA cannot be attributed to it under Articles 4, 5 or 8 of the ILC Articles. Whilst the claimant bears the legal burden of proof to establish attribution, the Respondent shall demonstrate below why the Claimant cannot avail of these Articles.

164. Article 4 provides that the conduct of any State organ shall be considered an act of that State. Domestic law is the starting point for determining whether an entity is a State organ[93]. Here, no evidence suggests that NHA was a State organ under Mercurian law. Moreover, if the entity is a *separate legal entity* of the State, regardless of the nature of its services and businesses, it cannot be considered as a State organ.[94] As evident in the arbitration between the Claimant and NHA in Reef[95], NHA has an *individual capacity to be sued*.[96]

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[90] *Azurix v Argentina*, [384]; *Burlington v Ecuador*, [233]; *Impregilo v Pakistan*, [98].
[91] *Hamester v Ghana*, [346].
[92] *Hamester v Ghana*, [347]; *Bosh v Ukraine* [246].
[93] ILC Articles, Article 4(2); Crawford, 243; *Hamester v Ghana*, [183-4]; *Jan v Egypt*, [160].
[94] *Noble Ventures v Romania*, [69], *Bayindir v Pakistan*, [119], EDF v Romania, [190].
[95] Facts, [17].
[96] *Hamester v Ghana*, [184].

Therefore, NHA is not a State organ under Article 4.

165. Where an entity is not a State organ, its undertakings can still be enforced against the State if it acts in governmental authority in the particular instance[97] or it acts under State's control[98].

166. In the ILC Draft commentators' words to article 8,

> *"The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity."*[99]

Thus, the mere fact that the Respondent through legislation established NHA trusts which subsequently set up NHA does not suffice to attribute NHA's conduct to the Respondent.

167. Further, no evidence suggests that NHA was exercising 'governmental authority' in terminating the LTA. What NHA has done – bargained for the greatest possible discounts and upon unsatisfactory bargaining invoked the exit clause in the contract – are acts that any commercial party would do in the circumstances.

168. On the contrary, NHA was in fact acting in pure commercial capacity, as inferred from its prioritising commercial interests over public interests. At the time of termination, Sanior supplied by the Claimant was the only effective treatment for Greyscale. Despite the rising demand for Sanior and prevalence of Greyscale, NHA opts to terminate the supply contract for the want of profits but not to maintain the supply, leaving Mercurian with no effective greyscale treatment before the start of HG-Pharma Valtervite deliveries. This aptly illustrates that NHA pursued commercial benefits at the expense of public interests and acts not in governmental authority in terminating the LTA.

169. As for control, no fact suggests that NHA terminated the LTA under the influence of the Respondent. It is loose to infer control from the fact that NHA made an offer to the

[97] Article 5, ILC Articles
[98] Article 8, ILC Articles
[99] ILC Draft, p.48

Claimant shortly after the Minister of Health sent a global offer[100]. This is because NHA's act could be reasonably explained by its success with the Claimant in the HIV/AIDS Partnership in 1999-2004.[101] Moreover, the fact that NHA has informed the Claimant of the want to renegotiate the price for Sanior before the alleged budgetary discussion with the Respondent militates against any implication of influence from the Respondent's budgetary problem. On top of that, there is no record of direct participation by Mercurian officials in the negotiation of the LTA and the NHA operates independently[102]. As such, all available evidence point to the conclusion that the NHA acted without the influence and control of the Respondent.

170. The Respondent respectfully submits that neither the BIT nor international law (i.e. ILC Articles) provides basis for the Claimant foisting NHA's wrongful termination on the Respondent. Given that the Respondent has no privity to the LTA and no responsibility for NHA's act, Article 3(3) is not engaged.

E. The dispute has already been conclusively dealt with under forum selection clause in LTA

171. Last but not least, Tribunals would normally consign a contractual claim to the forum freely chosen by both parties.[103] In the words of the Tribunal in *SGS v Pakistan*,

> *"we do not find a convincing basis…that [the umbrella clause] has had the effect of entitling a Contracting Party's investor…in the face of a valid forum selection contract clause, to 'elevate' its claims grounded solely in a contract with another Contracting Party…to claims grounded on the Treaty, and accordingly to bring such contract claims to this Tribunal for resolution and decision".*[104]

This is consonant with the principle of *lex specialis,* as espoused by Christopher Schreuer, that a document containing a dispute settlement clause which is more specific to the dispute should be given precedence over a document of more general application, namely the BIT.[105]

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[100] Facts, [7]
[101] Facts, [8]
[102] Procedural Order No.3, line 1591, 1594.
[103] *Toto v Lebanon*, [202]; *Bureau v Paraguay*, [159].
[104] *SGS v Pakistan*, [165].
[105] *SGS v Philippines,* [138-41]; Schreuer, 362; McLachlan, [4.168].

172. Here, not only is there a forum selection clause in the LTA, but the contractual claim has also been conclusively dealt with under the clause[106]. The principle of *lex specialis* aptly applies in this context such that Article 3(3) in the BIT does not override specific dispute settlement arrangements agreed and implemented by the parties to the LTA[107]. Therefore, Article 3(3) has not intended the Tribunal to adjudicate a contractual dispute that has been conclusively disposed of under a forum selection clause.

173. For the above reasons, Article 3(3) is not violated by NHA's termination of LTA.

[106] Facts, [17].
[107] *SGS v Philippines*, [134].

PART THREE: REMEDIES

VI. CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS

A. Claimant is not entitled to any compensation

174. By reason of the aforesaid, the Claimant is not entitled to any compensation.

VII. CLAIMANT SHOULD BEAR THE COST OF THE PRESENT PROCEEDINGS

175. According to the Article 42(1) of UNCITRAL Arbitration Rules, the losing party, i.e. the Claimant, should bear the costs of the proceedings.

PRAYER FOR RELIEF

A. The Respondent respectfully requests this Tribunal to find that it has no jurisdiction over all claims of the Claimant;

B. Should the Tribunal find that it has jurisdiction, Respondent asks this Tribunal to find that:

   a) There is no possible claim on TRIPS;
   b) Respondent did not breach fair and equitable treatment;
   c) There was no unreasonable delay in the enforcement proceedings;
   d) Termination of the LTA does not violate BIT Art 3(3);
   e) Therefore, Claimant is not entitled to any compensation and;
   f) Claimant should bear the cost of the present proceedings.

Respectfully Submitted on September 25, 2017

By

Team Pathak
On Behalf of Respondent
The Republic of Mercuria