RUDA

RESPONDENT MEMORIAL

FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT COMPETITION 2 NOVEMBER 2017 - 5 NOVEMBER 2017

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE PERMANENT COURT OF ARBITRATION

Atton Boro (Claimant)

v.

Republic of Mercuria (Respondent)

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I. LIST OF AUTHORITIES

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Argentina- US BIT	Argentina- United States of America BIT, entered in force 20 October 1994
ECT	Energy Charter Treaty, signed in Lisbon 1994, entered into force in 16 May 1998
BLEU-Tajikistan BIT	Belgium- Luxembourg Economic Union- Tajikistan BIT, date of signature 12 February 2009
ICSID	International Centre for Settlement of Investment Disputes Convention, entered into force 14 October 1966
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York 1958, entered into force in 7 June 1959
TRIPS	Trade Related Aspects of Intellectual Property, entered into force 1 January 1995
VCLT	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980)

III. LIST OF ABBREVIATIONS

§/§§	Paragraph(s)
AB	Atton Boro Ltd.
Art.	Article
Basheera	Kingdom of Basheera
BIT	Mercurian-Basheeran Bilateral Investment Treaty
DoB	Denial of Benefits
DoJ	Denial of Justice
ECHR	European Court of Human Rights
FDC	Fixed-dose combination
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FSP	Full Protection and Security Standard
ICJ	International Court of Justice
ILA	International Investment Agreements
IPR	Intellectual Property Rights
l.	Line
LTA	Long Term Agreement
Ltd.	Limited
Mercuria	Republic of Mercuria
MFN	Most Favourite Nation
NHA	National Health Authority
NoA	Notice of Arbitration
p./pp.	Page(s)
PCA	Permanent Court of Arbitration
PM	Philp Moris
PMA	Philip Moris Asia
PO2	Procedural Order 2
PO3	Procedural Order 3
Reef	Peoples Republic of Reef
Response	Response to the notice of Arbitration
RoP	Republic of Poland
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UC	Umbrella Clause
USD	United States Dollar
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

IV. SUMMARY OF FACTS

1. Mercuria and Basheera entered into a bilateral investment treaty on 11 January 1998.[1]
2. The newly founded National Health Authority (NHA) concluded with Atton Boro (AB) several agreements on the supply of medicine.[2] AB is a company which is held by the Atton Boro Group and is controlled by Atton Boro and Company.[3]
3. In 2003, the Minister of Health of Mercuria received the NHA´s annual report which pointed out the approaching public health crisis of greyscale. As working age individuals were mainly affected, aggressive measures were necessary. The most promising option was to change the current treatment of five to seven pills every day to the fixed-dose combination (FDC).[4]
4. The Minister of Health directed to invite pharmaceutical companies to make offers for the FDC drug at discounted rates.[5]
5. In May 2004, the NHA and AB concluded a Long-Term Agreement (LTA) for the supplement of the FDC drug Sanior[6] at a discounted rate of 25%[7], with the active substance Valtervite[8]. AB holds the patent for this compound[9].
6. A third of all greyscale patients received Sanior by the end of 2006.[10] Simultaneously, the NHA successfully[11] promoted the prevention of greyscale by offering workshops to raise awareness in order to get tested.[12] Also in 2006, the Minister of Health stated that "*the government would take every measure it deemed necessary to make ensure that patients of greyscale could avail treatment."*[13]
7. In 2007, the order for Sanior doubled by each quarter. Thus, the NHA announced a necessary additional discount of 30%. The NHA informed AB that it would be unable to continue the LTA without the reduction. [14]

[1] Facts §1.
[2] Facts §5.
[3] PO2 §3.
[4] Facts §6.
[5] Facts §7.
[6] Facts §9.
[7] Facts §10.
[8] NoA §6.
[9] Facts §4
[10] Facts §11.
[11] Facts §13.
[12] Facts §12.
[13] Facts §14.
[14] Facts §15.

8. The NHA terminated the LTA on 10 June 2008 and a Tribunal in Reef granted AB an award for the prematurely termination[15].
9. AB filed enforcement proceedings on 3 March 2008. In response, the NHA requested the court to decline the enforcement of the award, due to contrary public policy.[16] Official statistics on the duration of enforcement proceedings for foreign arbitral awards do not exist.[17]
10. The Law No. 8458/09 concerning Intellectual Property Law introduced with section 23 C the possibility of granting non-voluntary licenses on 10 October 2009.[18]
11. On 17 April 2010, a court granted a non-voluntary license to HG Pharma for manufacturing Valtervite, also fixing a royalty of 1% of the total earning to AB.[19] In January 2012, the director of the NHA disclosed that the use of the generic drug produced an annual saving of 1.2 billion USD.[20]

V. SUMMARY OF ARGUMENTS

13. The Tribunal has no jurisdiction over the claim in relation to the award. An award cannot constitute in and of itself an investment. Also, the award does not meet the criteria of Art.1 of the BIT. The overall theory says that an award can only be seen as one part of an investment, if the underlying economic operation itself is an investment. The underlying LTA is not an investment under Art. 1 of the BIT, so neither can be the award, since it arose out of the termination of the LTA.
14. Mercuria has the right to invoke Art. 2 of the BIT, the denial-of-benefits clause. The criteria *"controlled by a national of a third state"* and *"no substantial business activities"* have been met by AB. AB is controlled by Atton Boro and Company, which is an enterprise under the laws of Reef. Furthermore, the Claimant cannot prove a substantial business activity. AB´s business in Basheera restrains itself in internal tasks for its parent company.
15. Mercuria is not in breach of the FET standard as Art. 3 (2) of the BIT is not clearly intended as such. Even if the Tribunal should find the FET standard, the legitimate expectation which arises for AB is the expectation of a fair weighing of interests on both

[15] Facts §17.
[16] Facts §18.
[17] PO2 §4.
[18] Facts §20.
[19] Facts §21.
[20] Facts §22.

sides. This was done in case of the implementation of section 23 C and the grant of the license. No breach of AB's legitimate expectation can be found. Thus, there is no breach of the FET standard.

16. The Respondent did not breach Art. 3 of the BIT. Mercuria did not deny justice to AB at any time. The delay of the proceedings can be explained by Mercuria's status as a developing country and its overburdened judicial system. The threshold for a denial of justice is not reached. Mercuria did not act improper or discreditable. In connection with the delay of the enforcement proceedings, the Claimant cannot submit claims under other protection standards. On the grounds that this would result in a circumvention of the high standards required against a denial of justice.
17. The termination of the LTA by the NHA cannot amount to a breach of Art. 3 (3) of the BIT. The jurisdiction of an umbrella clause (UC) does not include terminations of the contract for unbiased reasons or on pure commercial grounds. The reasons why the NHA terminated the contract are the same as for private individuals, which is why AB does not get the benefit of elevating the breach to the BIT. Interpreting an UC with unlimited bounds raises the possibility of opening up floodgates and exposing states to unexpected and expansive international responsibilities.

VI. ARGUMENTS

A. THE TRIBUNAL HAS NO JURISDICTION OVER THE CLAIM IN RELATION TO THE AWARD

18. Mercuria submits that the arbitral award granted to the Claimant in January 2009 by a Tribunal seated in Reef[21], is not a protected investment within the meaning of the BIT.

a) An award is in and of itself not an investment

19. There have been different approaches to define an award as an investment. All of them have in common that they clearly underline the statement of the *Saipem* Tribunal: *"An award in and of itself cannot constitute an investment."*[22]
20. The broad definition of the term *investment* in Art. 1 of the BIT, does not give reason to believe that this definition includes an award. Especially, the example given by Art.1 (c)

[21] Facts §17.
[22] Saipem §113.

of the BIT, *"claims to money, and claims to performance under contract having financial value"*, cannot categorize an award as an investment. But this approach is not appropriate here and does not suffice for an analyzed interpretation of the BIT. Established by international law and Art. 31 VCLT, a treaty shall not only be interpreted by its text, but also *"in the light of its object and purpose"*.

21. If arbitral awards were qualified as investments, international investment Tribunals would become a *"supervisory-supervisory jurisdiction"* over domestic courts, enforcing commercial/arbitral awards.[23] This is not the purpose of investment treaty protection. When qualifying an investment, the meaning of the term *investment* itself *"cannot be ignored when considering the list contained"* in Art. 1 of the BIT.[24]
22. To start with an investment is an asset invested in the host state as stipulated by Art.1 of the BIT. Several approaches try to define *investment*, depending on the different subject areas.[25] Legally two tests can reliably determine whether an award can be categorized as an investment. There is the general legal test found in the Rules by *Zachary Douglas* and the Saline test developed by the Tribunal in *Salini Consturotti v. Morocco*.[26] Although both tests had been developed under the Art. 25 ICSID, they are also widely accepted by non-ICSID cases.[27]
23. The award does pass neither the *Douglas test* nor the *Salini test*, and therefore cannot be qualified as an investment within the meaning of Art. 1 of the BIT. *Douglas* requires in his *Rule 23* that an investment is committed to the economy of the host state *"by the claimant entailing the assumption risk in expectation of a commercial return"*[28]. The award does not meet this requirement, as it is not committed to the economy of the host state.
24. Furthermore, the award does not meet the four criteria required by the *Saline test*: the award is not a contribution of money or assets of economic value, it has no certain duration, no commercial risks and is not a contribution to the host state's development.
25. So, it is only consequential to follow the Tribunal in *GEA v. Ukraine* which stated that an award cannot constitute an investment.[29] The main reason is that it would be analytically

[23] Reisman/Iravani p.39.
[24] GEA §141.
[25] Dolzer/Scheuer p.60.
[26] Salini §56.
[27] Mansinghka/Srikumar p.5.
[28] Douglas p.161.
[29] GEA §161.

wrong, as an award does not involve a *"contribution to or a relevant economic activity"* within the host state.[30] The award just lacks the typical characteristic of investment.[31]

b) The problem of qualifying an award as investment

26. By granting BIT protection to an arbitral award, the Tribunal would run the risk to indirect enforce this award and circumventing the jurisdiction of the domestic courts.[32] An international investment Tribunal has no jurisdiction to enforce another arbitral award. It is not envisaged by the New York Convention.[33] The risk is *"to grand the same reliefs that were provided in the original arbitral award"*, due to this, *"the investor will have obtained indirect enforcement of the original award"*.[34]

c) The award does not meet the criteria of the *overall theory*

27. By following the *overall theory* acquired by the Tribunal of *Saipem*[35] and followed by several other Tribunals, e.g. *Chevron v. Ecuador*[36]*, ATA v. Jordan*[37]*, Frontier v. Czech Republic*[38]*, White Industries v. India*[39], the award still does not meet the criteria of an investment. According to the *overall theory,* an award can be characterized as an investment by seeing the award as a part of an overall economic operation and if the underlining economic activity itself is an award.
28. In the present case, the underlying economic activity from which the award arose is the LTA concluded between AB and the NHA in May 2004.[40] The LTA itself is not a proper investment under Art. 1 of the BIT. The LTA is a commercial contract and not an investment. A contract can only be seen as an asset if the contractual rights give rise to a proprietary interest.[41] Under the LTA, AB had a right to payment. This right lacks a proprietary foundation.

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[30] GEA §162.
[31] Mansinghka/Srikumar p.18.
[32] Mansinghka/Srikumar p.19.
[33] Paulsson p.14.
[34] Mansinghka/Srikumar p.20.
[35] Saipem §127.
[36] Chevron §192.
[37] ATA §§113-115.
[38] Frontier §231.
[39] White Industrie §4.1.25.
[40] Facts §9.
[41] White Industries §5.1.8.

29. So, the overall theory fails and the award arising out of the prematurely termination of the LTA is not an investment. Without the qualification of an investment, the Tribunal lacks jurisdiction. The Respondent submits the dismissal of all claims concerning the arbitral award.

B. ALL CLAIMS MUST BE DISMISSED UNDER THE DENIAL OF BENEFITS CLAUSE

30. The Respondent invocates Art. 2 of the BIT, the denial-of-benefit clause (DoB clause), and submits that all of AB`s claims are inadmissible. The requirements for the application of Art. 2 (1) of the BIT are fulfilled. AB is a legal entity controlled by a national of at third state and it has no substantial business activities in Basheera.

a) AB is fully controlled by a national of a third state

31. The Claimant is an entirely owned subsidiary of the Atton Boro Group.[42] Due to the fact that Art. 2 (1) of the BIT states *"...own or control…"*, it is sufficient to demonstrate that the Claimant is controlled by a national of a third state. Atton Boro Group affiliates hold the shares of AB, *"which are ultimately controlled by Atton Boro and Company"*[43]. Atton Boro and Company are constituted and incorporated under the law of the People´s Republic of Reef.[44]
32. There are different tests to determine the nationality of a legal entity. Art. 1 (2b) of the BIT states that, for the purposes of the BIT, an investor is a legal entity *"incorporated or duly constituted in accordance with the applicable laws of that Contracting Party"*. So, in the present BIT, the contracting parties decided to use the place of constitution and the place of incorporation to determine the nationality of a legal person. In *argumentum e contrario*, Atton Boro and Company which is neither constituted nor incorporated under the law of Basheera, depicts a national of a third state.

[42] Facts §4.
[43] PO2 §3.
[44] Facts §2.

b) AB has no substantial business activities in the territory of the contracting party

33. Despite the fact that AB has an office space, a bank account and some employees in Basheera[45], it has no substantial business activities there. The DoB clause prevents Mercuria from *"treaty shopping"*, a common method used by companies to obtain treaty protection.[46] Therefore the term *"substantial business activities"* is to be interpreted in the light of this purpose. Only this approach complies with the international standard, as Art. 31 VCLT stipulates that a treaty clause is to be interpreted *inter alia "in the light of its object and propose"*[47].
34. AB does not have its own business activity in Basheera. There is no economic connection between AB and Basheera, to the extent that the cash flow resulting from the investment stays between the contracting parties.[48] All investments made are fully funded by Atton Boro and Company and are thus attributed to Atton Boro and Company.[49] The Claimant´s activity is limited to internal performances for its parent companies. It provides Atton Boro Group with legal, accounting and tax services.[50] AB´s role is to support the Atton Boro Group, which is responsible for all business activities in Basheera.[51]
35. Even if the activities should be seen as an economic connection to Basheera, because AB indeed complies with its tax obligations and has a certain number of employees, those activities do not reach the threshold of a substantial business activity. Substantial is understood as *"large in size, value or importance"*.[52] AB´s activities in Basheera are none of those.
36. The Claimant also cannot plead the activities of Atton Boro Group in Basheera as his own. The shortfall of AB´s substantial business activities in Basheera, *"cannot be made good with business activities undertaken by an associated but different legal entity"* even if it holds or controls AB.[53]

[45] Facts §4.
[46] Pinto p.4.
[47] Art. 31 VCLT.
[48] Salacuse p.188.
[49] PO3 l.1570.
[50] PO2 §3.
[51] Facts §4.
[52] http://dictionary.cambridge.org/dictionary/english/substantial.
[53] Plama §169.

c) The exercise of the DoB clause has a retrospective effect

37. With its response to the notice of arbitration the Respondent exercised its right to deny the BITs benefits to the Claimant. There are several reasons why this invocation has a retrospective effect.
38. The BIT itself is silent about the timeliness for the exercise of the DoB right. If the contracting parties desired a time restriction, they would have included it in the BIT. Without an explicit wording, the Respondent has the right to invoke the DoB clause at any time, even at a time after a dispute has arisen. The Respondent may withdraw the benefits, *"when the benefits are being claimed"*[54].
39. The Tribunals in *GAI & Rurelec v. Bolivia*[55], *Ulysseas Inc. v. Ecuador*[56] and *Pac Rim Cayman v. El Salvador*[57] are in line with this reasoning. All Tribunals agreed that, if a treaty is silent regarding procedural requirements*, "the general rules applicable to the objection to the jurisdiction"* are to be used.
40. In the present case, the PCA Arbitration Rules 2012 in Art. 23 (2) rule that *"a plea that the arbitral Tribunal does not have jurisdiction shall be raised no later than in the statement of defense".* The objection of the Respondent lies within the timeframe, since it had raised the objection already with its response to the notice of arbitration.[58]
41. Consequently, the Claimant cannot refer to the FET standard and in this sense to its legitimate expectations. The BIT is not a secrete document. Before AB made his investment, he could have known that the host state can deny the benefits under the BIT at any time. It is not a surprise that Mercuria invoked its right under Art. 2 (1) of the BIT. The Tribunal in *GAI & Rurelec v. Bolivia* emphasizes in this respect:

> *the exercise cannot come as a complete surprise to a prudent investor in order to dismiss the claims of lack of predictability.*[59]

d) The Claimant bears the burden of proof

42. In principle, the Respondent provides evidence to its objections according to Art. 21 (2) of the PCA Rules. In this case, there is a reversal of the burden of proof. It is for AB *"to*

[54] GAI §376.
[55] GAI § 375-384.
[56] Ulysseas §173.
[57] Pac Rim Cayman §7.1.
[58] Response §5.
[59] GAI §383.

satisfy the Tribunal that its jurisdiction is properly invoked."[60] AB has better access to its ownership and actual business activities in Basheera than Mercuria. On this ground, the Tribunals in *Plama*[61] and *GAI*[62] acknowledged the reversal of the burden of proof.

e) Effect of the denial-of-benefits Clause

43. The Respondent denies the benefits of the BIT to the Claimant. It can do so, because all requirements subject to Art. 2 (1) of the BIT are met. In this regard, the Respondent submits that the Tribunal has no jurisdiction over the case. Under Art. 8 of the BIT, a benefit is the right to BIT arbitration. The exercise of the DoB clause has *"the effect of depriving the Tribunal of jurisdiction under the BIT."*[63]
44. On that ground, the Tribunal shall dismiss all claims due to the lack of its jurisdiction.

C. THE ENACTMENT OF LAW NO. 8458/09 AND/OR THE GRANT OF A LICENSE FOR THE CLAIMANT´S INVENTION DOES NOT AMOUNT TO A BREACH OF THE MERCURIA-BASHEERA BIT, ESPECIALLY IT DOES NOT UPHOLD THE STANDARD OF FAIR AND EQUITABLE TREATMENT

45. The insertion of section 23 C into Law No, 232/76 and the grant of the license for HG Pharma does not amount to a breach of the BIT under the FET standard. Art.3 (2) of the BIT does not act as a clause introducing the FET standard, but even if it does, the legitimate expectation of AB is not breached by actions Mercuria took.

a) Art. 3 (2) of the BIT does not formulate the FET standard

46. The FET standard is a common investor protection provision in International Investment Agreements which is only intended to protect investors against serious instances of arbitrary, discriminatory or abusive conduct by host states. The broad wording of the FET obligation carries a risk of overreaching in its application. It is often criticized to empower Tribunals to render decisions *ex aequo et bono*, overriding a strict rule of law and giving the decision on subjective merits. The Respondent invites the Tribunal to be careful when

[60] Sinclair p.380-381.
[61] Plama §82, 89, 94.
[62] GAI §370.
[63] Ulysseas Inc §172; Pac Rim Cayman LLC §4.92.

finding the interpretation of the FET standard in this case to avoid an overreaching. Further, the Respondent is unaware of any wilful wrongdoing on his behalf.

47. The OECD stressed the difference to other protective standards, as Most Favourite Nation (MFN) or National Treatment (NT), which are in their limits more defined than the FET standard.[64] It emphasized that the exact meaning can only be found by reference to the specific circumstances in the individual case.
48. Due to the loosely defined limits of the FET standard, it is often used as a fall-back clause, which is why a breach should not be found easily and a high threshold kept. If the Respondent had intended to put as much emphasis on the FET standard as on the other protective provision, it would have formulated it clearly and without any doubt.
49. An archetype example of an acknowledged and explicitly stated FET clause is Art. 3 (1) of the BLEU Tajikistan BIT that states:

> *All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.*[65]

50. However, in the present case, the contracting parties put the FET standard in an extra paragraph to give it an outstanding character and to make sure that this clause can only be understood as such a clause.
51. Art. 3 (2) of the BIT does employ the same formulation, but adds straight away another common phrasing of a protective standard, namely *"full protection and security"*. The BIT defines the protective standard set out in the first sentence in the following second one. It states that the national law may not impair or discriminate the investment in any way.
52. Referring to the example of an outstanding FET clause by the BLEU Tajikistan BIT, the FET clause in the BIT is clearly indicated by its position and formulation, which gives no reason for speculation as to what protective standard is intended. Had the contracting parties in the present case intended to promote the FET standard, they should have done so clearly and without doubt. Art.3 (2) of the BIT is only meant as a wage indication as to the treatment which is to be expected.
53. The Respondent invites the Tribunal to find Art. 3 (2) of the BIT only as an indication to the mutually bestowed treatment, but not as an enforceable standard of treatment.

[64] UNCTAD 1998.
[65] BLEU-Tajikistan BIT.

54. Even if the Tribunal should not share this finding, the Tribunal is invited to find the obligations under the FET standard of Mercuria according to the rules of interpretation laid down in the VCLT. Art. 31.1 VCLT requires that the treaty is interpreted:

> *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

55. *Judge Schwebel* found in *MTD Equity* that the ordinary meaning of *"fair"* and *"equitable"* is *"just"*, *"evenhanded"*, *"unbiased"*, *"legitimate"*[66].

b) Legitimate Expectation

56. The Tribunal in *Saluka* stated that FET standard is closely tied to the notion of legitimate expectations which is the *"dominant element of the standard."*[67] The Tribunal in *International Thunderbird Gaming v The United Mexican State* found that the concept of:

> *legitimate expectation relates (...) to a situation where a Contracting Party´s conduct creates a reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure (...) to honour those expectations could cause the investor (or investment) to suffer damages.*[68]

Furthermore, in *CME*, a breach of the FET standard was found by *"evisceration of the arrangements in reliance upon which the foreign investor to make the investment*."[69] Lastly, in *Waste Management*, it was held that the legitimate expectation and following the breach of FET are found by the *"representations made by the host State which were reasonably relied on by the claimant."*[70] In conclusion, *"there can be no doubt that stable and legal business environment is an essential element of fair and equitable treatment."*[71].

57. So, in the present case, the only legitimate expectation that AB can have, is that Mercuria conducts a fair weighing of the interests on both sides when making a decision. On this account, the justified hopes of the investor have been defeated, which must be weight and held in balance with the host state´s right to regulate in the public interest.

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[66] MTD Equity.
[67] MTD Equity §302.
[68] Thunderbird Gaming §147.
[69] CME §155.
[70] Waste Management §98.
[71] CMS §274.

58. The aspect of legitimate expectation considers that the decision to make an investment will always be based on an assessment of the current situation of domestic law and business environment. Mercuria made a representation at the time AB invested through the treaty, this is the foundation AB can derive its legitimate expectation from.
59. The Appellate Body in *India-Patents* found that the:

> *legitimate expectation of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intention of the parties.*[72]

This interpretation of the wording is to be done in accordance with Art. 31 VCLT.

60. The BIT defines a limit in Art. 3 (2) that no discriminatory or impairing measures shall be taken to obstruct the investment in anyway. Within Art. 3 (2) in the first sentence the treaty gives an indication on how to interpret these limits and whether to find a frustration of AB´s legitimate expectation or not. No discrimination or unreasonable impairment takes place when considerations are made in a fair and equitable manner, thus meaning a reasonable weighing of the interests of both sides must take place. AB´s legitimate expectation is limited so far to measures being neither discriminatory nor unreasonable impairing by fair and equitably weighing of interests.

c) Trade-related Aspects of Intellectual Property Rights

61. Through the adaption of the TRIPS Agreement, it became generally accepted that pharmaceutical products cannot be regarded as an ordinary good. Drugs play a significant social role as far as they are an integral part of the realization of a fundamental right, the right to health. The UDHR recognized medical care to be an important part of achieving a *"standard living adequate for the health"*[73] for oneself. The implementation of intellectual property rules is governed by those principles which support public health goals and access to medicine.[74] Following this, the TRIPS Agreement classified pharmaceutical goods as essential, which must be accessible.

[72] India-Patents §45.
[73] UDHR Art.25
[74] WHO Drug Information

62. The concept of accessibility is the policy which pursues to make drugs available for all individuals at an affordable price, the best possible supply must be ensured. Accordingly, it has been held in the Preamble of the TRIPS Agreement that:

> *taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce "intellectual property right do not themselves become barriers to legitimate trade*[75]

This formulation shows that intellectual property rights should adapt to the objective of not generating undue distortions in form of inaccessible medicine for the successful treatment of greyscale.

63. In conclusion, a breach of the TRIPS Agreement can be found, if the aspect of public health has been unjustifiably given more standing than the interests of AB´s, stemming from its investment. However, it cannot serve as a basis for a breach of AB´s legitimate expectation. The Respondent submits that every decision concerning the investment of AB underlies careful consideration and no unjust self-gain.
64. The Situation of AB does not defer to other claimants who asked Tribunals to find a legitimate expectation that host states comply with their international treaty obligations.
65. In *Eli Lilly*, proceedings followed the invalidation of pharmaceutical patents for its drugs by Canadian courts, because *Eli Lilly* did not fulfil the *"promise doctrine"*. A patent holder in Canada must be able to show that the promised utility of the patent is reached, otherwise the patent can be revoked. *Eli Lilly* claimed that the invocation of this *"promise doctrine"* is so strict that Canada violates its international IPR obligations under NAFTA and the TRIPS Agreement.
66. Also*, PM* and *PMA*, tried to invoke compliance with international obligation.
67. *Philip Morris* alleged that their trademark was substantially damaged. The value of the companies´ investments in Uruguay and deprived them of the ability to use their brands and trademarks. The Tribunal found this to be an insufficient reasoning to allow the obligation of the host state to comply with the international treaties.
68. AB also claims that it had a loss of 1 billion dollar, but on the contrary, Mercuria does not prevent AB from producing Sanior and distributing it. In *Philip Morris Asia* proceedings commenced after the implementation of the Plain Packaging Bill. Which aimed at reducing attractiveness and appeal tobacco product to consumers, increasing the notability and effectiveness of mandated health warnings and reducing the ability of the tobacco

[75] Preamble TRIPS.

products and its packaging to mislead consumers about the harms of smoking. *PMA* argued that plain packaging turns tobacco products into commodity and prevents it from distinguishing its products from competitor brands, and thereby substantially diminishes the value of *PMA´*s investments in Australia. Though the Bill was passed justified by public health concerns, the Tribunal did not find that it is a legitimate expectation of the investor that Australia complies with its international obligations.

69. So, Mercuria had to pass section 23 C to be able to provide sufficient and effective drugs for the with greyscale infected population.
70. Finally, it must be reminded that if an obligation for host states exist that they comply with every single international treaty, this would open floodgates of complaints.
71. The Tribunal in this case should not find this obligation on part of Mercuria as the consequence is that monetary interests of private investors weigh more than the protection of public health.

d) Enactment of Law No. 8458/09 does not amount to a breach of the FET standard

72. As Art. 30 of the TRIPS Agreement is not part of the legitimate expectation, AB only has the right to a fair and reasonable weighing of both interests. Mercuria did take the interests of AB into considerations in a fair and reasonable manner when implementing section 23 C.
73. The right to legislate may not be impaired by monetary interests of a company. By exercising this right, Mercuria did not deprive AB of any rights. The inclusion of section 23 C the national intellectual property law was not done unnecessarily sudden.
74. The Tribunal in *PSEG* found as one reason for the Respondent to be in breach of FET that the "continually"[76] changing legislature resembles a "rollercoaster"[77] which does not provide a stable legal framework for the investor. Already in *CMS* it was held that:

> *there can be no doubt that a stable legal and business environment is as essential element of fair and equitable treatment.*[78]

75. Mercuria acknowledges the need for stability and has not done anything to contradict it. So far, it simply changed a law once which affected AB. This is in no way comparable with a rollercoaster ride.

[76] PSEG §250.
[77] ibid.
[78] CMS §274.

76. Additionally, the Tribunal of *Saluka* held that no investor:

> *may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.*[79]

77. This was the same finding in *AES Summit Generation*:

> *A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.*[80]

78. As recognised above in Tribunals before, it is Mercuria´s legitimate regulatory interest to amend legislature and implement new laws. At the same time, Mercuria must ensure that this interest respects AB´s freedom from coercion or harassment. It achieves this goal if the legitimate expectation of AB is satisfied and public policy decisions are not undertaken unreasonably, meaning "*unrelated to some rational policy*[81]*"*, or discriminatory, meaning "*based on unjustifiable decision*[82]*"*. The underlying rational policy for Mercuria is the concern about the public health crisis.
79. If Mercuria had stayed within the LTA with AB and had not decided to pass section 23 C to enable non-voluntary licences, it would only be able to provide a free treatment to 100.000 of the poorest[83]. The remaining infected population would have been forced to provide the annual USD 10.000 by themselves[84]. This consequence would not be in line with Mercuria´s policy goal to "secure access to healthcare for all".[85]
80. This statement was announced to the public on 19 January 2004, the invitation to AB to enter the LTA only in May 2004[86]. Since then AB should have been aware of the importance to Mercuria of the policy goal of supplying free healthcare.
81. Furthermore, the protection of the intellectual property in Mercuria retained a high standard before section 23 C, the statute did not provide an option to grant a non-voluntary licence.[87] Mercuria as a signatory state to the TRIPS Agreement[88] only promised the minimum standard formulated in the agreement, including the possibility of granting

[79] Saluka §301, 305.
[80] AES Summit Generation §9.3.29.
[81] Saluka §309.
[82] Saluka §309.
[83] NHA Annual Report l.1364.
[84] NHA Annual Report l.1354, l.1365.
[85] ANNEX No.2, 4.
[86] ANNEX No.2, date in right hand corner.
[87] PO3 l. 1578.
[88] PO2 l. 1497.

compulsory licenses. Until 2009, when the amendment to the intellectual property law No. 232/76 passed, Mercuria has upheld a higher standard of protection. This standard does not preclude Mercuria from lowering the standard if necessary. The decision lies within its legitimate regulatory interest. Thus, the decision to change the law in order to be able to grant non-voluntary licenses is justified, because this possibility has always been present.

82. In conclusion, Mercuria enacted section 23 C based on its legitimate expectation to have the regulatory authority. The government did not overstep its sovereign right to legislate. There is no excess use of power on Mercuria´s side due to the underlying public policy of free healthcare for the population and the justification that the option of non-voluntary licenses was always present in the TRIPS Agreement.

e) The grant of the license to HG Pharma does not amount to a breach of the FET standard

83. Furthermore, Mercuria granted the license for Valtervite to HG Pharma taking the interests of AB sufficiently into consideration.
84. The Respondent points out that the license granted does not mean that AB will never again supply Sanior and get the chance to reach the earnings, which are necessary to cover the additionally expenses.
85. The licence granted is limited to as long as greyscale is posing a threat to the public health.[89] After successfully dealing with the crisis, the license will be revoked and AB may be reinstated as the main supplier of Sanior. This is also the requirement of Art. 31 c) of the TRIPS Agreement, that a compulsory license may only be given out for the duration of time which is defined by the underlying reason to grant it.
86. As already stated above, access to free healthcare is the underlying public policy goal for Mercuria[90]. In order to achieve this goal, the statement by the Minister of Health who pointed out that *"a stable, progressive IPR regime is essential"*[91]. Mercuria´s implementation of section 23 C does not make the legal framework unstable as already argued above. Also, does retaining the option to grant non-voluntary licenses not make the IPR regime intermittent, reserving this option gives Mercuria the needed flexibility to react to unexpected situations in the future appropriately. AB cannot base any expectation on the statement by the Minister of Health as no frustration took place.

[89] Facts §21.
[90] ANNEX No.2, 4.
[91] ibid.

87. It has been already established that the change by inserting section 23 C does not amount to a continuingly change, which might put a state into the position of breaching the FET standard. Thus, Mercuria offered a stable intellectual property rights (IPR) regime.
88. Also, Mercuria still keeps up to its promise that it promotes a progressive IPR regime. The non-voluntary license was not granted due to superficial reasons, but due to the fact that a satisfactory solution had not been so far found. The implementation of non-voluntary license retains Mercuria a necessary degree of flexibility which was necessary to combat the threat posed by greyscale.
89. Furthermore, Mercuria terminated the LTA in June 2008[92], giving AB over a year time to reconsider posting a better offer because section 23 C was implemented on 10 October 2009[93]. AB did not make an offer of this sort from which it can be assumed that the company is simply unable to provide the FDC drug at the price required by Mercuria. Mercuria was unable to provide treatment for a disease which forces the infected to depend on lifelong treatment, meaning a lifelong dependency on healthcare provided by the state. Additionally, the vulnerable population consists mainly of working age individuals[94]. This is the demographic group also responsible for supplying the taxes and thus keeping the social security system, of which one aspect is free healthcare, intact. If this group is unable to conduct wage earning work, the social security system based on taxes will crumble, which may lead to Mercuria taking a step back with their economic development and growing prosperity. Thus, the Respondent had to take the step of granting HG Pharma the license to produce Sanior to control the spreading of greyscale.
90. In conclusion, a fair weighing of both interests took place. Mercuria considered that AB will be temporarily deprived of its patent, but only for the time being of the ongoing crisis. Lastly, Mercuria had to take steps to combat the crisis effectively and on a ground covering base, otherwise negative consequences would have been immense.
91. Mercuria is not in breach of the FET standard as Art. 3(2) of the BIT is clearly not intended as such. Even if, the Tribunal should find the FET standard to be present, the legitimate expectation which arises for AB is the expectation of a fair weighing of interests on both sides. This is the case for the implementation of section 23 C and the grant of the license. A breach of AB´s legitimate expectation cannot be found. Thus, there is no breach of the FET standard.

[92] Facts §17.
[93] ANNEX No.4, date in top right-hand corner.
[94] ANNEX No.3 l.1330.

D. THE RESPONDENT IS NOT LIABLE UNDER ART. 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS

92. AB claims that the delay of the enforcement proceedings constitutes a breach of Art.3 of the BIT. Under the FET and FPS standard, the Claimant argues a denial of justice. This is not the case. The Respondent treated the Claimant fair and equitably and did not deny justice at any time. A denial of justice can only be presumed if the judiciary of Mercuria acted contrarily to a fair judicial process. A fair judicial process includes the access to justice, due process and the right of an appropriate decision.[95] In this case the Claimant accuses the Respondent of the disregard of due process, precisely of an undue delay.

a) The delay is not unreasonable

93. According to international law, a proceeding should not be retarded. At the same time, there is no appointed timeframe in which a proceeding must be resolved.[96] *"International law has no strict standards to assess whether court delays are a denial of justice."*[97] Though a unitary rule is missing, existing case law lays down clear conditions under which a delay becomes a denial of justice. The Tribunal in *Jan de Nul v. Egypt* declined a denial of justice after ten years of proceedings, because of the difficulty and large extent of the case.[98] In *Chevron v. Ecuador* the Tribunal decided that a delay of 14 years did not reach a denial of justice[99] and in *White Industries v. India* a delay of nine years was not seen as a denial of justice.[100] In those both cases the Tribunal supports its decision with the host states status as a developing country. Furthermore, all these cases commonly confirm that the status of a host state can be an appropriate reason for a delay. So, a developing country *"must be held to different standards"*[101] compared to an industrial country. If the host state is a developing country, a delay will rather be *"certainly unsatisfactory in terms of efficient administration of justice"*[102] than a denial of justice.

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[95] Azinian §102-103.
[96] White Industries §10.4.9.
[97] Toto §155.
[98] Jan de Nul, §204.
[99] Chevron §250.
[100] White Industries §5.2.19.
[101] White Industries §5.2.18.
[102] Jan de Nul §204, White Industries §11.4.5.

94. Mercuria is a developing country, with a population of 62 million people.[103] Its judiciary is overburdened.[104] Under this circumstance, it is hardly possible to speed up an extensive international proceeding. This justifies the duration of eight years. These facts foreclose a comparison with the case *Pey Casado v. Chile*, in which a denial of justice was confirmed for the delay of seven years.[105] First, Chile is an emerging country[106] and second, its population of 18 million[107] is almost 3.5 times lower than of Mercuria. An argument based on this case would undermine the status of Mercuria.

b) The delay does not reach the threshold of a denial of justice

95. There is a high standard required to constitute a denial of justice. The reason for such a high standard is, first, that the international investment arbitration is not supposed to interfere with the judicial sovereignty of the host state[108] and second, that the Tribunal is not supposed to act as a court of appeal or as an international court with supervisory jurisdiction over contracting states' obligations under the New York Convention.[109]
96. Different Tribunals have attempted to outline the threshold for a denial of justice. In *Mondev v USA,* it was held that the threshold is reached if the judiciary acted "*improper and discreditable"* and *„the shock or surprise occasioned to an impartial Tribunal leads, on reflection, to justified concerns as to the judicial propriety "*[110]. The Tribunal in *Chevron v. Ecuador* adds to the *Mondev test*:

> *"the test for establishing a denial of justice sets ... a high threshold…, it … requires the demonstration of a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."*[111]

97. The delay was not a surprise. AB could have been aware of the possibility that arbitral enforcement proceeding in Mercuria takes a long time. There is no evidence that the High Court of Mercuria acted improper or discreditable. In

[103] Response §9.
[104] Response §9.
[105] Pay Casado §674.
[106] IMF DataMapper, Real GDP Growth.
[107] http://www.heritage.org/index/country/chile, last visit 18.09.17.
[108] Guglya §5.01.
[109] Annacker p.6.
[110] Mondev §127.
[111] Chevron §244.

conclusion, the Claimant has to *"take a host state (including its court system) as it finds it."*[112]

c) The Claimant has an increased burden of proof

98. Besides the threshold of a denial of justice, a high threshold for the burden of proof exists that is shared by the Claimant. To avoid the interference with the sovereignty of Mercuria, the Claimant is obliged to bring adequate evidence. These facts need not only proof a delay, but also the arbitrary and improper actions of the jurisdiction.[113] AB falls short within his rational.

d) The Respondent is also not liable under other BIT standards in relation to the enforcement proceedings

99. To avoid the high requirements proving a denial of justice, investors use to invoke the breach of other BIT standards. They try to obtain redress for judicial misconduct without having to proof the high threshold of a denial of justice.[114] They make claims under other protection standards of the BIT, *e.g.* the FET standard or effective means standard.[115] Naming the claim differently has the goal to circumvent the requirements to proof a denial of justice. In this case, the Respondent submits that no any further overlapping standard cannot be claimed by AB.

100. The FET standard includes the special case against denial of justice. Furthermore, it is important to note that the BIT on hand does not have an *"effective means clause*". So, the contracting parties did not anticipate a lower standard for judicial wrongs and a claim against denial of justice should be treated as one, with all its high standards and requirements.

[112] White Industries §10.3.15.
[113] Winkler p.21.
[114] Sattorova p.241.
[115] Sattorova p.241.

E. THE TERMINATION OF THE LONG-TERM AGREEMENT BY THE RESPONDENT´S NATIONAL HEALTH AUTHORITY DOES NOT AMOUNT TO A VIOLATION OF ART. 3 (3) OF THE BIT

101. The termination of the Long-Term Agreement by the Respondent´s National Health Authority does not amount to a violation of Art.3(3) of the BIT, its jurisdiction does not include the LTA.

a) The significance of an Umbrella Clause

102. A proper formulated umbrella clause imposes a requirement on each contracting state to observe all investment obligations entered with investors from the other contracting state. The recent cases *SGS v Pakistan* and *SGS v Philippines* dealt with the question of whether the UC applies to obligations arising under otherwise independent investment contracts between the investor and the host State.

103. The significance of such an application is that the international arbitration Tribunal constituted under the BIT would thereby have jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause. The effect is that the investor can now seek redress for the breach of investment contract to which the investor and a state are contracting parties through international arbitration under the BIT.

b) The effect of Art. 3 (3) of the BIT

104. Art. 3 (3) of the BIT does not umbrella in the termination of the LTA by the NHA, because the termination was on ground of purely commercial reasons and otherwise it leads to a doubled penalization of the NHA´s actions.

105. In *CMS v Argentina,* the Tribunal upheld the umbrella clause claim, which was later annulled by the ad hoc committee but not for criticizing the Tribunal´s conclusion as to the substantive effect of the clause, but that they overextended the scope of the provision. The disputed clause stated that:

> *Each Party shall observe any obligation it may have entered into with regard to investments.*[116]

[116] Art. II (2) (c) Argentina- US BIT.

106. The Tribunal ruled, on the basis of the conflicting license terms in *CMS* and in the light of the applicable regulations, that Argentina had entered into commitments with regard to the claimant that it would not freeze the tariff regime for gas distribution, or apply price controls, and would not unilaterally alter the basic rules governing the operation of the license.[117] The Tribunal added that these were commitments of a public and not merely commercial nature, and that they had been violated through the exercise of Argentina´s sovereign power. It found that Argentina was in breach of the UC *"to the extent that legal and contractual obligations pertinent to the investment have been breached*"[118].

107. The breach of contract only amounts to a violation of the BIT, if the commitments are of a public nature, not commercial. Mercuria did not enter with the LTA any public commitments like Argentina. It did not make any promises as to the stability of the intellectual property law regime. The content of their contract was of a pure commercial nature, agreeing on to *"periodically placing purchase orders"*[119] at a *"25% discounted rate"*[120]. Contrarily, the obligations Argentina entered concerned specific regulatory stability amongst other things, which they did not keep up.

108. The next decision to rule on an umbrella clause claim, *Eureko v Poland*, contained a more elaborate exposition on the scope and effect of an umbrella clause. The decision concerned Art. 3.5 of the Netherlands-Poland BIT, which provides that each Contracting Party:

> *Shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.*

109. The central finding was the determination that Poland had, through its state treasury, entered into a binding commitment with the claimant that it would hold an initial public offering of shares in the state insurance company, in the course of which the claimant – which already owned 30 per cent of the shares– would be entitled to acquire a majority stake.[121] The government and state treasury, however, changed their strategy, with the Council of Ministers resolving that *"it was essential for the State Treasury to maintain*

[117] CMS Decision on Annulment §87.
[118] CMS §303.
[119] Facts §10.
[120] Facts §10.
[121] Eureko §157.

control". By a majority, the Tribunal found that this reversal was *"politically motivated"* and *"discriminatory*", in breach of Art. 3.5 of the BIT:[122]

> *This change in the RoP's privatization strategy, manifested principally by its decision not to relinquish to "foreign hands" the control of the Polish state in PZU, was only confirmed officially by the Council of Ministers in April 2002"*[123]

The policy change was only pursued to keep the insurance company *"under majority Polish control and to exclude foreign control"*[124].

110. Applying this aspect to the claim of AB, the NHA, on the contrary, only decided to terminate the LTA due to financial reasons. Up to that AB was unable to provide the reduction Mercuria needed to provide free healthcare to greyscale patients. The nationality of AB was of no interest to the NHA neither when concluding the LTA nor when terminating it. AB is in no need of finding its claim elevated into a breach of the treaty for there is no indication of bias or discrimination.

111. Furthermore, the dissenting arbitrator in *Eureko* rejected that Poland had entered into a binding commitment to which the UC applies. He criticised this aspect of the award, in particular, for insufficient treatment of the *"basic rules applicable under Polish law*". The arbitrator described it as an exercise in interpretation *"sans loi"*[125]. He disputed the substantive effect attributed to the UC by majority[126], believing it to be:

> *A potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatisations of State-owned companies.*[127]

112. The Respondent entirely agrees with this opinion. AB already invoked once proceedings against the NHA under the LTA. In January 2009, the Tribunal in Reef passed an award in favour of AB, for the same reason AB now tries to claim a breach under Art. 3 (3) of the BIT.

113. Allowing Art. 3 (3) of the BIT to cover with its jurisdiction, the termination of the LTA by the NHA would lead in the end to a doubled sanction. Furthermore, if the Court

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[122] Eureko §§191, 208, 219, 242, 250.
[123] Eureko §208.
[124] Eureko §242.
[125] Eureko, Dissenting Opinion §5.
[126] Ibid §§4, 11.
[127] Ibid §11.

declines the enforcement of the award granted by the former Tribunal, this Tribunal should follow this decision for neither the facts nor the parties changed.

114. Granting this second award or chance for AB leads to a preferential treatment for the investor and leaves the host state with instability regarding their legal obligations. This instability will reduce the willingness of host states to open up towards foreign investors and leads to a stricter legal regime governing investments and intellectual property rights.

115. In conclusion, the termination of the LTA by the NHA cannot amount to a breach of Art. 3 (3) of the BIT. The jurisdiction of an UC does not include terminations of the contract for unbiased reasons or on pure commercial grounds. The reasons why the NHA terminated the contract are the same as for private individuals, which is why AB should not get the benefit of elevating the breach to the BIT. Interpreting an UC with unlimited extend, raises the possibility of opening up floodgates and exposing States to unexpected and expansive international responsibility. The Tribunal in *SGS v Pakistan* thought that

> *while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion.*[128]

116. We invite the Tribunal to agree with the Respondent´s findings and see the danger of defining an UC with unlimited extend.

VII. REQUEST FOR RELIEF

Mercuria respectfully requests the Tribunal to find that:

(1) It lacks jurisdiction over any claims in relation to enforcement of the award
(2) That AB cannot avail itself of the benefits of the BIT by virtue of application of Art.2 BIT
(3) That Art. 3(2) of the BIT does not formulate the FET standard and that even if it does that the Respondent is not in breach of it, and
(4) The jurisdiction of the umbrella clause in Art. 3(3) of the BIT does not include the termination of the LTA by the NHA.

[128] SGS §166.