**TEAM PINTO**

**PERMANENT COURT OF ARBITRATION**

---

**BETWEEN**

**ATTON BORO LIMITED**

**CLAIMANT**

**-AND-**

**THE REPUBLIC OF MERCURIA**

**RESPONDENT**

---

# MEMORIAL FOR THE RESPONDENT

## TABLE OF CONTENTS

## INDEX OF ABBREVIATIONS

| | |
|---|---|
| **Amendment Application** | Amendment Application submitted by the NHA to the Supreme Court on 27 March 2012 |
| **Annex No. 2** | Statement by Minister for Health Mr. Joseph Bell concerning the five-year health plan 1999–2004 |
| **Annex No. 3** | NHA's Annual Report 2006 (Executive Summary) |
| **Art.** | Article |
| **Atton Boro** | Atton Boro Limited, the Claimant in the present proceedings |
| **Atton Boro and Co.** | Atton Boro and Company, the primary holding company for Atton Boro Group |
| **Award** | Award on termination passed by a tribunal seated in Reef, which ordered the NHA to pay the Claimant USD 40,000,000 in damages |
| **Basheera** | The Kingdom of Basheera |
| **BIT** | Agreement between Mercuria and Basheera for the Promotion and Reciprocal Protection of Investments (Annex No. 1) |
| **Contracting Party/Parties** | A party/the parties to the BIT, namely Basheera and Mercuria |
| **ECT** | Energy Charter Treaty |
| **Facts** | Statement of Uncontested Facts |
| **GATT** | General Agreement on Tariffs and Trade |
| **HG-Pharma** | A Mercurian generic drug manufacturer |
| **High Court** | High Court of Mercuria |
| **ICJ** | International Court of Justice |

| | |
|---|---|
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ILC Articles** | Articles on the Responsibility of States for Internationally Wrongful Acts |
| **Judge** | A judge of the High Court |
| **Law No. 8458/09** | Law No. 8458/09, National Legislation, To Amend Intellectual Property Law, 1976 (Law No. 232/76) |
| **LCIA** | The London Court of International Arbitration |
| **LTA** | Long-Term Agreement between Atton Boro and the NHA |
| **Mercuria** | The Republic of Mercuria, the Respondent in the present proceedings |
| **NAFTA** | North American Free Trade Agreement |
| **NHA** | National Health Authority |
| **Notice** | Notice of Arbitration dated 7 November 2016 |
| **PCA** | Permanent Court of Arbitration |
| **PCA Rules** | PCA's Arbitration Rules 2012 |
| **PCIJ** | Permanent Court of International Justice |
| **PO2** | Procedural Order No. 2, dated 26 June 2017 |
| **PO3** | Procedural Order No. 3, dated 27 August 2017 |
| **Preamble** | The preamble of the BIT |
| **Reef** | The People's Republic of Reef |
| **Response to Notice** | Response to the Notice, dated 26 November 2016 |
| **SCC** | Arbitration Institute of the Stockholm Chamber of Commerce |

| | |
|---|---|
| **Supreme Court** | Supreme Court of Mercuria |
| **Tribunal** | The tribunal hearing the present proceedings, namely the Permanent Court of Arbitration |
| **TRIPS** | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **VCLT** | Vienna Convention on the Law of Treaties |
| **WTO** | World Trade Organization |

## INDEX OF AWARDS AND JUDGMENTS

| Cited as: | Full citation: |
|---|---|
| **AMTO** | Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Award, March 26, 2008 |
| **Arif** | Franck Arif v. Republic of Moldovia, ICSID Case No. ARB/11/23, Award, April 8, 2013 |
| **Bayindir (Award)** | Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, August 27, 2009 |
| **Bayindir (Jurisdiction)** | Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005 |
| **Biwater Gauff** | Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, July 24, 2008 |
| **Burlington** | Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 |
| **Chevron** | Chevron Corporation v. The Republic of Ecuador, PCA Case No. 34877, Partial Award on the Merits, March 30, 2010 |
| **Continental Casualty** | Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, September 5, 2008 |
| **Dan Cake** | Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, August 24, 2015 |
| **Duke Energy** | Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, August 18, 2008 |
| **EDF** | EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, October 8, 2009 |
| **EMELEC** | Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/09, Award, June 2, 2009 |
| **Frontier Petroleum** | Frontier Petroleum Services Ltd. v. The Czech Republic, PCA Award IIC 465, Final Award, November 12, 2010 |
| **GEA** | GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award, March 31, 2011 |
| **Genin** | Genin v. Estonia, ICSID Case No. ARB/99/2, Award, 25 June, 2001 |
| **Hague District Court** | The Hague District Court's judgement in joint cases of the Russian Federation v. Veteran Petroleum Limited, Yukos |

| | |
|---|---|
| | Universal Limited, Hulley Enterprise Limited, case numbers: C/09/477160, C/09/477162, C/09/481619, April, 20, 2016 |
| **Hamester** | Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, June 18, 2010 |
| **Hulley** | Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, November 30, 2009 |
| **Ickale Insaat** | Ickale Insaat Limited Sirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, March 8, 2016 |
| **Impregilo** | Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 |
| **Jan de Nul** | Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, November 6, 2008 |
| **L.E.S.I.-DIPENTA** | Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/08, Award, January 10, 2005 |
| **Lemire** | Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 21, 2010 |
| **Libananco** | Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, September 2, 2011 |
| **Malaysian Historical Salvors** | Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009 |
| **Methanex** | Methanex Corporation v. United States of America, UNCITRAL, (NAFTA), Final Award, August 3, 2005 |
| **Mondev** | Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 |
| **Nagel** | William Nagel v. The Czech Republic, SCC Case No. 049/2002, Final Award, September 9, 2003 |
| **Oostergetel** | Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, *ad hoc* arbitration, Final Award, April 23, 2012 |
| **Pac Rim** | Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 1, 2012 |
| **Parkerings** | Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, September 11, 2007 |

| | |
|---|---|
| **Philip Morris** | Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016 |
| **Plama** | Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, August 27, 2008 |
| **Pulp Mills** | Pulp Mills on the River Uruguay, Argentina v. Uruguay, ICJ Reports 2010, Judgment, April 20, 2010 |
| **Quiborax** | Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012 |
| **Romak** | Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280, Award, November 26, 2009 |
| **Rurelec** | Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17, Award, January 31, 2014 |
| **Saluka** | Saluka Investments B.V. v. Czech Republic, Partial Award, March 17, 2006 |
| **Société Générale** | Société Générale v. Dominican Republic, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008 |
| **Toto** | Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/23, Decision on Jurisdiction, September 11, 2009 |
| **TSA Spectrum** | TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, December 19, 2008 |
| **Ulysseas** | Ulysseas, Inc. v. The Republic of Ecuador, PCA Case No. 2009-19, Interim Award, September 28, 2010 |
| **Upper Silesia** | Certain German interests in Polish Upper Silesia, Germany v Poland, Merits, Judgment, PCIJ Series A no 7, May 25, 1926 |
| **UPS** | United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007 |
| **White Industries** | White Industries Australia Limited v. The Republic of India, *ad hoc* arbitration, Final Award, November 30, 2011 |
| **Wintershall** | Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, December 8, 2008 |
| **Yukos (Award)** | Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, July 18, 2014 |

| | |
|---|---|
| **Yukos (Jurisdiction)** | Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, November 30, 2009 |

## INDEX OF AUTHORITIES

| Cited as: | Full citation: |
|---|---|
| **Alvik** | I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration*, Oxford and Portland, Oregon 2011 |
| **Antony** | J. Antony, *Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus*, Arbitration International 2013, Vol. 29, Issue 4 |
| **Baltag** | C. Baltag, *The Energy Charter Treaty: The Notion of Investor*, Alphen aan den Rijn 2012 |
| **Bjorklund** | A. K. Bjorklund, *The Use of Investor-State Arbitration as a De Facto Enforcement Mechanism for Arbitral Awards* in: *The Evolution and Future of International Arbitration*, eds S. L. Brekoulakis, J. D. M. Lew et al, Alphen aan den Rijn, 2016 |
| **Black's Law Dictionary** | Black's Law Dictionary, ed. B. A. Garner, 10th ed., St. Paul 2014 |
| **Brownlie's** | J. R. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford 2012 |
| **Clasmeier** | M. Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law*, Alphen aan den Rijn 2017 |
| **Diehl** | A. Diehl, *The Core Standard of International Investment Protection*, Alphen aan den Rijn 2012 |
| **Dolzer/Schreuer** | R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford 2008 |
| **Ecuador–United States of America BIT** | The Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investment, with protocol and a related exchange of letters, signed on August 27, 1993 |
| **Feit** | M. Feit, *Attribution and the Umbrella Clause – Is There a Way out of the Deadlock?*, Minnesota Journal of International Law 2012, Vol. 21 |
| **Feit II** | M. Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, Berkeley Journal of International Law 2010, Vol. 28, Issue 1 |
| **Gastrell/Le Cannu** | L. Gastrell, P.-J. Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review 2015, Vol. 30, No. 1 |

| | |
|---|---|
| **Germany–Ukraine BIT** | The Agreement between the Government of the Federal Republic of Germany and the Government of the Ukraine on the Promotion and Protection of Investments , signed on April 28, 1993 |
| **Hamamoto** | S. Hamamoto, *Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause*, ICSID Review 2015, Vol. 30, No. 2 |
| **Hoffmann** | A. K. Hoffmann, *Denial of Benefits* in: *International Investment Law: A Handbook,* eds. M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch, Baden-Baden 2015 |
| **Italy-Pakistan BIT** | The Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments, signed on July 19, 1997 |
| **Jagusch/Sinclair** | S. Jagusch, A. Sinclair, *The Limits of protection for Investments and Investors under the Energy Charter Treaty*, in: *Investment Arbitration and the Energy Charter Treaty*, eds. C. Ribeiro, New York 2006 |
| **Kinnear** | M. Kinnear, *The continuing development of the fair and equitable treatment standard* in: *Investment Treaty Law: Current Issues III*, eds. A. Bjorklund et al., London 2009 |
| **Legum** | B. Legum, *Defining Investment and Investor: Who Is Entitled to Claim?,* Arbitration International 2006, Vol. 22, No. 4, |
| **Mbengue** | M. M. Mbengue, *Preamble* in: *Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrum, Oxford 2012 |
| **Mistelis** | L. A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, ICSID Review 2013, Vol. 28, Issue 1 |
| **Mistelis/Baltag** | L. A. Mistelis, C. M. Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty,* Penn State Law Review 2009, Vol. 113:4 |
| **Paulsson** | J. Paulsson, *Denial of Justice in International Law,* Cambridge 2005 |
| **Romesh Weeramantry** | J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford 2012 |
| **Schwebel** | S. M. Schwebel, *Justice in International Law: Selected Writings of S.M. Schwebel*, Cambridge 1994 |
| **Switzerland-Uzbekistan BIT** | The Agreement between the Swiss Confederation and the Republic of Usbekistan on the Promotion and Reciprocal Protection of Investments, singed on April 16, 1993 |

| | |
|---|---|
| **Tawil** | G. S. Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview* in: *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Vol. 13, ed. A. J. van den Berg, Alphen aan den Rijn 2007 |
| **Understandings No. 3 to ECT** | Final Act of the European Energy Charter Conference, Understandings, No. 3. with respect to Article 1(6), December 16-17, 1994 |
| **Vandevelde** | K. J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, New York, Oxford 2010 |
| **Vázquez** | C. M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, Columbia Law Review 1992, Vol. 92 |
| **Villiger** | M. E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission* in: *The Law of Treaties Beyond the Vienna Convention*, ed. E. Cannizzaro, Oxford 2011 |
| **Waibel** | M. Waibel, *The Principle of Privity*, University of Cambridge Faculty of Law Research Paper No. 44/2016 |
| **Wang** | G. Wang, *Judicial Independence in the Context of International Investment Law*, in: *The Culture of Judicial Independence: Rule of Law and World Peace*, Sh. Shetreet, Leiden 2014 |
| **WTO Declaration** | World Trade Organization, Declaration on the TRIPS and public health, WT/MIN(01)/DEC/2, 14 November 2001 |
| **Yu** | H. Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, Contemporary Asia Arbitration Journal 2008, Vol. 1, Issue 2 |

## STATEMENT OF FACTS

1. Mercuria, the Respondent in these proceedings, is a state located in Westeros. In 1998, Mercuria entered into the BIT with Basheera.

2. Atton Boro, the Claimant in these proceedings, is a company incorporated in Basheera and operating in the territory of Mercuria. The Claimant is a wholly-owned subsidiary of Atton Boro Group, which is directly controlled by Atton Boro and Co., acting as the primary holding company for Atton Boro Group. Atton Boro and Co. is organized under the laws of Reef.

3. Atton Boro Group is a drug discovery and development enterprise. It holds a protected patent for Valtervite, a compound that significantly improves treatment for greyscale patients.

4. In 2003, a report by Mercuria's National Health Authority highlighted an increasing incidence of greyscale among the state's population, a situation that risked spiralling into a national crisis. The Ministry of Health of Mercuria instructed the NHA to invite offers from pharmaceutical companies for a long-term strategic supply of greyscale medicines.

5. In 2004, the NHA and the Claimant entered into a Long-Term Agreement. Under the LTA, the Claimant was to provide the NHA with a greyscale drug synthesised from Valtervite. The drug was marketed under the brand name Sanior.

6. Concurrently, in 2003 the NHA began efforts to promote prevention of sexually transmitted diseases such as greyscale. It conducted awareness workshops in educational institutions and workplaces. By 2006, 50% of all adults were getting themselves tested every six months, as compared to 15% in 2003.

7. In 2008, the NHA informed the Claimant that the NHA had underestimated the number of greyscale patients in Mercuria. As a result, the NHA asked for an additional discount on Sanior and stated that otherwise it would be compelled to terminate the LTA. The Claimant rejected the request.

8. On 10 June 2008, the NHA terminated the LTA for the reason of unsatisfactory performance by the Claimant. As a result, the Claimant initiated international arbitration proceedings before a tribunal seated in Reef and obtained the Award, which ordered the

NHA to pay the Claimant USD 40,000,000 in damages for terminating the LTA prematurely.

9. On 3 March 2009, the Claimant initiated enforcement proceedings before the High Court of Mercuria. The matter was adjourned several times for procedural reasons. The enforcement of the Award is still pending.

10. On 10 October 2009, the National Legislation for Intellectual Property Law (Law No. 8458/09) came into force. It introduced a provision allowing for the use of patented inventions without the authorization of the owner. Subsequently, in November 2009, HG-Pharma, a Mercurian drug manufacturer, filed an application under the new provision seeking a licence to manufacture Valtervite. The High Court granted HG-Pharma a licence on 17 April 2010 and fixed the royalty to be paid to the Claimant at 1% of total earnings.

11. In 2013, the media reported that the governments of three states neighbouring Mercuria had expressed their gratitude for greyscale medicines received in the form of humanitarian aid from Mercuria.

12. On 7 November 2016, the Claimant initiated the proceedings before this Tribunal.

## PART ONE: JURISDICTION

## I. THE TRIBUNAL LACKS JURISDICTION, AS NEITHER THE AWARD NOR THE CLAIM MADE IN RELATION TO THE AWARD QUALIFY AS AN INVESTMENT

13. The Tribunal lacks jurisdiction in the present case since neither the Award itself nor the claim made in relation to it qualify as an investment under Art. 1(1) BIT.

14. In 2004, the Claimant and the NHA entered into the LTA. The parties agreed that the Claimant was to provide the NHA with its drug, Sanior. The NHA was to pay the agreed price.[1] In 2008, the NHA terminated the LTA due to the Claimant's unsatisfactory performance. Subsequently, the Claimant initiated international arbitration proceedings seated in Reef and obtained the Award, which ordered the NHA to pay the Claimant USD 40,000,000 in damages.[2] The enforcement of the Award is still pending.[3]

15. The Respondent submits that this Tribunal lacks jurisdiction in these proceedings. Pursuant to Art. 8(1) BIT, any investment dispute between an investor of one Contracting Party and the other Contracting Party arising out of or in relation to the BIT should be settled by arbitration. The dispute before this Tribunal does not arise out of the BIT, as there exists no protected investment within the meaning of Art. 1(1) BIT. Neither the Award *itself* (**A**) nor the monetary claim amounting to USD 40,000,000 to which the Award gives rise (**B**) fall within the scope of the term 'investment' provided by the BIT. In fact, the Claimant seeks the protection of the Award—a purely commercial arbitration award—within the framework of the BIT, which is an international investment law instrument.

### A. THE AWARD ITSELF DOES NOT QUALIFY AS AN INVESTMENT

16. The Award is a legal instrument granting rights and obligations arising out of the commercial arbitration in Reef. It does not constitute an investment within the meaning of the BIT.

---

[1] Facts, ¶10.

[2] Facts, ¶17.

[3] PO3, ¶1595.

17. Pursuant to Art. 1(1) BIT, the definition of 'investment' covers any kind of asset held by, or invested through an investor of, one Contracting Party in the territory of the other. This provision also provides a non-exhaustive list of what the Contracting Parties deemed to be an investment. It consists of, *inter alia*, movable and immovable property, intellectual property rights, claims to money and claims to performance.

18. The rule of the customary international law reflected in Art. 31(1) VCLT requires that the terms of a treaty should be interpreted in accordance with their ordinary meaning in their context and in the light of their object and purpose.[4]

19. The *Romak*[5] and *Malaysian Historical Salvors*[6] tribunals discussed the 'ordinary meaning' of the term 'investment'. They found that an investment is the commitment of funds or other assets with the purpose of receiving profit or 'return' from the commitment of capital. This definition emphasises three constitutive elements of 'investment': (i) a contribution (ii) that extends over a certain period of time and (iii) entails some risk.[7] Any dedication of resources of economic value constitutes a 'contribution',[8] including financial commitments,[9] personnel,[10] equipment[11] and know-how.[12] There is no fixed minimum duration that determines that an asset qualifies as investment,[13] but the adequate duration should distinguish investments from purely commercial transactions.[14] Equally, there ought to be an 'investment risk', i.e. a situation in which an investor cannot predict the outcome of a transaction due to many unpredictable factors.[15]

20. Arbitral awards cannot constitute an 'investment' within the ordinary meaning of this term. An arbitral award is a final decision by an arbitrator or panel of arbitrators.[16] It is considered analogous to a court judgment, and hence is vested with the same functionality

[4] Pulp Mills, ¶65; Wintershall, ¶77; Burlington, ¶104; Romesh Weeramantry, ¶¶1.14, 2.24.
[5] Romak, ¶177.
[6] Malaysian Historical Salvors, ¶57.
[7] Romak, ¶¶207, 212; Quiborax, ¶219.
[8] Romak, ¶214.
[9] L.E.S.I.-DIPENTA, ¶14(i); Bayindir (Jurisdiction), ¶131.
[10] Biwater Gauff, ¶239.
[11] L.E.S.I.-DIPENTA, ¶14(i); Bayindir (Jurisdiction), ¶131.
[12] Bayindir (Jurisdiction), ¶131; Biwater Gauff, ¶239.
[13] Romak, ¶225.
[14] Bayindir (Jurisdiction), ¶132.
[15] Romak, ¶230.
[16] Black's Law Dictionary.

and powers.[17] Although there is no consensus on the legal nature of arbitral awards, four main theories have been formulated.[18] Some see an arbitral award as the outcome of the agreement to arbitrate,[19] while others treat it as if it were a judgment of a national court.[20] According to other theories, an award is akin to a national court's judgment but stems from an underlying contract[21] or is a *sui generis* occurrence supported by a global arbitration institution.[22]

21. All these authorities share the view that an arbitral award is a legal instrument relatively similar to the judgment of a national court, even if based on a different, non-national system. None of them considers that an arbitral award would meet the necessary criteria to qualify as an investment.

22. This reasoning was adopted by the tribunal in *GEA*,[23] where it was held that an arbitral award itself cannot constitute an investment within the meaning of Art. 1(1) of the Germany–Ukraine BIT,[24] which defined investment broadly, covering 'assets of any kind'.[25] Moreover, the treaty in question also contained a 'transformation clause'[26] stipulating that *'*[a]*ny change to the form in which assets are invested shall not affect their nature as investments'.* However, neither the broad definition of 'investment' nor the transformation clause persuaded the tribunal to consider an award to constitute an investment.

23. The *GEA*[27] tribunal pointed out that an award is a legal instrument that provides for the disposition of parties' rights and obligations. As the award involved no contribution to or relevant economic activity within the territory of Ukraine, it failed to qualify as an investment.[28] The tribunal also emphasised that it is of no importance that an award might rule upon rights and obligations arising directly out of an investment;[29] this fact did not

[17] Mistelis, p. 67.
[18] Mistelis, p. 67; Clasmeier, p. 65.
[19] Mistelis, p. 67; Yu, pp. 271-272.
[20] Mistelis, p. 67; Yu, p. 262.
[21] Mistelis, p. 67; Yu, p. 274.
[22] Mistelis, p. 67; Yu, p. 279.
[23] GEA, ¶161.
[24] Germany–Ukraine BIT.
[25] Germany–Ukraine BIT, Art. 1(1).
[26] Clasmeier, pp. 99-100.
[27] GEA, ¶161.
[28] GEA, ¶¶161-162.
[29] GEA, ¶162.

equate the award with the investment itself and the two remained 'analytically distinct'.[30] For this reason, an award could not be considered to fall within the 'transformation clause' contained in Art. 1 of the Germany–Ukraine BIT.[31]

24. In the present case, the Award does not constitute an 'investment' within the meaning of Art. 1(1) BIT. The Award is a legal instrument that determines the parties' rights and obligations arising out of the commercial arbitration in Reef. Hence, the Award lacks the qualifications necessary to establish the existence of an investment under the BIT.

25. Similarly to in *GEA*,[32] the Award involves no contribution to the territory of Mercuria. The Claimant did not commit any funds or assets to Mercuria in order to obtain the Award. Indeed, a commitment of funds might have taken place in the form of the cost of arbitration proceedings, but the Claimant made this commitment in Reef, not in Mercuria. In any event, the Award also fails to satisfy the certain duration of time requirement. The Award, as a legal instrument, is an isolated occurrence, not a process that may extend over a certain period of time. Finally, the Award does not entail an 'investment risk'. Every arbitral award is associated with the risk of non-enforcement or partial enforcement; however, it is not a risk an investor usually bears.

26. Additionally, the natural consequence of allowing investment tribunals to treat arbitral awards—the Award in these proceedings—as investments is that it requires investment tribunals to examine the actions or omissions of the judiciary of the host state.[33] Arbitrators would put themselves in the shoes of national judges in order to call into question the national court's procedural decisions (if the enforcement proceedings of an award are pending as in the case before this Tribunal) or final judgment (if an award was not enforced or partially enforced).[34] It raises serious doubts as to whether investment tribunals are qualified to make judgments under the national law.[35]

27. In this scenario, the investor-state arbitration mechanism could be used as a *de facto* enforcement mechanism for arbitral awards.[36] Investment arbitration tribunals would become another appeal opportunity for parties dissatisfied with the result of enforcement

[30] GEA, ¶162.
[31] GEA, ¶162.
[32] GEA, ¶162.
[33] Bjorklund, p. 114.
[34] Wang, p. 310.
[35] Wang, p. 310.
[36] Wang, p. 312.

proceedings before the national courts of the Contracting Party. Any judgment adverse to an investor seeking enforcement of its commercial award might alone trigger the Contracting Party's liability for an infringement of the BIT. This result may not be accepted[37] and would be 'unreasonable' within the meaning of Art. 32(b) VCLT, which reflects the principle of the customary international law.[38]

28. Moreover, in order to avoid the discussed liability for an infringement of the BIT, each Contracting Party would have to pay unnecessary attention to every enforcement proceeding before its national courts. The cost of this supervision would be difficult to estimate. Hence, investors would be provided with yet another way to exercise pressure on the Contracting Party.[39]

29. Furthermore, it would be too expansive and erroneous interpretation of the BIT to give the term 'investment' a scope broad enough to cover the Award. The BIT,[40] as with other modern investment treaties, does not reflect the formula of 'property, rights and interests' found in traditional friendship, commerce and navigation treaties.[41] This is because the modern investment treaties were not designed to cover all types of assets, rights and interests. Their drafters intended to limit the scope of the treaties.[42]

30. In sum, the Award does not constitute an 'investment' within the meaning of Art. 1(1) BIT and is not entitled to the protection that the BIT grants to investments.

## B. THE CLAIM MADE IN RELATION TO THE AWARD DOES NOT QUALIFY AS AN INVESTMENT

31. The Award, if enforced in Mercuria, will primarily entitle the Claimant to demand that the NHA pay it USD 40,000,000 in damages. This monetary claim does not constitute a protected 'claim to money' within the meaning of Art. 1(1)(c) BIT.

32. The non-exhaustive list contained in Art. 1(1) BIT consists of several kinds of asset that the Contracting Parties deemed to constitute an investment. It includes, *inter alia*, 'claims

[37] Bjorklund, p. 113.
[38] Wintershall, ¶77; Burlington, ¶104; Romesh Weeramantry, ¶¶1.14, 2.24.
[39] Bjorklund, p. 116.
[40] BIT, Art 1(1).
[41] Dolzer/Schreuer, pp. 60-61.
[42] Dolzer/Schreuer, pp. 60-61.

to money, and claims to performance under contract having financial value'.[43] This definition, however, does not mean that all claims to money qualify as an investment.

33. The *Romak*[44] tribunal noted that the term 'investment' has a meaning of its own and rejected the 'mechanical application' of the categories contained in Art. 1(2) of the Switzerland-Uzbekistan BIT.[45] The article in question stipulated that the term 'investment' should include every kind of asset and particularly 'claims to money or to performance having an economic value'.[46] The tribunal held that this provision did not mean that all monetary claims would automatically constitute an investment. The tribunal was clear that *'while many "claims to money" will qualify as "investments", it does not follow that* all *such assets necessarily so qualify'*.[47] A claim to money must first meet the inherent definition of the term 'investment', entailing a contribution that extends over a certain period of time and involves some risk.[48] These constitutive elements have already been discussed.

34. Furthermore, the *Romak*[49] tribunal emphasised that if claims to money were always considered to qualify as protected 'claims to money' under the Switzerland-Uzbekistan BIT,[50] it would create a new instance of review of a state's courts' decisions concerning the enforcement of arbitral awards. Any refusal or failure to enforce such an award could provide grounds for re-appraisal of a state's courts' decisions under an international law instrument. The tribunal deemed this outcome '*manifestly absurd or unreasonable*'.[51]

35. In the case at hand, the claim made in relation to the Award do not qualify as a protected 'claim to money' within the meaning of Art. 1(1)(c) BIT.

36. Firstly, this claim arose out of the Award, which itself does not constitute an investment. Hence, even if the claim in question were tested against the definition of an investment, it would fail, as it neither involves contribution and risk nor extends over a certain period

[43] BIT, Art. 1(1)(c).
[44] Romak, ¶¶178-180, 186, 207.
[45] Switzerland-Uzbekistan BIT.
[46] Switzerland-Uzbekistan BIT, Art. 1(2)(c).
[47] Romak, ¶188.
[48] Romak, ¶¶207, 212.
[49] Romak, ¶186.
[50] Switzerland-Uzbekistan BIT, Art. 1(2)(c).
[51] Romak, ¶¶184, 188.

of time. As the *Romak*[52] tribunal explained, the mere fact that the claim made in relation to the Award is literally 'claim to money' does not suffice.

37. Secondly, providing the claim arising out of the Award with protection under the BIT would increase the risk of double compensation. This would occur, for example, if the Tribunal ordered Mercuria to pay damages to the Claimant and then subsequently the High Court enforced the Award. This scenario is likely, as the High Court did not find these proceedings to be a reason to suspend the enforcement proceedings; they are pending.[53]

38. Finally, as has already been discussed, if the Award or the claim made in relation to it could constitute a protected investment within the meaning of the BIT, investment arbitration tribunals risk becoming another 'appellate' instance for parties dissatisfied with the result of enforcement proceedings before a state's courts.

39. In light of the above, neither the claim made in relation to the Award nor the Award itself may qualify as an 'investment' within the meaning of the BIT. Thus, as no protected investment exists, this Tribunal lacks jurisdiction in the present case.

## II. THE CLAIMANT WAS DENIED THE ADVANTAGES OF THE BIT SINCE THE RESPONDENT INVOKED THE DENIAL OF BENEFITS CLAUSE

40. The Respondent lawfully invoked the denial of benefits clause stipulated in Art. 2(1) BIT. In effect, the Claimant was denied all advantages of the BIT, including the right to initiate arbitration.

41. Pursuant to Art. 2 BIT, each Contracting Party may deny the benefits of the BIT to an entity or investment of another Contracting Party. The entity may be deprived of the BIT's advantages if it is owned or controlled by nationals of a third state and if it has no substantial business activity in the territory of the Contracting Party in which it is organized.

42. The Respondent invoked the denial of benefits clause in Response to Notice on 26 November 2016.[54] Accordingly, the Claimant has been denied all advantages of the BIT, including the right to treaty arbitration (**A**). The Respondent exercised its right under Art.

[52] Romak, ¶188.

[53] PO3, ¶1595.

[54] Response to Notice, ¶5.

2 BIT validly since the Claimant is controlled by nationals of a third state and has no substantial business activity in Basheera (**B**). Furthermore, the invocation of the denial of benefits clause in the Response to Notice applies to these proceedings, as it has a retrospective effect (**C**).

## A. THE INVOCATION OF THE DENIAL OF BENEFITS CLAUSE REMOVES THE CLAIMANT'S RIGHT TO ARBITRATE UNDER THE BIT

43. The effective invocation of the denial of benefits clause provided for in Art. 2 BIT deprived the Claimant of the right to initiate treaty arbitration under Art. 8 BIT. The Contracting Parties purposefully agreed to subject the BIT's arbitration clause to the denial of benefits clause. Thus, the right to arbitrate claims under the BIT may be taken away by effective invocation of the denial of benefits clause.

44. Firstly, the right to commence treaty arbitration constitutes one of the benefits provided for by the BIT. The tribunals in *Rurelec*,[55] *Ulysseas*[56] and *Pac Rim*[57] confirmed that the right to arbitrate is beyond doubt included in the 'package' of benefits afforded under investment treaties. Therefore, the aforementioned tribunals concluded that since a denial of benefits clause affects all advantages, it also applies to the arbitration clause.[58]

45. Secondly, the wording of Art. 2 BIT does not limit the scope of application of the denial of benefits clause. To the contrary, it is very board. It stipulates that each Contracting Party may deny '*the advantages of this Agreement*'[59]—namely, the benefits of the entire BIT. In consequence, it covers the advantage of arbitrating claims under the BIT's dispute resolution clause.

46. Had the Contracting Parties wished to exclude the arbitration clause from the scope of the denial of benefits clause, they would have done so by drafting the BIT differently. For instance, the parties to the ECT explicitly limited the application of the denial of benefits clause to only one of its parts, by stipulating that: '*Each Contracting Party reserves the*

[55] Rurelec, ¶381.
[56] Ulysseas, ¶172.
[57] Pac Rim, ¶4.92.
[58] Rurelec, ¶381; Ulysseas, ¶172; Pac Rim, ¶4.92.
[59] BIT, Art. 2.

*right to deny the advantages of this Part'.*[60] Since Art. 2 BIT does not provide for such limitation, the right to arbitrate is covered by the denial of benefits clause.

47. In conclusion, a Contracting Party may deny the benefits stemming from the arbitration clause in Art. 8 BIT, and the Respondent did so. Since the Claimant was denied all advantages of the BIT, it also lost the right to arbitrate and has no standing to pursue its claims before the Tribunal.

## B. THE REQUIREMENTS TO DENY THE CLAIMANT THE BENEFITS OF THE BIT WERE MET

48. The Respondent validly invoked the denial of benefits clause, as all the requirements of Art. 2(1) BIT, indicated above in paragraph 41, were met. The Claimant is controlled by nationals of a third state (**i**) and merely constitutes a 'shell company' with no substantial business activity in Basheera (**ii**).

### i) The Claimant is controlled by nationals of a third state

49. The Claimant is controlled by Atton Boron and Co., a company constituted under the laws of Reef—a 'third state' under the BIT.

50. Pursuant to Art. 2(1) BIT, an investor being a legal entity may be denied the benefits of the BIT if it is owned or controlled by nationals of a third state. In this regard, the denial of benefits clause aims to counteract the practice of nationality planning, whereby investors structure a multinational business merely to take advantage of treaties available in certain jurisdictions.[61] Thus, to maintain reciprocity, the Contracting Parties agreed to withdraw the benefits of the BIT from investors controlled by third-state nationals.

51. The BIT defines neither the term 'third state' nor the term 'control'. In the context of preventing illegitimate nationality planning, the term 'third state' used in Art. 2 BIT should be construed within its ordinary meaning, pursuant to Art. 31(1) VCLT. Namely, it should be defined as every state which is a non-signatory to the BIT. The same

[60] ECT, Art. 17(1).

[61] Dolzer/Schreuer, p. 55; Vandevelde, p. 163.

interpretation in respect of this phrase has been adopted by several tribunals, in particular in the *AMTO*[62], *Yukos*[63], *Hulley*[64] and *Libananco*[65] cases.

52. Likewise, the term 'control' should be defined within the scope of Art. 31(1) VCLT. It must be interpreted as control in fact, determined after examination of the circumstances of the case.[66] In particular, the following factors have to be taken into consideration: (i) the ability to exercise substantial influence over the management and operation of the investment and (ii) financial interest.[67] Alternative interpretation would contradict the BIT's goal of preventing nationality planning, allowing its safeguards to be circumvented by means of a formal corporate structure.

53. When determining the question of influence, tribunals look past the first layer of shareholding or ownership.[68] The Tribunal should follow the practice established by investment tribunals in *AMTO*[69] and *Plama*,[70] where multiple layers of the claimant's corporate structure were pierced to determine the real source of control. The tribunal in *Yukos*[71] also accepted such an approach. The fact that recently the interim award on jurisdiction and admissibility in the latter case has been annulled[72] does not influence the legitimacy of the tribunal's reasoning in relation to the practice of piercing the corporate veil. A similar view in relation to determining real control was adopted by the tribunal in *TSA Spectrum*,[73] where Prof. Schreuer stated that it would be more appropriate just to look

> '*at the true controller thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States*'.[74]

54. In the present case it is Atton Boro and Co., incorporated in Reef, which possesses the ability to exercise substantial influence over the Claimant's management and operation.

---

[62] AMTO, ¶62.
[63] Yukos (Award), ¶544.
[64] Hulley, ¶543.
[65] Libananco, ¶553.
[66] Baltag p. 160.
[67] Baltag p. 160; Understandings No. 3 to ECT.
[68] Baltag, p. 140.
[69] AMTO, ¶¶66–67.
[70] Plama, ¶88.
[71] Yukos (Jurisdiction), ¶536.
[72] Hague District Court.
[73] TSA Spectrum, ¶153.
[74] TSA Spectrum, ¶153.

Atton Boro and Co. holds enough shares to directly control all Atton Boro Group affiliates.[75] It operates as the primary holding company of Atton Boro Group.[76] Since Atton Boro Group entities own all shares in the Claimant,[77] it is in fact Atton Boro and Co. which has decisive influence on the Claimant's policies and operations through these fully dependent intermediaries.

55. Furthermore, Atton Boro and Co. has significant financial interest in the Claimant's operations. It was Atton Boro and Co. which funded the Claimant and delivered the capital necessary to commence business in Mercuria.[78] Therefore, there is a close relationship and commonality of interest between these two entities. Though Atton Boro and Co. may not be by default liable for the Claimant, its overall financial success depends on the development of the Claimant's business.

56. These facts allow the reasonable supposition that the Claimant was primarily created to obtain BIT protection for Atton Boro Group's future investments. Such a practice amounts to nationality planning, which the denial of benefits clause included in the BIT is intended to counter.

57. In the case at hand the real and effective control over the Claimant is exercised by Atton Boro and Co., a company constituted under the laws of Reef.[79] Since Reef is a third state in respect of the BIT, the first requirement for exercising the denial of benefits clause is satisfied.

### ii) The Claimant is a mere 'shell company' with no substantial business activity in Basheera

58. Furthermore, the Claimant constitutes merely a 'shell company' without substantial business activity in the territory of Basheera.

59. The purpose of the substantial business activity prerequisite is to guarantee that an entity seeking protection under the BIT is economically bound to the Contracting Party.[80] Such an economic link exists when an entity contributes meaningfully to the country in which

[75] PO2, ¶3.
[76] Facts, ¶2.
[77] PO2, ¶3.
[78] PO3, ¶1570.
[79] Facts, ¶2.
[80] Mistelis/Baltag, p. 1313.

it is incorporated.[81] Thus, the aim of the 'substantial business activity' requirement is to exclude companies without active business operations or significant assets in the territory of the Contracting Party ('shell' or 'mailbox' companies)[82] from BIT protection.[83]

60. The term 'substantial business activity' is not defined in the BIT. Thus, pursuant to Art. 31(1) VCLT, it should be interpreted within its ordinary meaning. The word 'substantial' means 'significant' or 'large'.[84] Accordingly, such business activity cannot be minor, and at least should go beyond day-to-day business.

61. In order to establish substantial business activity an entity should be more than a façade incorporated for purposes other than doing business.[85] Moreover, an entity must be engaged in buying, selling, and contracting in the territory of the Contracting Party for its activities to be considered substantial for the purposes of the BIT.[86] Such operations should go beyond the regular activities or functions required merely by the fact of an entity's corporate existence.[87] Therefore, corporate registration and administration, holding requisite board or shareholders' meetings, and the payment of associated taxes and corporate registration fees do not suffice to establish substantial business activity.[88]

62. In the case at hand, the Claimant does not conduct substantial business activity in the territory of Basheera within the meaning of the BIT. The Claimant's single purpose is to coordinate activities of Atton Boro Group affiliates in American and South African countries[89] and collaborate with the agencies of states outside Basheera.[90] These limited, insignificant tasks require minimal presence in Basheera. In consequence, the Claimant maintains only an establishment of bare essentials, consisting of a single office and a handful of employees[91]—barely enough to conduct the activities required by the fact of its corporate existence. The Claimant does not conduct any large-scale or significant operations in Basheera. In particular, the Claimant does not trade, contract or contribute

[81] Hoffmann, p. 613.
[82] Vandevelde, p. 163.
[83] Dolzer/Schreuer, p. 55.
[84] Black's Law Dictionary.
[85] Baltag, p. 162.
[86] Jagusch/Sinclair, ¶20.
[87] Jagusch/Sinclair, ¶20.
[88] Jagusch/Sinclair, ¶20.
[89] Facts, ¶4; PO2, ¶3.
[90] Facts, ¶5; PO2, ¶3.
[91] Facts, ¶4.

economically in any form. The support it provides for Atton Boro Group affiliates located outside Basheera is entirely inward-focused and does not amount to significant business activity in the territory within the meaning of the BIT.

63. In consequence, the Claimant constitutes merely a 'shell company' with no substantial business activity in the territory of Basheera. Since the Claimant has no meaningful economic link to Basheera, it does not deserve protection under the BIT. Thus, the second prerequisite of the denial of benefits clause is met and the Respondent's invocation of the denial of benefits clause was valid.

## C. THE EFFECTS OF THE INVOCATION OF THE DENIAL OF BENEFITS CLAUSE ARE RETROSPECTIVE

64. In any even the Respondent submits that since the Respondent invoked the denial of benefits clause, the Claimant is deprived of all advantages of the BIT with retrospective effect. In other words, the benefits of the BIT are unavailable to the Claimant's business from the moment the Claimant commenced its operations in Mercuria.

65. The Respondent exercised its right under Art. 2 BIT in its Response to Notice on 26 November 2016.[92] The Respondent submits that the practice of exercising a right to deny benefits after the beginning of arbitration was first accepted in *EMELEC*,[93] where the tribunal allowed such a retrospective effect.[94] This reasoning was followed in several other cases.[95] Tribunals have tended to accept that a claimant's business is affected by a denial of benefits 'from the outset'.[96] Beside case law, also scholars and the wording of Art. 2 BIT support the presented approach.[97]

66. Firstly, Art. 2 BIT does not limit the scope of the denial of benefits clause. Its wording does not suggest that such a denial is effective only in relation to disputes arising after the invocation of Art. 2 BIT. This interpretation was reinforced in *Ulysseas*[98] and *Rurelec*[99]. The *Rurelec* tribunal found that under the US-Bolivia BIT the parties could

[92] Response to Notice, ¶5.
[93] EMELEC, ¶71.
[94] EMELEC, ¶71.
[95] Ulysseas, ¶172; Rurelec, ¶381; Pac Rim, ¶4.56.
[96] Ulysseas, ¶172; Rurelec, ¶381; Pac Rim, ¶4.56.
[97] Legum, ¶¶524–525; Jagusch/Sinclair, ¶101; Baltag, p.153; Gastrell/Le Cannu, p. 96.
[98] Ulysseas, ¶172.
[99] Rurelec, ¶377.

have limited the effects of the denial of benefits clause, but decided not to. Therefore, they imparted the provision with retrospective effect.[100]

67. Secondly, retrospective effect is the only reasonable interpretation bearing in mind the environment in which the BIT operates. It would border the absurd to demand that the Respondent examine whether every single investor coming to Mercuria fulfils the prerequisites of Art. 2 BIT. The modern-day structure of investments tends to be so complex that host states rarely become aware of the circumstances justifying an invocation of the denial of benefits clause before a dispute arises.[101] Arbitral tribunals concur[102] and emphasise that an '*untenable burden*' to monitor the fluctuations of investors' corporate structures would be placed on a host state were it not for the retrospective effect.[103] Since host states would not manage to examine all investors before they make an investment, the denial of benefits clause would become worthless without retrospective effect.

68. Thirdly, every diligent investor is aware of the existence of the denial of benefits clause. The text of the BIT is publicly available. The tribunal in *Ulysseas,*[104] allowing retrospective effect, emphasised that the right of a host state to exercise a denial of benefits is known to an investor from the time it makes its investment.[105] This was later acknowledged by the *Rurelec*[106] tribunal, which stated that the retrospective effect is consistent with the principle of legal transparency.[107] In terms of the BIT, every investor that fulfils the prerequisites of Art. 2 should be aware of the possible consequences, no matter when the Respondent exercises the denial of benefits.

69. Thus, the denial of benefits clause applies retrospectively. When the Respondent invoked the denial of benefits clause, the Claimant's business was affected from the beginning of its commencement. In consequence, the Claimant cannot use the BIT as a tool to pursue its claims before the Tribunal.

---

[100] Rurelec, ¶377.

[101] Legum, ¶¶524–525; Jagusch/Sinclair, ¶101; Baltag, p.153; Gastrell/Le Cannu, p. 96.

[102] Rurelec, ¶379; Pac Rim, ¶4.56.

[103] Pac Rim, ¶4.56.

[104] Ulysseas, ¶173.

[105] Ulysseas, ¶173.

[106] Rurelec, ¶383.

[107] Rurelec, ¶383.

70. In conclusion, the Respondent validly exercised the denial of benefits clause stipulated in Art. 2 BIT, since the Claimant is controlled by Atton Boro and Co.—a national of third-state Reef—and conducts no substantial business activity in Basheera. In consequence, the Claimant was deprived of any right to arbitration under the BIT and has no standing to bring its claims before the Tribunal.

## PART TWO: MERITS

## III. THE RESPONDENT ACCORDED THE CLAIMANT'S INVESTMENT FAIR AND EQUITABLE TREATMENT

71. The Respondent has treated the Claimant's investment in a fair and equitable manner, and has guaranteed the Claimant's investment the protection envisaged by the BIT. In contrast, by alleging the Respondent to have breached the FET standard, the Claimant attempts to prioritize its business profits over public health emergencies.

72. The Claimant alleges that by issuing HG-Pharma a licence to manufacture Valtervite (the compound used in the greyscale drug manufactured by the Claimant) the Respondent infringed the standard of protection guaranteed in the BIT.[108] These allegations are, however, unfounded, as the Respondent acted in full compliance with the FET standard encompassed in Art. 3(2) BIT.

73. From the Claimant's argument that the alleged infringement of the FET standard took place as a result of the issuing of a licence to manufacture the compound, it can be inferred that the Claimant seeks protection for its claimed investment by reference to intellectual property rights, i.e. the patent for Valtervite.

74. The Claimant relies on two grounds.[109] First, it claims that by enacting Law No. 8458/09 the Respondent disregarded TRIPS. Secondly, it argues that its legitimate expectations have been breached by the Respondent.

75. Neither of these arguments prove the alleged breach of the FET standard by the Respondent. The Claimant's alleged expectations were illegitimate (**A).** Furthermore, the Respondent's obligations under TRIPS cannot constitute the basis of an investment claim litigated under the BIT (**B**).

### A. THE CLAIMANT'S EXPECTATIONS WERE ILLEGITIMATE

76. The Claimant's allegation that its legitimate expectations were infringed by the Respondent's conduct with regard to the Claimant's IP rights is groundless.

[108] Notice, ¶13.

[109] Notice, ¶13.

77. Although the Respondent agrees that in principle the protection of legitimate expectations constitutes a key element of the FET standard,[110] a finding by the Tribunal that the Claimant's expectations have been breached and that for this breach it should be compensated would be unwarranted.

78. An investor may claim protection in relation to its legitimate expectations only if three prerequisites are met.[111] Firstly, the emergence of legitimate expectations must be triggered by representations made by the host state to the investor, on which the investor later relied. Secondly, the expectations must take into consideration the political and socio-economic conditions surrounding the investment. Finally, the expectations must not be such as to hinder the host state in its exercise of legitimate regulatory powers.[112]

79. In the present case none of these prerequisites are satisfied. The Respondent has not made representations to the Claimant which could have given rise to legitimate expectations (**i**). The Claimant disregarded the difficult socio-economic conditions prevailing in the Respondent's state at the time of its investment, and therefore illegitimately disregarded the associated risk (**ii**). Finally, the Claimant's expectations are illegitimate since they aim at limiting the Respondent's regulatory powers, exercised in public purpose (**iii)**.

### i) The Respondent has made no relevant representations to the Claimant

80. Specific representations, addressed personally to investors, are a preliminary precondition which must be satisfied in order to trigger legitimate expectations.[113] Representations giving rise to legitimate expectations may be found, for instance, in contracts with stabilisation clauses, where the state explicitly represents to the investor that it will not modify certain aspects of its regulatory framework.[114] Such representations have to be contrasted with general statements of a PR character, not enshrined in any binding document concluded with the investor, which cannot be held to be grounds upon which a professional investor may develop legitimate expectations.

81. In relation to the above, no specific undertaking was made by the Respondent to the Claimant. In particular, there was no direct communication between the Claimant and the

[110] Kinnear, pp. 207-238.
[111] Duke Energy, ¶340.
[112] Saluka, ¶305.
[113] Parkerings, ¶331; Methanex, Part IV – Chapter D, ¶¶9-10.
[114] Parkerings, ¶332.

Respondent with regard to the Respondent's IP regulatory framework. Nor was any stabilisation clause included in contracts or administrative decisions issued in the Claimant's interest.

82. The Respondent, through its public bodies, did indeed express a general desire to promote IP rights; however, the circumstances in which the statement was made preclude it from being considered a representation made towards the Claimant.[115] Broad statements made by the Respondent's public administration in a press release lauding the success of a health plan, completely unrelated to the Claimant's investment, can hardly constitute a basis for legitimate expectations arising in the mind of a diligent business person. The statements were made by public authorities of the Respondent in relation to the launching of a health plan concerning HIV/AIDS—an entirely separate disease from greyscale, which is not treated by the drug at the centre of this dispute. Moreover, on a general level, press statements, by reason of their promotional character, ought not to be considered a source of binding promises made by a host state.

83. The Claimant's expectations were unreasonable, particularly given that both Contracting Parties are signatories to the Doha Agreement, comprising the Declaration on the TRIPS Agreement Public Health.[116] The signatories acknowledged the right of states to protect public health and to promote access to medicines for all, and reiterated that it is in light of these commitments that TRIPS should be interpreted.[117] In signing the Doha Agreement, the Respondent was acting consistently with its long-held position that IP rights deserve protection to the extent that they do not threaten publicly protected values, such as public health. In forming its expectations, the Claimant ought to have taken this into consideration.

84. In light of the above, no representation was made by the Respondent to the Claimant in relation to the Claimant's IP rights over Valtervite, and therefore no legitimate expectations arose.

[115] Annex No. 2.

[116] PO2, ¶2.

[117] WTO Declaration, ¶¶4-5.

### ii) The Claimant disregarded the socio-economic conditions prevailing in the Respondent's state

85. In shaping its expectations, the investor must take into account the political and socio-economic context of its investment in the host state.[118]

86. The Respondent is a developing country which has been struggling with public health issues for many years.[119] Having invested in a state with well-documented public health problems, the Claimant should be considered to have voluntarily undertaken the associated risks, including the potential need for public authorities to take decisive action. The Claimant, being part of an international group of pharmaceutical companies, ought to have been aware that countries facing a public health crisis may respond by limiting the IP rights attached to medicinal compounds. However, this knowledge was doubtless counterweighed by promising business forecasts concerning demand for the Claimant's medicine, which, in light of the increasing prevalence and detectability of greyscale, likely predicted large profits from the sale of Valtervite.

87. The Claimant would not have formed the expectations it alleges were breached by the Respondent had it thoroughly analysed the circumstances of its investment, taking into account not only the chances of it being highly profitable but also the risk that the Respondent would be forced to limit that profitability in order to protect a public purpose.

### iii) The Respondent, by enacting Law No. 8458/09, acted within its regulatory powers

88. Contrary to the position of the Claimant, by enacting Law No. 8458/09 (which was the legal basis for granting HG-Pharma a licence to manufacture Valtervite) the Respondent did not breach the Claimant's legitimate expectations.[120] What the Claimant conveniently omitted to address is that the Respondent enacted Law No. 8459/09 in response to an imminent threat to public health, exercising its legitimate regulatory powers. Hence, no breach of legitimate expectations exists.

[118] Genin, ¶348; Parkerings, ¶335.

[119] Annex No. 3.

[120] Notice, ¶13.

89. As the tribunal in *Saluka*[121] stated, in assessing a claim concerning a breach of the FET standard,

> '*the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well'.*

This regulatory power should be weighed against the alleged legitimate expectations of the investor, and so long as it is exercised in good faith a breach of the FET is precluded.[122] Similarly, the tribunal in *Parkerings*[123] underlined that in the absence of a representation that the legal framework will remain unchanged, for example in the form of a stabilisation clause,

> '*there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment'.*

This approach was also followed in *EDF*[124] where an investor's reliance on the BIT to claim protection against a change of legal regulations was compared to attempting to utilise investment arbitration as an insurance policy against the risk of legal framework amendment. The expectation of a freezing of the law was found to be illegitimate and unreasonable, whereas the tribunal expressed the need to pay due regard to the *'host state's power to regulate its economic life in the public interest'*.[125]

90. The facts of this case reveal that there were strong grounds for the Respondent to enact Law No. 8458/09, and that the Claimant's alleged expectation that it would not do so were illegitimate. From the NHA's Annual Report 2006 it is clear that the public health situation as regards greyscale was already severe in that period. Firstly, the number of confirmed cases of greyscale had risen more than tenfold in just three years and the number of estimated cases of the disease more than doubled.[126] The annual cost of treatment with Sanior amounted to USD 10,000 per patient; therapy for just 100,000 of the poorest patients consumed one third of the total health budget of the Respondent.[127]

91. Keeping in mind this concerning public health picture, it must be remembered that commercial attempts to curb expenditure on the treatment of greyscale (undertaken by

[121] Saluka, ¶¶304-308.
[122] Saluka, ¶304; Lemire, ¶273.
[123] Parkerings, ¶332.
[124] EDF, ¶217.
[125] EDF, ¶217.
[126] Annex No. 3, ¶¶1335-1345.
[127] Annex No. 3, ¶¶1350-1365.

the Claimant's business partner, the NHA) failed.[128] The NHA requested a discount on the Claimant's drug and the Claimant, despite being aware of soaring demand among patients and a guarantee of substantial turnover, declined.[129]

92. Faced with no other way to avert the looming public health crisis other than to reopen the market for manufacturing the critical drug, the Respondent enacted a non-discriminatory, proportionate law which allowed the judiciary to grant licences on patents in strictly enumerated circumstances associated with threats to publicly protected values.[130]

93. This exercise of sovereign power reflected the Respondent's pursuit of a legitimate public purpose. Hence, the Claimant's alleged expectations were not breached.

## B. THE RESPONDENT'S OBLIGATIONS UNDER TRIPS CANNOT CONSTITUTE THE BASIS OF THE CLAIMANT'S CLAIM

94. The Claimant is precluded from arguing a breach of the FET standard with regard to its investment on the basis of an alleged breach of TRIPS by the Respondent.

95. TRIPS is an international treaty, the parties to which are sovereign states. Investors are precluded from basing their claims in investment arbitrations on treaties that were concluded between states, since these treaties, unless otherwise stated in their provisions, produce rights and obligations only between their signatories.[131] This principle of international law was confirmed by a statement of the PCIJ in the case *Upper Silesia*[132]. The PCIJ contended that: '*A treaty only creates law as between the States which are parties to it*'.[133] The VCLT expresses this principle in its Art. 34.

96. International treaties are instruments of public international law, which in principle create obligations between the subjects of public international law, a group to which states, but not individuals, belong.[134] Although the obligations enshrined in treaties may concern individuals, this does not change the fact that they are owed by one subject of public international law to another, i.e. by one state to another. Whether treaty obligations can

[128] Facts, ¶15.
[129] Facts, ¶15.
[130] Annex No. 2.
[131] Waibel, p. 5.
[132] Upper Silesia, ¶82.
[133] Upper Silesia, ¶82.
[134] Waibel, p. 39.

be enforced or not depends on who is subject to them.[135] Given that, unless expressly stated otherwise, individuals do not have rights and obligations under a treaty, they are incapable of compelling states to comply with it.

97. This conclusion is reinforced in circumstances where an international treaty indicates a dispute settlement scheme according to which disagreements between its parties are to be resolved. Considering that one of the conditions under which states enter into such a treaty is their agreement to the dispute settlement clause, other methods of enforcing compliance with treaty provisions would violate the state's rights under the treaty.

98. Art. 1 TRIPS states that *'Members shall give effect to the provisions of this Agreement,'* clearly indicating that it is the signatories who are under an obligation to implement treaty provisions within their sovereign powers.[136]

99. Moreover, Art. 64 TRIPS contains a dispute settlement provision, which requires all disputes to be settled in accordance with Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.[137] Pursuant thereto, the parties to TRIPS should refer the dispute to the WTO dispute resolution panel. The settlement procedure can only be initiated by a member of the WTO.[138] This, therefore, is the procedure according to which binding statements regarding a state's compliance with TRIPS should be made.

100. What is more, were the Tribunal to adjudicate on the matter of the Respondent's compliance with TRIPS, it would exceed the competences granted by Art. 8(1) BIT. The Tribunal is only entitled to settle disputes between an investor of one Contracting Party and the other Contracting Party, arising out of or in relation to the BIT or the existence, interpretation, application, breach, termination or invalidity thereof. The Tribunal is hence not entitled to settle disputes concerning the interpretation of other legal instruments.

101. The Tribunal is not entitled to decide whether the Respondent has complied with TRIPS. The Claimant cannot circumvent what the parties to TRIPS have agreed to by referring its case to investment arbitration.

---

[135] Vázquez, p. 1088.

[136] TRIPS, Art. 1.

[137] TRIPS, Art. 64.

[138] GATT, Art. XXIII.

102. In conclusion, the Respondent has accorded the Claimant's investment fair and equitable treatment. In particular, the Respondent acted in compliance with all expectations that the Claimant legitimately could have held. Moreover, the Claimant's allegations of the Respondent's breach of TRIPS cannot be settled in investment arbitration.

## IV. THE CONDUCT OF MERCURIA'S JUDICIARY FAILS TO MEET THE THRESHOLD FOR BREACHING A STATE'S INTERNATIONAL OBLIGATIONS

103. Even if the Tribunal in the present case deems that the Award constitutes an investment within the meaning of the BIT, the conduct of the High Court in the course of the Award's enforcement proceedings does not amount to a violation of any international obligation of Mercuria. On the contrary, the Respondent accorded the Claimant's alleged investment fair and equitable treatment.

104. The Claimant obtained the Award after the dispute over the termination of the LTA was resolved by an arbitral tribunal.[139] On 3 March 2008 the Claimant filed an application and initiated enforcement proceedings before the High Court.[140] The proceedings are still pending.[141]

105. In the case at hand, the Claimant argues that the Respondent is liable for the conduct of the High Court in the course of the enforcement proceedings. In particular, the actions of the High Court are said to have violated the FET standard in two ways. Firstly, the Claimant alleges that the enforcement proceedings are subject to unreasonable delay,[142] and secondly that the Respondent failed to provide the Claimant with effective means of asserting its rights.[143] Both allegations ring hollow.

106. The conduct of Mercuria's judiciary did not breach any international obligation of the Respondent. Firstly, the Respondent accorded the Claimant's alleged investment fair and equitable treatment in the course of the enforcement proceedings (**A**). Secondly, in any

[139] Facts, ¶17.
[140] Facts, ¶18.
[141] PO3, ¶1595.
[142] Notice, ¶10.
[143] Notice, ¶13.

event, an effective means of asserting claims clause is not available to the Claimant, since it lacks legal effect in the present case (**B**).

## A. THE RESPONDENT ACCORDED THE CLAIMANT'S ALLEGED INVESTMENT FAIR AND EQUITABLE TREATMENT IN THE COURSE OF ENFORCEMENT PROCEEDINGS

107. The Claimant initiated enforcement proceedings against the NHA before the High Court on 3 March 2009.[144] The NHA requested a rejection of the application for enforcement on the grounds that it was contrary to public policy.[145] Despite the Claimant's allegations,[146] the mere duration of the enforcement proceedings does not constitute a violation of the FET standard.

108. Protection against denials of justice is a vivid component of the FET standard.[147] While actions undertaken by domestic courts may amount to a denial of justice, the test for establishing a violation of this standard is one of the most stringent.[148] International law offers no strict guidance on whether court delays constitute a denial of justice,[149] but the tribunals in *Jan de Nul*,[150] *White Industries*[151] and *Toto*[152] stated that court proceedings delayed by 10 years, 9 years and 6 years respectively did not constitute denials of justice. Rather, the test for a denial of justice requires the failure of the national system as a whole,[153] systemic injustice,[154] or an outrageous breakdown in the judicial system.[155] Violations committed by domestic courts, an erroneous decision or even an incompetent judicial procedure are not enough to meet the threshold of a denial of justice.[156] Instead, such a claim should stem from a decision so egregiously wrong that no honest or

[144] Facts, ¶18.
[145] Facts, ¶19.
[146] Notice, ¶10.
[147] Diehl, p. 501.
[148] Philip Morris, ¶500; Oostergetel, ¶273; Chevron, ¶244.
[149] Toto, ¶155.
[150] Jan de Nul, ¶204.
[151] White Industries, ¶¶10.4.4, 10.4.22.
[152] Toto, ¶165.
[153] Oostergetel, ¶273.
[154] Oostergetel, ¶273.
[155] Diehl, p. 499; Mondev, ¶126.
[156] Mondev, ¶126.

competent court could possibly have given it[157] or from a particular result which would shock or at least surprise an impartial tribunal.[158] Finally, state responsibility for a denial of justice occurs only when the system as a whole has been tested[159] and all available means offered by the state's judiciary to redress the denial of justice have been exhausted.[160]

109. In the present case, the high threshold for a denial of justice is not met. Firstly, a mere delay of enforcement proceedings does not come close to constituting a failure of the national system as a whole (**i**), and secondly, the Claimant did not take advantage of all accessible legal remedies, which is a prerequisite to arguing that a denial of justice has occurred (**ii**).

### i) A delay in enforcement proceedings fails to meet the threshold of outrageous failure of the judicial system

110. In the case at hand, the conduct of the High Court does not amount to an outrageous failure of Mercuria's judicial system. Establishment of such a failure might involve a party being deprived of a fundamental right, such as the right to have a composition hearing convened, as seen in the *Dan Cake*[161] tribunal.

111. In *Dan Cake*[162] the Metropolitan Court of Budapest, Hungary, sitting as a bankruptcy court, declared the investor insolvent and appointed a liquidator to sell its assets. Under Hungarian law, once liquidation is ordered, the only way an investor can avoid the sale of its assets is by entering into a restructuring agreement with its creditors. For this purpose, Hungarian bankruptcy law allows a debtor to request that the bankruptcy court convene a composition hearing.[163] Accordingly, the investor submitted such a request, accompanied by all required documentation. Notwithstanding the investor's rights under statute, the Metropolitan Court of Budapest refused to convene a composition hearing and left the investor without any form of appeal against the court's decision.[164] This

[157] Paulsson, p. 196.
[158] Mondev, ¶127.
[159] Paulsson, pp. 245-246.
[160] Philip Morris, ¶499.
[161] Dan Cake, ¶146.
[162] Dan Cake, ¶41.
[163] Dan Cake, ¶46.
[164] Dan Cake, ¶¶54-55.

conduct resulted in the sale of the investor's factory and the loss of the investment.[165] Hence, the *Dan Cake* tribunal found that the conduct of the Hungarian court amounted to a denial of justice.[166] By contrast, a litigant who has been given full access to the procedures provided within a legal system, including mechanisms for appeal, cannot ask for more justice or different justice.[167]

112. In light of the above, it can be seen that in the present case the High Court's conduct towards the Claimant was consistent with legal due process and the FET standard of protection. The judicial system of the Respondent was fully available to the Claimant and responsive to requests made by the Claimant in the course of the enforcement proceedings. The High Court acceded to the Claimant's applications for leave, transfer of the case, and an additional hearing to conclude oral submissions.[168] Moreover, the formal protests filed by the Claimant in the course of the proceedings were properly recorded by the High Court.[169] Being aware of potential delays to the proceedings, the High Court was not only prepared but even willing to take strict adverse measures against the NHA, such as hearing the case *ex parte*.[170] The Claimant was given opportunity to present its case thoroughly and in detail, to make both oral and written submissions, and to file formal protests and arguments on the jurisdictional, as well as substantive, aspects of the case. Concurrently, the High Court repeatedly adjourned hearings upon the request of both parties,[171] in order to safeguard the fundamental right to be heard. In sum, the Respondent's judicial system exercised every available measure to properly administer justice, and hence its conduct cannot amount to an outrageous failure of the judicial system.

113. Secondly, the duration of the enforcement proceedings in the Claimant's case cannot be considered an undue delay amounting to a denial of justice, since it stems from the intricacy of the case and difficulties arising in the course of the enforcement proceedings. Such factors alone cannot render the conduct of the High Court a breach, despite their adverse impact on the duration of the enforcement proceedings.

---

[165] Dan Cake, ¶¶57-59.
[166] Dan Cake, ¶146.
[167] Diehl, p. 454.
[168] Notice, Exh. I, ¶¶10, 17, 18, 25.
[169] Notice, Exh. I, ¶¶13, 21, 34.
[170] Notice, Exh. I, ¶¶5, 21, 18, 25.
[171] Notice, Exh. I, ¶¶7, 8, 10, 25.

114. In this regard, the *AMTO*[172] tribunal ruled that a delay in proceedings may be explained by the procedural complexity of the case. Such a delay should be measured against the rules or practices prevailing in local courts.[173]

115. In the present case, the length of proceedings is attributable to procedural complexity. Although enforcement proceedings were initiated before the regular bench of the High Court, the judgments rendered afterwards by the Supreme Court resulted in redirection of jurisdiction over enforcement cases to the commercial benches of the High Court. Eventually, following clarification by the Supreme Court, the jurisdiction was switched once again to the regular benches of the High Court, inducing the administrative muddle.

116. On 12 April 2012, the High Court rendered two judgments[174] which confirmed that the newly constituted Commercial Bench of the High Court had exclusive jurisdiction to hear enforcement applications. The Claimant successfully requested on 30 April 2012 that the High Court transfer the case accordingly.[175] Subsequently, the NHA objected to the jurisdiction of the Commercial Bench, drawing its argument from a new decision delivered by the Supreme Court—an instance higher than the High Court. Notwithstanding the earlier judgment, the Commercial Bench of the High Court ruled that it had jurisdiction over enforcement applications. However, on 2 December 2013 an official notification was published by the High Court which specified that '[a]*ll enforcement applications shall be reassigned to regular benches of the Court forthwith'*.[176] As a result, the Claimant's application was transferred back from the Commercial Bench exactly one month later.[177]

117. Simultaneously, the High Court was dealing with the NHA's Amendment Application. On 27 March 2012 the NHA filed a request to amend its written submission due to newly issued decisions of the Supreme Court.[178] The Claimant objected to such an amendment.[179] The Amendment Application involved not only an exchange of notes conveying the parties' positions on the issue, but also oral submissions at hearings, and

[172] AMTO, ¶83.
[173] Diehl, p. 465.
[174] Notice, Exh. I, ¶17.
[175] Notice, Exh. I, ¶17.
[176] Notice, Exh. I, ¶28.
[177] Notice, Exh. I, ¶28.
[178] Notice, Exh. I, ¶16.
[179] Notice, Exh. I, ¶16.

took up almost three years.[180] Finally, on 31 January 2015, the High Court allowed the NHA to amend its application.[181]

118. The above-mentioned nexus of events naturally influenced the duration of the proceedings. The jurisdictional complication alone delayed the proceedings by almost two years and overlapped with the Amendment Application which was pending for nearly three years, jointly creating an exceptionally burdensome case for the High Court. On top of this, the formal notification from the High Court ordering the reassignment of all enforcement applications to the regular bench of the High Court occasioned an overwhelming case backlog which stifled the Mercurian judicial system.[182] Though this resulted in the enforcement proceedings lasting longer than the Claimant expected, in no way can it be determined a fundamental breakdown of the judicial system.

119. Finally, the duration of the enforcement proceedings is a result of the case overload of Mercuria's courts.[183] The Claimant should have foreseen this when entering into the LTA.

120. The tribunal in *Frontier Petroleum*[184] stated that a high volume of cases and a shortage of judges is not an optimal situation for the efficient resolution of claims; nevertheless, a delay caused by such does not reach the level of a breach of the FET standard. The Claimant should have considered at the time of entering into the LTA whether the domestic court system of the Respondent was overburdened or not.[185] An investor must take the host state, including its judicial system, as it finds it.[186]

121. Mercuria is a developing country[187] with a population of over 67 million.[188] It is obvious that the country's judicial system may struggle to cater for the needs of its citizens. Given that the condition of the domestic judicial system is a key factor in assessing the likelihood of a delay to legal proceedings, the Claimant could not have reasonably expected its enforcement proceedings to be swift.

---

[180] Notice, Exh. I, ¶¶16, 22, 23, 25, 35.
[181] Notice, Exh. I, ¶36.
[182] Notice, Exh. I, ¶32.
[183] Response to Notice, ¶9; Annex No. 3, ¶1325.
[184] Frontier Petroleum, ¶336.
[185] White Industries, ¶10.3.14.
[186] White Industries, ¶10.3.15.
[187] Response to Notice, ¶9.
[188] Annex No. 3, ¶1325.

122. In conclusion, the conduct of the High Court does not amount to an outrageous failure of the judicial system. Bearing in mind the access the claimant was afforded to the High Court, its responsiveness, the complexity of the case, and the strain upon the Mercurian judiciary, the delay in question is neither unreasonable nor unexpected.

### ii) The Claimant failed to take advantage of all accessible legal remedies

123. Prior to pursuing a claim for violation of the FET standard in response to the conduct of the High Court, the Claimant should have taken advantage of all available alternative courses of action.

124. The *Arif*[189] tribunal ruled that as long as the judicial system is not tested as a whole the FET standard cannot be violated in the form of a denial of justice. Consequently, state responsibility for a denial of justice occurs only when all available means offered by the state's judiciary to redress the denial of justice have been exhausted.[190] Hence, the state is not responsible for the wrongdoings of an individual judge so long as it provides a readily accessible mechanism which is capable of neutralizing that judge.[191]

125. In the present case, if the Claimant harboured any objections or reservations about the conduct of the High Court, in particular about the Judge, it should have filed a motion to exclude that Judge. No such submission has been filed by the Claimant in the entire course of the enforcement proceedings. The Claimant had full access to the High Court and over eight years in which to submit an allegation of improper or even biased behaviour by the Judge resulting in a supposed violation of the FET standard. As yet, the Claimant has declined to do so.

126. Therefore, the Respondent cannot be held responsible for the alleged wrongdoing of an individual Judge, since the Claimant has not availed itself of all readily accessible mechanisms capable of counteracting such a Judge.

127. In conclusion, the BIT does not grant protection against mere inconsistences in the course of domestic legal proceedings, nor does it provide for extraordinary appeals against the decisions of municipal courts. Instead, it sets a high standard for claiming a denial of justice, requiring systemic injustice and an outrageous failure of the national

[189] Arif, ¶443.
[190] Philip Morris, ¶499.
[191] Arif, ¶443.

judicial system as a whole. Since the Claimant's case does not come close to the above-mentioned threshold, its claim must fail.

## B. IN ANY EVENT, PROTECTION UNDER AN EFFECTIVE MEANS OF ASSERTING CLAIMS CLAUSE IS UNAVAILABLE TO THE CLAIMANT

128. The Claimant's invocation of the effective means of asserting claims principle[192] is futile, since the clause does not exist in the body of the BIT. This standard of protection is only mentioned in the Preamble and hence it does not have binding legal effect.

129. An effective means of asserting claims clause (effective means clause) is an independent standard of protection stipulated in BITs, rather than a mere restatement of the principle of denial of justice.[193] The purpose of an effective means clause is to form part of the more general guarantee against a denial of justice[194] and to provide an effective framework for the enforcement of rights.[195] Such a clause is contained e.g. in Art. II(7) of the Ecuador–USA BIT,[196] and obliges contracting parties to

> '*provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations'.*

130. This clause was one of the means by which an investor - Electroquil sought investment protection before the tribunal in *Duke Energy*.[197]

131. It is well-established in international law, including in the jurisprudence of investment treaty tribunals, that preambles to treaties are not an operative part of the treaty.[198] Therefore, they do not create binding legal obligations which are capable of giving rise to a distinct cause of action.[199] While a preamble may, in certain circumstances, be relied upon in treaty interpretation as part of the context of the treaty, it cannot be relied upon

[192] Notice, ¶13.
[193] Chevron, ¶242.
[194] Duke Energy, ¶391.
[195] AMTO, ¶88.
[196] Ecuador–United States of America BIT.
[197] Duke Energy.
[198] Ickale Insaat, ¶337; Continental Casualty, ¶258; Société Générale, ¶33.
[199] Ickale Insaat, ¶337; Société Générale, ¶33; Mbengue, p. 397.

as a source of independent or free-standing legal rights or obligations.[200] In essence, a preamble simply cannot add substantive requirements to the provisions of a treaty.[201]

132. In the case at hand, an effective means clause is unavailable to the Claimant since the clause is mentioned only in the Preamble. It is not contained in the body of the BIT and hence cannot give rise to any course of legal action against the Respondent. Accordingly, the Claimant cannot rely on such a clause in its claim before this Tribunal.

## V. THE RESPONDENT IS NOT LIABLE UNDER ART. 3(3) BIT FOR THE TERMINATION OF THE LTA BY THE NHA

133. The Respondent is not liable under the umbrella clause for the termination of the LTA by the NHA.

134. For a breach of the umbrella clause to be found, the state must owe a contractual obligation to the investor.[202] Secondly, the breach of those contractual obligations must attract protection under the umbrella clause enshrined in the BIT.[203]

135. The Claimant's allegation that the Respondent has violated Art. 3(3) BIT is unjustified, as neither of the above prerequisites are satisfied on the facts of this case. The LTA does not establish a contractual relationship between the Respondent and the Claimant (**A**) and, in any case, the umbrella clause only protects against breaches of contract resulting from the exercise of sovereign power (**B**).

### A. THE LTA DOES NOT CREATE ANY CONTRACTUAL OBLIGATION BETWEEN THE RESPONDENT AND THE CLAIMANT

136. The LTA does not create a binding commitment between the Respondent itself and the Claimant. Hence, any breach of the umbrella clause cannot be assignable to the Respondent.

[200] Ickale Insaat, ¶337.

[201] Société Générale, ¶31.

[202] Duke Energy, ¶318.

[203] Feit, pp. 22-23; EDF, ¶¶213–214.

137. Article 3(3) BIT specifies that each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.

138. In *Impregilo*[204], the claimant alleged a breach of investment treaty on the basis that the Pakistan Water and Power Development Authority, a sub-state entity, had failed to fulfil obligations under a contract with Impregilo. The tribunal declined to give a broad reading to the umbrella clause contained in the Italy-Pakistan BIT,[205] deciding that '*the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party'*.[206]

139. Faced with a similar problem, the tribunal in *Hamester*[207] approved the position taken in *Impregilo*. After stressing that the contract in question had not been signed by the state, Ghana, and that it was not intended to be a party thereto,[208] the tribunal concluded with a statement

> '*the contractual commitments of Cocobod, being a separate entity from the state, cannot be considered as elevated (…) into treaty commitments of the State itself*'.[209]

140. The same approach was also adopted in *Nagel*,[210] where it was noted that contractual obligations were not assignable to the Czech Republic, since the party to the contract had a separate personality from the state and the latter was not involved in the conclusion of the contract.

141. It follows from the above that the umbrella clause covers solely obligations entered into by Contracting Parties with regard to investments of an investor of the other Contracting Party. This means the actions undertaken by the NHA could elevate to a breach of the BIT only if they were assignable to the Respondent.[211]

142. The NHA is an authority set up by the Respondent that has operated independently ever since. It was created to fulfil the constitutional goal of securing universal healthcare for

[204] Impregilo, ¶¶33-35.
[205] Italy-Pakistan BIT.
[206] Impregilo, ¶216.
[207] Hamester, ¶343.
[208] Hamester, ¶347.
[209] Hamester, ¶484.
[210] Nagel, ¶¶161-162; Hamester, ¶345.
[211] Hamamoto, p. 463.

the people of Mercuria.[212] However, the actions taken by such a public entity in the fulfilment of its general interest, mission or purpose cannot qualify as actions assignable to the state.[213]

143. In the present case the NHA is financially independent of Mercuria. It has its own budget, which is financed both by national taxation and by private contributions.[214] The budget is organized and governed by the NHA's trusts.[215] The NHA's tasks include, among others, making offers to pharmaceutical companies. It also holds the power to enter into contractual obligations, which is a manifestation of its commercial business activity. Even if this ability was to be considered as a prerogative of public authority, it could not lead to a conclusion that all of the NHA's conduct is governmental in nature.[216] As the tribunal in *Hamester*[217] noted

> '*for an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity*.'

144. What is more, both the entering into and the termination of the LTA were the results of an independent decision-making process on the part of the NHA that was in no way influenced by the Respondent. Following the NHA's Annual Report 2006,[218] the Ministry of Health only instructed the NHA to begin preparatory work, consisting of estimating the required drug supply and inviting offers from pharmaceutical companies.[219] There is no evidence that the invitation to the Claimant to make an offer, the negotiation process, and finally the creation of the LTA were in any way influenced by members of the Respondent's government. It has also not been proven that the purpose of the private meeting that took place in May 2008[220] between the Minister for Health, the President of Mercuria and the Director of the NHA was intended to force or otherwise influence the NHA's decision to terminate the LTA.

---

[212] Annex No. 2, ¶2.
[213] Hamester, ¶202; Jan De Nul, ¶170.
[214] PO3, ¶1590.
[215] PO3, ¶1590.
[216] UPS, ¶¶63-78.
[217] Hamester, ¶193.
[218] Facts, ¶6.
[219] Facts, ¶7.
[220] Facts, ¶17.

145. Consequently, it must be underlined that the conduct of the Respondent did not in any way, neither explicitly nor implicitly, suggest that it is or intended to be considered a party to the LTA. The NHA and the Claimant were the only parties to the LTA, as the NHA acted as an independent entity in both entering and terminating the LTA. The NHA could not assume an obligation which could be assignable to the Respondent since it is a separate institution. Thus, no obligation between the Claimant and the Respondent arises from the LTA.

## B. IN ANY EVENT, THE UMBRELLA CLAUSE ONLY PROTECTS AGAINST BREACHES OF CONTRACT RESULTING FROM THE EXERCISE OF SOVEREIGN POWER

146. The Claimant cannot argue a violation of the umbrella clause and thereby claim protection under the BIT, since the breach of the LTA was not caused by the Respondent's exercise of sovereign power. The umbrella clause should be construed in accordance with the purpose of the protection the BIT is intended to provide to investors.

147. A breach of contract by a State during ordinary commercial intercourse is not a violation of international law.[221] International law is violated when a state uses its sovereign authority, contrary to the expectations of the parties, to repudiate or violate a contract with an investor.[222] An example of such action could be the use of a state's legislative, administrative or executive authority to undo the fundamental expectations upon which the contract was entered.[223]

148. Tribunals in *Impregilo*[224] and *Bayindir*[225] confirm that in order for a breach of contract to constitute a violation of a BIT, it must result from extraordinary behaviour of a contracting party.[226] A breach of a contract with an alien by a state in ordinary commercial intercourse does not constitute a violation of international law.[227] It is only when the sovereign authority of a state is used, contrary to the expectations of the investor, to abrogate or violate a contract with an alien that the protection envisaged in international

[221] Tawil, p. 522.
[222] Tawil, p. 522.
[223] Schwebel, pp. 431-432.
[224] Impregilo, ¶260.
[225] Bayindir (Award), ¶180.
[226] Feit II, pp. 157-158.
[227] Tawil, p. 522.

arbitration comes into play.[228] This approach reserves the application of umbrella clauses to breaches of contract pursuant to, or reliant upon, governmental authority.[229]

149. In the dispute at hand, to benefit from the protection offered by the umbrella clause the Claimant would have to prove that it was the Respondent who stepped out of its role as an ordinary Contracting Party[230] and breached the LTA.

150. As discussed above, the termination of the LTA was an independent decision of the NHA, a separate and independent entity. There is no evidence of a clear and deliberate violation which would reflect a deliberate decision or policy to repudiate the LTA. No member of the Respondent's government or any of its administrative bodies issued a statement urging the NHA to terminate the LTA, nor did the government of the Respondent introduce a legislative decree aimed at rendering the LTA null and void.

151. The NHA terminated the LTA due to the Claimant's unsatisfactory performance, in accordance with clause 6 of the LTA. This clause declared the LTA valid for a period of ten years, with the possibility of termination in the event of unsatisfactory performance by the Claimant.[231] The Claimant delivered its first consignment of medicine by June 2005.[232] The NHA's 2006 Annual Report took issue with the effectiveness of Valtervite, for which the Claimant holds a patent[233] and which is a key compound of Sanior. The Annual Report stressed a sharp increase of confirmed and estimated greyscale cases.[234] Medical studies failed to provide the NHA with consistent evidence that Valtervite prevents the transmission of greyscale to healthy people.[235] Hence, the NHA's termination of the LTA was not for the mere purpose of escaping its contractual obligations. It was rather a commercial decision, based on the disputable effectiveness of the Claimant's drug and the high costs of purchase.

152. In sum, the termination of the LTA involved no exercise of sovereign power on the part of the Respondent and thus the protection stemming from the BIT is not available to the Claimant in the present case.

---

[228] Schwebel, pp. 431-432.
[229] Alvik, p. 187.
[230] Alvik, p. 188.
[231] Facts, ¶10.
[232] Facts, ¶11.
[233] Facts, ¶4.
[234] Annex No. 3, ¶¶1355-1345.
[235] PO3, ¶¶1580-1590.

## PART THREE: PRAYER FOF RELIEF

For all of the above-mentioned reasons, the Respondent respectfully requests the Tribunal to **DECLARE** that:

1. the Tribunal has no jurisdiction, as neither the Award itself nor the claim made in relation to the Award qualify as an investment;
2. in any case, the Claimant has no standing to pursue its claims before the Tribunal since the Respondent invoked the denial of benefits clause.

Should the Tribunal find that the Claimant has standing in these proceedings, the Respondent respectfully requests the Tribunal to

**DECLARE** that:

3. the Respondent complied with Art. 3(2) BIT;
4. the conduct of the Respondent's judiciary falls short of the threshold for breaching a state's international obligations;
5. the Respondent complied with Art. 3(3) BIT;

and in consequence to **DECLARE** that:

6. the Respondent is not in any way liable for the losses of the Claimant.

**ORDER**

7. the Claimant to bear all costs associated with these proceedings, including all legal and other professional fees and disbursements incurred by the Respondent.

**GRANT**

8. any such further relief as the Tribunal deems appropriate.

Respectfully submitted on 25 September 2017.

On behalf of the Respondent,

Team Pinto