PERMANENT COURT OF ARBITRATION

ATTON BORO LIMITED

Claimant

v.

THE REPUBLIC OF MERCURIA

Respondent

PCA CASE NO. 2016-74

MEMORIAL FOR RESPONDENT

September 25, 2017

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STATEMENT OF FACTS

1. In January 1998, the Republic of Mercuria ("Mercuria") and the Kingdom of Basheera ("Basheera") signed an "Agreement for the Promotion and Reciprocal Protection of Investments" (the "BIT").[1] Mercuria, a developing nation, has suffered from an outbreak of the greyscale disease for more than fifteen years.[2]

2. Greyscale is a chronic, incurable disease that surfaced in the early 1980's with symptoms including flaking skin, stiffening muscles, swollen limbs, and severe joint pain.[3] From 2003 to 2006 alone, the number of confirmed cases in Mercuria increased from 20,485 to 266,298.[4] With an estimation that by the end of 2006, 578,390 people would be affected by greyscale, it became clear to Mercuria that it was in the midst of a public health crisis.[5] A 2003 annual report sent from Mercuria's National Health Authority (the "NHA") to the Ministry of Health (the "Ministry") emphasized that the greyscale disease was an "imminent public health concern."[6] The report warned "aggressive measures" were necessary to avert a nationwide crisis.[7] Accordingly, the Ministry directed the NHA to collect bids from pharmaceutical companies to supply the modern "fixed-dose combinations" ("FDC") greyscale treatment drug.[8]

3. The NHA entered into a Long-Term Agreement ("LTA") with the company Atton Boro Limited ("Atton Boro") in May 2004.[9] The LTA, which provided that the NHA would purchase the FDC drug Sanior periodically at a twenty-five percent discount and detailed

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[1] Statement of Uncontested Facts ("Uncontested Facts") ¶ 1, R. at 28.

[2] *See* NHA Annual Report, Annex No. 3, R. at 41.

[3] *Id.*

[4] *Id.*, R. at 42.

[5] *Id.*

[6] Uncontested Facts ¶¶ 5-6, R. at 28.

[7] *Id.* ¶ 5, R. at 28.

[8] *Id.* ¶¶ 6-7, R. at 29.

[9] *Id.* ¶ 9, R. at 29.

a minimum guaranteed annual order value, specified that it was valid "for a period of ten years effectives from commencement date subject to the Supplier's satisfactory performance."[10] Atton Boro, incorporated in Basheera, is a wholly owned subsidiary of Atton Boro Group, a pharmaceutical company organized under the laws of the People's Republic of Reef ("Reef").[11] In 1997, Atton Boro Group secured a patent for Valtervite, a component used in greyscale treatments, in Reef.[12] Atton Boro Group obtained a Mercurian patent for Valtervite in February 1998.[13]

4. By the end of 2006, approximately a third of greyscale patients were being treated with Sanior, and a 2006 report estimated a thirty-three percent increase in adult testing rates.[14] Despite these advances, data showed that greyscale incidence had outpaced all estimates, and the Sanior order value doubled during each quarter in 2007.[15] The Mercurian Minister for Health promised that the government would "take every measure" to ensure greyscale patients could receive treatment.[16] Facing a need to treat almost twice the greyscale patients previously estimated, the NHA was forced to renegotiate the price for Sanior in early 2008.[17] Atton Boro offered a further discount of ten percent, but the NHA requested a forty percent discount, citing the satisfactory performance requirement in the LTA.[18]

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[10] *Id*. ¶ 10, R. at 29.

[11] *Id*. ¶¶ 2, 4, R. at 28.

[12] *Id*. ¶ 3, R. at 28.

[13] *Id*.

[14] *Id*. ¶¶ 11-13, R. at 29.

[15] *Id*. ¶¶ 13-15, R. at 29.

[16] *Id*. ¶ 14, R. at 29.

[17] *Id*. ¶ 15, R. at 30.

[18] *Id*.

5. Atton Boro was unable to satisfactorily provide the required Sanior supply, so the NHA was obliged to terminate the LTA on 10 June 2008.[19] Atton Boro initiated arbitration against the NHA under the LTA, and in January 2009, a tribunal seated in Reef granted Atton Boro an award (the "Award") of USD 40,000,000.[20] Still facing a greyscale crisis, in October 2009, the President of Mercuria announced "National Legislation for its Intellectual Property Law," or Law No. 8458/09, which enabled use of patents without the owner's authorization.[21] This allowed HG-Pharma, a Mercurian generic drug manufacturer, to apply for and receive a license in April 2010 for the manufacture of Valtervite until the greyscale threat had passed.[22] Atton Boro was compensated by a royalty of one percent of HG-Pharma's total earnings from the sale.[23] Because of over USD 1.2 billion in annual savings, Mercuria was able to send greyscale medicines to aid neighboring countries in their fight against the disease.[24]

6. Atton Boro was not pleased that the vastly improved availability of greyscale medicines meant a loss of market share and declining profits.[25] The head of Atton Boro's Mercurian division announced in February 2015 that it was cutting off Sanior supplies to Mercuria, though Mercurians were still invited "to benefit from its range of other health and lifestyle products."[26]

7. As to Atton Boro's award procured in Reef, on 3 March 2009, Atton Boro filed an application for enforcement of the Award in the High Court of Mercuria.[27] On 16 March

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[19] *Id*. ¶ 17, R. at 30.

[20] *Id*.; Notice of Arbitration ¶ 9, R. at 4.

[21] *Id*. ¶ 20, R. at 30.

[22] *Id*. ¶ 21, R. at 30.

[23] *Id*. ¶ 21, R. at 30.

[24] *Id*. ¶¶ 22-23, R. at 30.

[25] *Id*. ¶ 24, R. at 31.

[26] *Id*. ¶ 25, R. at 31.

[27] Notice of Arbitration at Exhibit 1, ¶ 1, R. at 7.

2009, less than two weeks after Atton Boro filed its application, the High Court heard Atton Boro's application for enforcement and ordered that NHA be given notice.[28] From May 2009 through April 2012, the matter slowly continued to progress through the High Court.[29] The court granted NHA extensions to file its written submissions, and the court rescheduled hearings on three occasions during this time period because the judge was on leave or other cases had lengthy arguments.[30]

8. On 30 April 2012, Atton Boro argued to the High Court that in light of recent Supreme Court decisions, the Commercial Bench of the Court had exclusive jurisdiction to hear its case.[31] The High Court agreed and transferred Atton Boro's application for enforcement to a Commercial Bench of the Court on 14 June 2012.[32] But on 2 December 2013, the Supreme Court of Mercuria clarified that the Commercial Benches of the Court do not have jurisdiction to entertain enforcement proceedings of arbitral awards, and on 2 January 2014, Atton Boro's application was transferred back to a regular bench of the High Court.[33]

9. As proceedings continued, NHA was absent on several occasions.[34] In 2015, the court limited NHA's extensions and said no further extensions would be granted.[35] Moreover, when Atton Boro protested the NHA's absences or extension requests, the court took note

[28] *Id.* at ¶ 2, R. at 7.

[29] *Id.* at ¶¶ 3-17, R. at 7-8.

[30] *See id.*

[31] *Id.* at ¶ 17, R. at 8-9.

[32] *Id.* at ¶ 18, R. at 9.

[33] *Id.* at ¶¶ 28-29, R. at 10.

[34] *See id.* at ¶¶ 1-44, R. at 7-12.

[35] *Id.* at ¶ 37, R. at 11.

of its complaints.[36] The court also acquiesced to Atton Boro's request to hold an additional hearing for it to conclude its oral submissions.[37]

10. As of 30 October 2016, Atton Boro's application to enforce the Reef-procured Award in the High Court of Mercuria remained unresolved, although attempts to reach an amicable settlement occurred as recently as 30 September 2016.[38] Atton Boro filed a notice of Arbitration, pursuant to Article 3 of the PCA Arbitration Rules 2012, [39] against the Republic of Mercuria on 7 November 2016.[40] Atton Boro now attempts to invoke the BIT by claiming that the Award is an "investment" within the meaning of that agreement.[41]

[36] *See, e.g.*, *id.* at ¶ 13, R. at 8.

[37] *Id.* at ¶ 25, R. at 9.

[38] *Id.* at ¶¶ 43-44, R. at 12.

[39] Notice of Arbitration ¶ 2, R. at 3.

[40] *Id.*, R. at 2.

[41] *Id*. ¶¶ 3-4, 14, R. at 2-5.

ARGUMENT

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD.

11. Atton Boro initiated this action by submitting a Notice of Arbitration under Article 8 of the BIT.[42] By invoking the BIT, Atton Boro hopes to hold Mercuria liable for the enforcement proceedings of the Award granted by a separate tribunal seated in Reef.[43] Yet, Atton Boro fails to recognize that a separate arbitral award is not an "investment" as defined by the BIT. Thus, this Tribunal lacks jurisdiction to decide Atton Boro's claims in regard to the enforcement of the Award.

A. This Award Cannot Fit Under The Definition Of An Investment Under The BIT.

12. Atton Boro submitted this arbitration in accordance with the ICSID Convention.[44] Section 25 of the ICSID Convention states that jurisdiction shall extend to any legal dispute arising directly out of an "investment."[45] Since the ICSID Convention does not provide a definition of an "investment," it must be interpreted through the language of the BIT.[46] Article 1 of the BIT defines an "investment" in relevant part as: an asset "held or invested either directly, or indirectly through an investor . . . [including] claims to money, and claims to performance under contract having a financial value."[47] Atton Boro will likely rely on this language to argue that its Award, as a "claim to money," should be considered an investment as defined by the BIT. Yet, multiple tribunals have articulated the common-sense understanding that the word "investment" has an inherent meaning in and of itself that cannot be ignored within the context of the BIT, thereby resisting the literal application that Atton Boro will likely contend for.

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[42] *Id.* ¶ 8, R. at 3.

[43] *See id.* ¶ 14, R. at 5.

[44] *Id.* ¶ 3, R. at 3.

[45] ICSID Convention, art. 25(1).

[46] *See id.*

[47] BIT, art. 2, R. at 32.

13. For example, in *Romak S.A. v. Uzbekistan*, the tribunal noted that the dictionary definition of an "investment" is "the commitment of funds or other assets with the purpose to receive a profit, or 'return,' from that commitment of capital."[48] The tribunal also noted that the BIT's stated purpose was to foster economic cooperation and prosperity to both participating States.[49] Combining the inherent definition of "investments" along with the context of the contractual language, the tribunal concluded that the term "investment" has an inherent meaning "entailing a contribution that extends over a certain period of time and that involves some risk."[50] Analogous to *Romak*, the BIT in the present case was specifically enacted to promote greater economic cooperation and development between the Contracting Parties.[51]

14. Applying the same definition of an "investment" to the present case, the Award cannot be an investment because it does not entail a contribution to the economic development of Mercuria that extends over a certain period of time. As the *Romak* tribunal stated, finding jurisdiction over the Award simply because the BIT includes "claims to money" as an example of an investment would produce "a result which is manifestly absurd or unreasonable" because it "would create, *de facto*, a new instance of review of State court decisions concerning the enforcement of arbitral awards."[52] Any award "rendered in favor of a national of a Contracting Party (even one rendered in a purely commercial arbitration procedure) would be considered a 'claim to money.'"[53] Thus, the Award does not fit under the definition of an investment for the purposes of the BIT.[54]

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[48] *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, ¶ 177 (Nov. 26, 2009), https://pcacases.com/web/sendAttach/491.

[49] *Id.* at ¶ 188.

[50] *Id.* at ¶ 207.

[51] BIT, Preamble, R. at 32.

[52] *Romak*, PCA Case No. AA280 at ¶¶ 184, 186.

[53] *Id.*

[54] *See Petrobart Ltd. v. Kirgyz Republic*, SCC Case No. 126/2003, Arbitral Award (Mar. 29, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0628.pdf ("In the Arbitral Tribunal's view, a correct legal analysis leads to the conclusion that the Contract and the judgment are not in themselves assets but merely

B. The Award And The LTA Must Be Analytically Distinct.

15. Atton Boro may attempt to group the Award with the LTA to argue that the Award was a part of the operation that constituted an investment in Mercuria. Some tribunals have used this approach to find that an arbitral award should be considered as a part of "the entire operation" of the investment.[55] However, this broad approach to the definition of an investment has been heavily criticized.[56] As Professor Juillard stated,

> The interweaving between ICSID jurisdiction and BITs has become so close that one day, by the interplay of the inclusion of ICSID clauses in these treaties . . . the Centre will be in a position to examine legal disputes relating to foreign asset status, which do not present any link, of any sort, with an investment.[57]

This trend has led to a fear that there will continue to be an "extension of ICSID jurisdiction to economic operations without any connection to a 'real' investment."[58] Exercising jurisdiction over the Award in the present case simply because it is distantly related to the entire operation would be an example of such an improper extension of jurisdiction.

16. The Award and the LTA in the present case must remain analytically distinct. Article 25 of the ICSID Convention states that the jurisdiction of the tribunal "shall extend to any *legal dispute* arising *directly* out of an investment."[59] Here, the investment was the LTA between Atton Boro and Mercuria in which Atton Boro agreed to sell Sanior for a certain

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legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered as assets.").

[55] S*aipem v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 114 (Mar. 21, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0733.pdf.

[56] *See* Jean-Pierre Harb, *Definition of Investments Protected by International Treaties: An On-Going Hot Debate*, MEALEY'S INT'L ARBITRATION REPORT, 1, 2 (Aug. 2011), http://www.jonesday.com/files/Publication/c24e6d62-3269-4b32-b93d-992f1d5e2e77/Presentation/PublicationAttachment/b4526438-d73b-4bd4-a780-8003fe19feaf/689472.pdf.

[57] *Id.* (citing *The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?*, J. INT'L. ARB. 124 (2005)).

[58] *Id.* (internal citation omitted).

[59] ICSID Convention, art. 25(1).

amount of time. There is no legal dispute that is arising directly out of this investment. Rather, the legal dispute pertains to the enforcement of the Award, which arises only indirectly out of the LTA. Even in *Saipem v. Bangladesh*, the case in which the tribunal introduced the "entire operation" approach, the tribunal conceded that "the rights arising out of the ICC Award arise only *indirectly* from the investment."[60] The tribunal went on to say, "Indeed, the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept."[61] Thus, this Tribunal cannot assume jurisdiction over the Award without breaching Article 25 of the ICSID Convention because the Award arises only indirectly out of the investment.

17. In *GEA v. Ukraine*, the tribunal similarly held that the underlying contract and the arbitral award are two "analytically distinct" assets and that arbitral awards in and of themselves cannot constitute an "investment."[62] The tribunal went on to state that the arbitral award is simply "a legal instrument, which provides for the disposition of rights and obligations arising out of the contract" as opposed to an investment to a contracting party.[63] In the same way, the Award in the present case must remain analytically distinct from the LTA. Because the Award itself involves "no contribution to, or relevant economic activity within [Mercuria]," it is not an investment. Thus, this Tribunal does not have jurisdiction to hear any legal disputes arising from Mercuria's treatment of the Award.

18. The result is the same under the popular *Salini* test, which describes an investment as involving a "certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment[,] and significance for the host State's development."[64] Here,

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[60] *Saipem*, ICSID Case No. ARB/05/07 at ¶ 113.

[61] *Id.*

[62] *GEA Group Aktiengellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (Mar. 28, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0356.pdf.

[63] *Id.* at ¶ 61.

[64] *Fedax v. Venezuela*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/96/3, ¶ 43 (July 11, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf.

the Award contains no certain duration in terms of when or how it may be enforced. Also, the Award has no certain regularity of profit and return because it must be enforced and it only has a one-time return without any regularity. While there may be an assumption of risk by Atton Boro in the sense that it might not be successfully enforced, the Award has no substantial commitment since it is simply a claim for Atton Boro to collect from Mercuria. Lastly, the Award has no significance for the host State's development because it is nothing but a detriment for Mercuria as the host State. Therefore, the Award in the present case cannot be treated as an investment.

II. MERCURIA CAN DENY BENEFITS TO ATTON BORO UNDER ARTICLE 2 BECAUSE ATTON BORO IS A "MAILBOX" COMPANY.

19. Article 2 of the BIT gives Mercuria "the right to deny the advantages of [the] Agreement to a legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized."[65] Clauses like Article 2 are specifically designed to prevent "mailbox" companies from reaping the benefits of the BIT without being legitimate corporations of the party State. According to Professor Steffan Hindelang, a "mailbox" or "shell" company is a company designed to harvest the benefits of an investment treaty by establishing a nominal presence within the jurisdiction of one of the party States.[66] The European Parliament adds that a "mailbox" company does not command any significant assets or undertake meaningful operations.[67] Atton Boro is a "mailbox" company because it is controlled by its parent company in The Republic of Reef, and it has no substantial business activities in Basheera.

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[65] BIT, art. 2.1, R. at 33.

[66] *See* STEFFEN HINDELANG, THE INVESTMENT CHAPTERS OF THE EU'S INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS IN A COMPARATIVE PERSPECTIVE 17 (2015); *see also The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, EUR. PARL. (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf. "A mailbox company is a company which is established in the jurisdiction of a State party to the investment treaty without commanding significant assets or without undertaking meaningful operations itself. It serves the purpose of gaining access to the investment treaties of that State concluded with potential host States by qualifying as an 'investor' thereunder." *Id.*

[67] *Id.*

A. Atton Boro Is Exclusively Controlled By A Transnational Entity That Is Engaging In "Treaty Shopping."

20. A true "mailbox" company is controlled by citizens or nationals of a third state. They are usually front companies set up for "Treaty Shopping," which is the practice of seeking BITs with the most advantageous benefits for a particular company.[68] This practice is common among transnational corporations.[69] In *Saluka Investments v. Czech Republic*, the company at issue was officially incorporated in Holland, but was wholly controlled by a transnational Japanese Company that was purposefully attempting to harvest the benefits of the Netherlands–Czech Republic BIT.[70] The tribunal held that a company without any actual business links to the State, but that is a party to the BIT, should not be protected by it.[71]

21. Similar to *Saluka*, Atton Boro is a subsidiary of Atton Boro Group, which is a company incorporated under the laws of the Republic of Reef—a State that is not a party to the BIT.[72] In fact, Atton Boro was created by Atton Boro Group as a "vehicle for carrying on business in South American and African countries."[73] It was to this end that Atton Boro was assigned the patent for Valtervite.[74] However, Atton Boro Group is a subsidiary of Atton Boro Company, whose broader vision is to secure pharmaceutical patents in fifty different jurisdictions.[75] Therefore, Atton Boro is simply a cog within

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[68] Suzy H. Nikiema, *Best Practices Definition of Investor*, INT'L INST. FOR SUSTAINABLE DEV., 1, 12, section 4.2.2 (Mar. 2012), http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf.

[69] *Id.* at 3, section 2.2.

[70] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 239 (Mar. 17, 2006), https://www.italaw.com/documents/Saluka-PartialawardFinal.pdf.

[71] *Id.* at ¶ 240.

[72] Uncontested Facts ¶ 4, R. at 28.

[73] *Id.*

[74] *Id.*

[75] *Id.*

Atton Boro Company's pharmaceutical empire that has no independent purpose other than to avail itself of the benefits of the BIT.

B. Mercuria's Invocation Of Article 2 Is Timely Because The Right Can Apply Retroactively.

22. Atton Boro may attempt to argue that Mercuria's invocation of Article 2 is untimely because Article 2 can only apply prospectively, meaning before the investment was made. This view of "denial of benefits" clauses is incorrect. Many tribunals, other than those deciding cases under the Energy Charter Tribunal, have held that the right to deny benefits can be exercised retrospectively.[76]

23. In *Pac Rim Cayman v. El Salvador*, for example, the tribunal held that El Salvador could exercise its right to deny benefits under the BIT retrospectively because the BIT made no explicit procedural requirement.[77] There, the tribunal emphasized that the respondent was not trying to gain an unfair advantage over the claimant by invoking the clause; rather, it was a response to the claimant's attempt to invoke the BIT.[78]

24. Likewise, in *GAI v. Bolivia*, the tribunal held that a denial of benefits clause should apply retroactively because it activates when the rights of the BIT are claimed.[79] The tribunal noted that even though the respondent's invocation of the right to deny benefits clause was sudden, the claimant was fully aware of the right's existence.[80] Moreover, it postulated that "[t]he very purpose of the denial of benefits is to give the Respondent the

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[76] *See* Débora Pinto, *Is the Retrospective Exercise of the 'Denial of Benefits' Clause Contrary to the Investor's Legitimate Expectations Under the Energy Charter Treaty?* (Mar. 2016), https://www.researchgate.net/publication/303920259_Is_the_retrospective_exercise_of_the_'denial_of_benefits'_clause_contrary_to_the_investor's_legitimate_expectations_under_the_Energy_Charter_Treaty.

[77] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections ¶¶ 4.83-92 (June 1, 2012), https://www.italaw.com/documents/PacRimDecisiononJurisdiction.pdf.

[78] *Id.* at ¶ 4.84.

[79] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award ¶ 376 (Jan. 31, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf.

[80] *Id.* at ¶ 375.

possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits."[81] The tribunal further reasoned that applying the denial of benefits clause prospectively would be "odd" because a State would have to invoke the clause against a company with whom it has no dispute.[82] In other words, the invocation of a denial of benefits clause is contingent on the existence of an actual dispute. Requiring States to vet every possible "mailbox" company before a dispute arises would constitute an undue burden.

25. In this case, similar as in *Pac Rim*, the BIT does not provide explicit time requirements for the exercise of the "denial of benefits" clause in Article 2.[83] Thus, it should be construed that the right can be exercised even after the dispute has begun. Moreover, as in *Pac Rim*, Mercuria's invocation of the denial of benefits clause was in response to Atton Boro's use of the BIT and was not engineered to gain an unfair advantage.[84] In the same vein as *GAI v. Bolivia*, since Atton Boro is bringing the claim under the BIT, it is aware of Mercuria's right to deny benefits to any party that is not a proper national of Basheera.[85] Further, requiring Mercuria to invoke the denial of benefits clause before the dispute existed would be counter intuitive and would run against the purpose of the clause, which is to provide protection for investor States during disputes.

[81] *Id.* at ¶ 376.

[82] *Id.* at ¶ 379.

[83] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 at 23-26.

[84] *See id.*

[85] *Supra* note 79 and accompanying text.

III. THE ENACTMENT OF LAW NO. 8458/09 AND THE GRANT OF A LICENSE FOR ATTON BORO'S INVENTION DID NOT AMOUNT TO A BREACH OF THE FAIR AND EQUITABLE TREATMENT STANDARD.

A. Mercuria Did Not Breach The Fair And Equitable Treatment Standard By Enacting Law No. 8458/09 And Granting A License To HG-Pharma To Produce Valtervite.

26. Article 3.2 of the BIT states that "[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[86] Atton Boro claims that Mercuria breached the fair and equitable treatment standard by enacting Law No. 8458/09 and subsequently granting HG-Pharma the license to produce Valtervite.[87] However, it is well established that the fair and equitable treatment standard is a minimum standard that requires egregious circumstances. As the tribunal stated in *United Parcel Service of America Inc. v. Canada*, "the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard."[88] Rather, "[a]cts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[89]

27. None of these circumstances are present in this case. Greyscale presented Mercuria with a long-standing crisis that forced the government to "take every measure it deemed necessary" to ensure that "patients of greyscale could avail treatment."[90] Indeed, the prevalence of greyscale continued to exceed the most liberal of Mercuria's estimates until

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[86] BIT, art. 3.2, R. at 34.

[87] Notice of Arbitration ¶ 13, R. at 5.

[88] *United Parcel Serv. of Am. Inc. v. Canada*, ICSID Case No. UNCT/02/1, ¶ 97 (Nov. 22, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0884.pdf.

[89] *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, ¶ 367 (June 25, 2001), https://www.italaw.com/documents/Genin-Award.pdf; *see also Neer v. United Mexican States*, United Nations, ¶ 4 (Oct. 15, 1926), http://legal.un.org/riaa/cases/vol_IV/60-66.pdf (describing a breach of the international minimum standard to require actions amounting to "an outrage, to bad faith, to willful neglect or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency").

[90] Uncontested Facts ¶ 14, R. at 29.

the government decided that it needed to supply medicines for nearly twice the number of previously estimated patients.[91] With medicine needed on such a wide scale, Mercuria had no choice but to grant HG-Pharma the license to produce Valtervite.[92] HG-Pharma's production of the drug led to a cost reduction of Valtervite by as much as 80%, resulting in over 1.2 billion USD in annual savings.[93] Further, three neighboring States expressed gratitude for Valtervite that Mercuria sent in the form of humanitarian aid.[94]

28. This stands in contrast with cases such as *Middle East Cement Shipping and Handling v. Egypt*, in which the tribunal found a violation of the fair and equitable treatment standard where the respondent seized and auctioned off the claimant's ship without direct notice.[95] The tribunal in that case found that the seizure was tantamount to expropriation and was thus a violation of the fair and equitable treatment standard.[96] Unlike the *Middle East Cement Shipping and Handling* case, Mercuria did provide notice to Atton Boro and gave it a chance to re-negotiate when it asked for a further discounted price in response to the rapid escalation of the greyscale crisis.

29. Based on the uncontested facts, there was neither a willful neglect of duty nor an insufficiency of action falling far below international standards.[97] Further, Mercuria did not act in bad faith. Mercuria hoped to renegotiate the price of Atton Boro's product, but despite the urgency of the situation, Atton Boro was only willing to provide a 10%

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[91] *Id.* ¶ 15, R. at 29-30.

[92] *Id.* ¶ 21, R. at 30.

[93] *Id.* ¶ 22, R. at 30.

[94] *Id.* ¶ 23, R. at 30.

[95] *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, ¶ 143 (Apr. 12, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0531.pdf.

[96] *Id.*

[97] *See Fair and Equitable Treatment Standard in Int'l Inv. Law*, OECD, 1, 29 (Sept. 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (citing I. Brownlie, *Principles of Public International Law*, OXFORD SIXTH ED. 502 (2003)) (describing a denial of justice as "a denial, unwarranted delay or obstruction of access to courts, [or] gross deficiency in the administration of judicial or remedial process").

discount.[98] Nonetheless, Mercuria approved HG-Pharma's license only until greyscale was no longer a threat to public health in Mercuria and granted Atton Boro a royalty of 1% of HG-Pharma's total earnings.[99]

B. Atton Boro Assumed The Risk of Doing Business With Mercuria.

30. As the tribunal stated in *MTD Equity v. Chile*, "BIT's are not an insurance against business risk."[100] The claimants "should bear the consequences of their own actions as experienced businessmen."[101] In this case, Atton Boro was one of the leading drug discovery enterprises with a specialty in curing critical epidemic diseases in developing countries.[102] On the contrary, Mercuria is a developing country that was faced with a public health crisis. Atton Boro, as an experienced company, should have been aware that any investment in these circumstances would come with heightened risk.

31. Speaking to investments in countries with a water crisis, the tribunal in *Biwater Gauff v. Tanzania* stated, "When investors choose to enter into this sector, they encumber themselves with responsibilities that are linked to the achievement of essential human rights."[103] In light of the danger that greyscale continued to present to Mercuria, along with the resounding success of HG-Pharma's product, Atton Boro should be viewed as a victim of its own business risk rather than a victim to a breach of the fair and equitable treatment standard.

32. This case is analogous to *Parkerings v. Republic of Lithuania*, in which the tribunal considered an investment made in Lithuania undergoing transition from the Soviet Union

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[98] Uncontested Facts ¶ 15, R. at 30.

[99] *Id.* ¶ 21, R. at 30.

[100] *MTD Equity v. Chile*, ICSID Case No. ARB 01/7, Award, ¶ 178 (May 25, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf.

[101] *Id.*

[102] Uncontested Facts ¶ 2, R. at 28.

[103] *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Amicus Curiae Submission by LEAT, LHRC, TGNP, CIEL and IISD, ¶ 11 (Mar. 26, 2007), http://www.ciel.org/wp-content/uploads/2015/03/Biwater_Amicus_26March.pdf.

to candidacy for the European Union.[104] The tribunal held that the claimant "took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment" and that the claimant could have "sought to protect its legitimate expectations by introducing into the investment agreement a stabilization clause."[105] Similarly, here, not only was Mercuria's greyscale crisis well documented, but Mercuria's leadership gave ample indication that future legislation was on the horizon. For example, the President himself shared on his Twitter account that Mercuria intended to "do away with red tape and roll out the red carpet for investors" in order to combat greyscale.[106]

C. Atton Boro Does Not Have Standing To Rely On The TRIPS Agreement.

33. Atton Boro states that Mercuria violated Atton Boro's legitimate expectations by enacting Law No. 8458, and the license granted to HG-Pharma disregarded international covenants such as the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[107] Yet, the BIT makes no mention of the TRIPS Agreement.[108] Further, Atton Boro does not have standing to bring any claims in this investment dispute regarding possible violations of the TRIPS Agreement. The World Trade Organization ("WTO") has stated that "private individuals or companies do not have direct access to the dispute settlement system,"[109] meaning that Atton Boro, as a private company, does not have access to the TRIPS Agreement's dispute settlement mechanism.

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[104] *Parkerings v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 336 (Sept. 11, 2007), https://www.italaw.com/documents/Pakerings.pdf.

[105] *Id.*

[106] Uncontested Facts ¶ 8, R. at 29.

[107] Notice of Arbitration ¶ 13, R. at 5.

[108] *See generally* BIT, R. at 32-38.

[109] *Introduction to the WTO Dispute Settlement System*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm (last visited Sept. 23, 2017).

34. Even if Atton Boro were able to bring claims relying on the TRIPS Agreement, there is no evidence that Mercuria's actions violated the TRIPS Agreement. Article 31 of the TRIPS Agreement explicitly states that a Member State may allow for the use of a patent without the authorization of the right holder "in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use" as long as the right holder is notified.[110] Mercuria was acting in response to the crisis of the spread of greyscale, dating back to at least 2003 when the NHA cautioned that the situation could spiral into a national crisis unless aggressive measures were taken to combat it.[111] HG-Pharma's product was also used for public, non-commercial distribution because Mercuria shipped the drug to neighboring States in the form of humanitarian aid.[112] Mercuria's pure intentions of acting solely in response to this crisis were solidified when it granted HG-Pharma the license to produce Valtervite only until greyscale was no longer a threat to public health in Mercuria.[113]

35. Article 8 of the TRIPS Agreement also provides that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance."[114] This interest in upholding public health is corroborated by Article 7 of the BIT, which states,

> Non-discriminatory measures of a Contracting Party that are designated and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article.[115]

36. Greyscale is a chronic, incurable disease that started in the early 1980's with symptoms including flaking of the skin, stiffening muscles, swollen limbs, and severe joint pain.[116]

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[110] TRIPS Agreement, art. 31.

[111] Uncontested Facts ¶ 6, R. at 28.

[112] *Id.* ¶ 23, R. at 30.

[113] *Id.* ¶ 21, R. at 30.

[114] TRIPS Agreement, art. 8.

[115] BIT, art. 6, R. at 35.

[116] NHA Annual Report, Annex No. 3, R. at 41.

From 2003 to 2006 alone, the number of confirmed cases increased from 20,485 to 266,298 in Mercuria.[117] With an estimation that 578,390 people would be affected by the end of 2006, it became clear to Mercuria that it was in the midst of a public health crisis.[118] Given that the TRIPS Agreement along with the BIT provide for legislation in response to public safety crises, an incorporation of the TRIPS Agreement still would not change this Tribunal's analysis.

IV. MERCURIA DID NOT BREACH ARTICLE 3 OF THE BIT BECAUSE MERE DELAY IN ENFORCEMENT PROCEEDINGS DOES NOT AMOUNT TO A DENIAL OF JUSTICE.

A. Mercuria Did Not Breach The Fair And Equitable Treatment Provision Of Article 3.2 Of The BIT.

37. Article 3.2 of the BIT between Mercuria and Basheera states:

> Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.[119]

38. Article 3.2 obligates each party to guarantee the other minimum standards of due process in domestic court proceedings.[120] It does not guarantee that a case will be decided within a certain amount of time, and public international law does not provide time limits within which courts must resolve certain cases.[121] Rather, whether fair and equitable treatment has been accorded in each case depends on

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[117] *Id.*, R. at 42.

[118] *Id.*

[119] BIT, art. 3.2, R. at 34.

[120] Alford, Roger P., *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 132 (2012), http://scholarship.law.nd.edu/law_faculty_scholarship/405.

[121] *White Inds. Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award, ¶ 10.4.9 (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

its unique factual circumstances.[122]

39. In international law, the fair and equitable treatment standard may be breached by a denial of justice.[123] Denial of justice has an extremely high threshold.[124] It only occurs where a State commits a "serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."[125] The minimum standard of fair and equitable treatment is infringed by Mercuria's conduct that is harmful to Atton Boro only if it is "arbitrary, grossly unfair, unjust or idiosyncratic, . . . or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings."[126] As explained below, the conduct of Mercuria's courts does not rise to a denial of justice to breach the fair and equitable treatment standard included in Mercuria's and Basheera's BIT.[127]

B. Mercuria's Courts' Conduct Was Reasonable Under The Circumstances Of This Case.

40. Tribunals prefer a highly fact-intensive inquiry to determine whether delays in judicial proceedings constitute a denial of justice.[128] These factors include (1) "the complexity of the proceedings," (2) "the need for swiftness," (3) "the behavior of the litigants involved," (4) "the significance of the interest at stake,"

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[122] *See El Oro Mining and Railway Co. v. United Mexican States*, 5 R.I.A.A., 191, 198 (June 18, 1931), http://legal.un.org/riaa/cases/vol_V/191-199_Oro_Mining.pdf.

[123] *Lowen Group Inc. and Raymond L. Lowen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf.

[124] *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, ¶ 244 (Mar. 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0151.pdf.

[125] *Id.*; *see also Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 127 (Oct. 11, 2002), https://www.state.gov/documents/organization/14442.pdf.

[126] *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf.

[127] *See* BIT, art. 3.2, R. at 34.

[128] *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.14.

and (5) "the behavior of the courts themselves."[129]

41. As to the first factor of the complexity of the proceedings,[130] Atton Boro's application for enforcement was complex in itself because the award asked for substantial funds of USD 40,000,000.[131] Additionally, the procedural history of the case was complicated by whether the Commercial Bench had exclusive jurisdiction over the enforcement of arbitral awards.[132] Atton Boro brought the issue to the court's attention on 30 April 2012 and argued that the Commercial Bench should hear its case.[133] The High Court agreed and transferred Atton Boro's application for enforcement to a Commercial Bench of the Court on 14 June 2012.[134] But on 2 December 2013, the Supreme Court of Mercuria clarified that the Commercial Benches of the Court do not have jurisdiction to entertain enforcement proceedings of arbitral awards, and on 2 January 2014, Atton Boro's application was transferred back to a regular bench of the High Court.[135] Thus, the complexity behind which segment of the court had jurisdiction to hear Atton Boro's application accounts for almost two years of the delays in enforcement proceedings.[136]

42. The second factor, "the need for swiftness," is much less important where an application for enforcement involves "purely commercial matters," as opposed to criminal and human rights proceedings.[137] While commercial matters should not

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[129] *Id.*

[130] *Id.*

[131] Notice of Arbitration, ¶ 9, R. at 4.

[132] *Id.* at Exhibit 1, ¶¶ 17-18, 26-29, R. at 8-10.

[133] *Id.* at Exhibit 1, ¶ 17, R. at 8.

[134] *Id.* at Exhibit 1, ¶ 18, R. at 9.

[135] *Id.* at Exhibit 1, ¶¶ 28-29, R. at 10.

[136] *See id.* at Exhibit 1, ¶¶ 17-18, 26-29, R. at 8-10.

[137] *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.14.

"be allowed to languish," the need for swiftness is not compelling.[138] Here, Atton Boro's award is purely commercial; therefore, it does not command an urgent need for swiftness.[139]

43. As to the third factor of the litigants' behavior,[140] NHA created substantial delays in the enforcement proceedings, which prohibited the court from reaching a decision more promptly.[141] NHA was absent on several occasions and asked the court for many extensions.[142] And while Atton Boro may claim the court gave too many extensions to NHA, the court limited NHA's extensions in 2015 and said no further extension would be granted.[143] The court also acquiesced to Atton Boro's requests to transfer the case to the Commercial Bench and to hold an additional hearing for Atton Boro to conclude its oral submissions.[144] Further, the court took note of Atton Boro's objections and protests, and it expressed to NHA after being absent that it would take adverse measures against it if NHA did not appear at the next hearing.[145] While the proceedings were lengthy, these facts show the court was merely accommodating both parties' schedules while also balancing an overwhelming caseload.[146]

44. As to the last factor, the tribunal in *White Industries Australia Limited v. The Republic of India* paid particular attention to the courts' behavior. There, the Arbitral Tribunal held that although India delayed enforcement of White's ICC

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[138] *Id.*

[139] Notice of Arbitration ¶ 9, R. at 4.

[140] *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.10.

[141] *See* Notice of Arbitration at Exhibit I, ¶¶ 1-44, R. at 7-12.

[142] *Id.*

[143] *See id.*

[144] *Id.* at Exhibit 1, ¶ 17-18, 25, R. at 8-9.

[145] *See id.* at Exhibit 1, ¶¶ 1-44, R. at 7-12.

[146] *See id.* at Exhibit 1, ¶ 32, R. at 10-11.

award for more than nine years, India's actions did not amount to a denial of justice.[147] White obtained an ICC award in its favor after a contractual dispute with Coal India.[148] White applied to India's High Court to enforce the Award on 11 September 2002.[149] The Delhi High Court heard White's application for enforcement on 27 November 2002.[150] Coal India requested a stay of the proceedings, but the Delhi High Court denied the request and required Coal India to file a reply within three weeks.[151] After several petitions for transfer, which were denied, the Delhi High Court "granted Coal India one final opportunity to comply and ordered [it] to file a reply within three weeks, by 8 March 2003."[152] Because of pending proceedings in front of the Calcutta High Court, the Delhi High Court stayed the proceedings in 2006.[153] White appealed the Calcutta High Court's decision to the Indian Supreme Court, which first heard White's appeal as a two-judge panel, and then referred the matter to another three-judge panel, presided by India's Chief Justice.[154] As of December 2009, India's Supreme Court had never set the matter for oral argument.[155]

45. In evaluating whether India's court delays arose to a breach of the fair and equitable treatment standard, the Arbitral Tribunal held the courts' behavior did not meet the standard for denial of justice.[156] The tribunal reasoned that both the Calcutta and Delhi High Courts heard the various applications within months of

[147] *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.22.

[148] *Id.* at ¶ 3.2.33.

[149] *Id.* at ¶ 3.2.36.

[150] *Id.* at ¶ 3.2.43.

[151] *Id.*

[152] *Id.* at ¶¶ 3.2.45-49.

[153] *Id.* at ¶ 3.2.60.

[154] *Id.* at ¶¶ 3.2.61-62.

[155] *Id.* at ¶¶ 3.2.63-64.

[156] *Id.* at ¶ 10.4.22.

when they were initiated, and they reasonably progressed until the Supreme Court granted leave to appeal the decision from the Calcutta High Court in 2004 and the Delhi High Court ordered a stay in 2006.[157] The tribunal focused on the largest delay in the case—the Supreme Court's inability to impanel a three-judge bench for more than four years—but ultimately held that while the delay was unfortunate, it was not surprising that the Indian Supreme Court experienced delays.[158] The tribunal emphasized that India is a "developing country" with a "seriously overstretched judiciary."[159]

46. This case is comparable to *White*. Here, Mercuria's courts' behavior did not rise to the level of a denial of justice. The court first heard Atton Boro's application less than two weeks after it was filed in the High Court, even faster than the two months it took India's courts to hear White's initial application.[160] Moreover, just as in *White*, the matter continued to progress through the court, despite the fact that there were several interim delays at no fault of the court.[161] The court rescheduled hearings for Atton Boro's case on five occasions of the entire seven-year proceeding, which hardly constitutes undue delay, especially in context of *White*, where the Supreme Court failed to convene a panel for more than four years.[162]

47. Taken together, these factors show that in the context of Mercuria's circumstances as a developing nation with an overburdened judiciary,[163] Mercuria did not deny

[157] *Id.* at ¶ 10.4.17.

[158] *Id.* at ¶¶ 10.4.19-21.

[159] *Id.* at ¶ 10.4.18.

[160] Notice of Arbitration at Exhibit 1, ¶¶ 1-2, R. at 7; *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.17.

[161] Notice of Arbitration at Exhibit 1, ¶¶ 1-44, R. at 7-12; *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.17.

[162] Notice of Arbitration at Exhibit 1, ¶¶ 1-44, R. at 7-12; *see also White Inds. Australia Ltd.*, UNCITRAL at ¶¶ 10.4.22-24 (holding a delay of nine years, almost four of which were caused by inaction from the Indian Supreme Court, was not enough to constitute a denial of justice).

[163] *See* Response to the Notice of Arbitration, ¶ 9, R. at 17; *White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.17 ("The Tribunal considers it also to be relevant, when examining the [behavior] of the courts, to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.").

justice to Atton Boro, and thus it did not breach the fair and equitable treatment standard in Mercuria's and Basheera's BIT.[164]

C. The Effective Means Standard In The Preamble Of Mercuria's And Basheera's BIT Is Not Binding.

48. Atton Boro may attempt to argue that Mercuria breached the "effective means" standard included in the preamble of the BIT, but the preamble is not binding on either party. The preamble of a bilateral investment treaty helps to describe the parties' desire and purpose behind the agreement, but the language of the preamble has no legally binding significance.[165] It is important for context, but a simple reference to a legal standard in the preamble does not create substantive obligations on the parties.[166]

49. In the preamble of Mercuria's and Basheera's BIT, the parties recognize the "importance of providing effective means of asserting claims and enforcement rights with respect to investment under national law as well as through international arbitration."[167] While Atton Boro may argue Mercuria breached the effective means standard detailed above, Mercuria cannot be held liable for a clause that never created legally binding obligations on Mercuria.

D. Even If The Effective Means Standard Is Binding On Mercuria, Mercuria Provided Atton Boro With Effective Means To Enforce Its Arbitral Award.

50. Mercuria acknowledges that as a signatory to the New York Convention, it must recognize arbitral awards as binding and enforce them, subject to limited exceptions.[168] But Mercuria need not guarantee a time limit within which the

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[164] *See* BIT, art. 3.2, R. at 34.

[165] RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 20 (1995).

[166] *See id.*

[167] BIT, Preamble, R. at 32 (emphasis added).

[168] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. III-V (June 10, 1958).

awards will be enforced.[169] While the "effective means" standard is lower than the threshold required for denial of justice in customary international law,[170] it looks to the same factors analyzed above, in light of the circumstances of this case: the complexity of the proceedings, the behavior of the litigants and the courts, and the significance of the interests at stake.[171] Importantly, although not an absolute defense, court congestion and backlog is relevant "in determining the period of delay that is reasonable in the circumstances."[172]

51. Here, Mercuria's courts suffer from an overwhelming caseload, where the courts cater to a population of sixty-seven million people in a developing nation.[173] In this context, it is clear Mercuria provided Atton Boro with effective means to assert its claim.

52. As stated above, regarding the first factor, Atton Boro's application for enforcement proceedings was complex in itself because the award seeks substantial funds of USD 40,000,000.[174] Moreover, the case's procedural posture was complicated by whether the Commercial Bench had exclusive jurisdiction to hear and enforce foreign arbitral awards.[175] This complication alone accounts for approximately two years of the delay in Atton Boro's application for enforcement of its arbitral award.[176]

53. As to the behavior of the litigants and the courts, Mercuria's courts continued to

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[169] *See El Oro Mining and Railway Co.*, 5 R.I.A.A. at 198 ("The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment.").

[170] *See Chevron Corp. and Texaco Petroleum Co.*, UNCITRAL at ¶¶ 247-50; *see also White Inds. Australia Ltd.*, UNCITRAL at ¶ 11.4.17, n.78.

[171] *Chevron Corp. and Texaco Petroleum Co.*, UNCITRAL at ¶ 250.

[172] *Id.* at ¶ 263.

[173] Response to the Notice of Arbitration ¶ 9, R. at 17.

[174] Notice of Arbitration ¶ 9, R. at 4.

[175] *Id.* at Exhibit 1, ¶¶ 17-18, 26-29, R. at 8-10; *see supra* notes 132-36 and accompanying text.

[176] *See* Notice of Arbitration at Exhibit 1, ¶¶ 17-18, 26-29, R. at 8-10.

progress Atton Boro's application through the judicial system, despite the fact that its judiciary is overburdened.[177] The court rescheduled hearings on only five occasions in the entire seven-year period, and it heard Atton Boro's application within two weeks after it was filed in the High Court.[178] Conversely, the litigants' behavior contributed to substantial delays in court proceedings. NHA was absent on many occasions and requested several extensions.[179] The court granted NHA's requests for extensions,[180] but this was appropriate in the context of this case, because as established above, the proceedings were complex.[181] The court also entertained Atton Boro's argument that the Commercial Bench should hear the case and granted Atton Boro an additional hearing to continue its oral submissions,[182] which shows the court acted neutrally throughout the proceedings.

54. Finally, the interests at stake are purely monetary.[183] While Atton Boro's award is for substantial funds, "purely commercial matters" demand less swiftness than criminal or human rights proceedings.[184] Considering all of these factors, especially in the context of this case where Mercuria is a developing nation with an overburdened judiciary,[185] Mercuria did not breach the effective means standard.

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[177] *See id.* ¶¶ 1-44, R. at 7-12.

[178] *See id.*

[179] *Id.*

[180] *Id.*

[181] *See* ELIE KLEIMAN ET AL., INTERNATIONAL ARBITRATION AND PUBLIC POLICY 73 (Devin Bray & Heather L. Bray eds., 2014) (noting in the context of arbitral tribunals, that "[w]hether an arbitral institution may grant time extensions seems to be a matter that courts may review according to the circumstances of each case").

[182] Notice of Arbitration at Exhibit 1, ¶¶ 17-18, 25, R. at 8-9.

[183] *Id.* at ¶ 9, R. at 4.

[184] *See White Inds. Australia Ltd.*, UNCITRAL at ¶ 10.4.14.

[185] Response to the Notice of Arbitration, ¶ 9, R. at 17.

V. MERCURIA'S TERMINATION OF THE LTA IS NOT A VIOLATION OF ARTICLE 3.3 OF THE BIT.

55. Article 3.3 of the BIT states that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."[186] Clauses of this kind are often referred to as "umbrella clauses" in international BITs.[187] Although tribunals have come to disparate results regarding their scope, they generally follow one of two approaches: the "broad approach" or the "narrow approach."[188] Under the "narrow approach," a mere breach of contract between State and investor should not automatically be elevated to a breach of international treaty law. Conversely, the "broad approach" converts contractual obligations between States and investors into international law obligations.[189] This approach oversimplifies the umbrella clause analysis and imposes an undue burden on the investing State. Instead, Article 3.3 of the BIT should be interpreted under the "narrow approach."

A. Article 3.3 Should Be Interpreted Under The "Narrow Approach" Because The "Broad Approach" Is Untenable.

56. Article 3.3 should be interpreted under the "narrow approach" because it provides a more tenable jurisprudential framework. The narrow approach was first articulated in *SGS v. Pakistan*, in which the tribunal reasoned that a contractual violation between a State and investor did not automatically amount to a violation of international law under the BIT's "umbrella clause."[190] The tribunal in *Pakistan* clearly rejected the notion that umbrella clauses automatically elevate any contract breach into a matter of international law.[191]

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[186] BIT, art. 3.3, R. at 34.

[187] *See* Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD WORKING PAPERS ON INT'L INV. 2006/03, 1, 18-19 (Oct. 2006), http://dx.doi.org/10.1787/415453814578.

[188] *Id.* at 15.

[189] *Id.*

[190] *SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (Aug. 6, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf.

[191] *Id.*

The tribunal criticized this approach for failing to place any rational limits on umbrella clauses.[192] In essence, the "broad approach" proffers a bright-line test that would allow any contractual dispute, no matter how trivial, to be protected under the BIT. Instead, the tribunal advocated a balancing approach to the interests of State and investor—i.e., economic hardship and investment incentive. Similarly, in *El Paso Energy International Co. v. The Argentine Republic*, the tribunal rejected the broad approach, reasoning that it provided a dangerous incentive for investors to invoke the clause under any circumstances.[193] Indeed, under the broad approach, there is no reason for investors to show restraint in invoking its power for any kind of infraction.[194]

57. Instead of serving as a bright-line rule, the purpose of an "umbrella clause" should be to provide a legal framework by which tribunals can assess individual cases. In *Salini Construttori v. Jordan*, for example, the tribunal reasoned that the purpose of the "umbrella clause" was to provide a legal framework "apt to guarantee the compliance of all undertakings it has assumed with regards to each specific investor."[195] Similarly, in *Pan American Energy v. Argentina*, the tribunal reasoned,

> It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law "with regard to investments."[196]

The tribunals in both *El Paso* and *Pan American* came up with the same proposal: umbrella clauses should not apply to ordinary commercial contracts, but rather, only to

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[192] *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 156 (2006).

[193] *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf.

[194] *Id.* at ¶ 82.

[195] *Salini Construttori S.p.A. and Italstrade S.p.A v. The Hashemite Kindgom of Jordan*, ICSID case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004), http://www.worldbank.org/icsid/cases/salini-decision.pdf.

[196] *Pan Am. Energy LLC and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13 and *BP Am. Prod. Co. and Others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 109 (Jul. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0616.pdf.

those that are agreed upon by the State acting as a sovereign.[197] The example given by the *El Paso* tribunal was a stabilization clause, which is a clause that guarantees protection for investors against hostile legislation that may be inserted into a contract.[198] Under this theory, clauses like a stabilization clause would serve to extend BIT umbrella protections to an ordinary commercial contract, but otherwise, they would fall outside of the umbrella. These standards allow tribunals to make individual assessments regarding the applicability of specific umbrella clauses as opposed to applying a bright-line rule that automatically envelops any contract dispute—i.e. the "broad approach." Finally, it is worth noting that P. Mayer maintains that umbrella clauses only extend to contracts between the sovereign States themselves.[199]

58. In this case, under the "narrow approach," alleged contractual violations should not automatically be considered as violations of the BIT. Instead, under the *Pakistan* standard, this Tribunal should balance the interests of preserving Atton Boro's investment against the interests of Mercuria.[200] Mercuria is currently battling a severe and pervasive epidemic of greyscale that is threatening the health and safety of its citizens.[201] In fact, from 2003 to 2006, the number of adults that contracted greyscale rose from 17% to 50%.[202] Similarly, the number of confirmed cases increased from 20,485 in 2003 to 266,298 in 2006.[203] According to Mercurian research, the total number of greyscale patients is dependent solely on the "public health schemes to obtain medicines for treatment."[204] The number of greyscale patients dependent solely on government aid for

[197] *El Paso Energy Int'l Co.*, ICSID Case No. ARB/03/15 at 28.

[198] *Id.*

[199] P. Mayer, *La neutralisation du pouvoir normatif de l'État en matière de contrats d'État*, JDI 1, 36-37 (1986).

[200] *See supra* note 186 and accompanying text.

[201] Uncontested Facts ¶ 13, R. at 29.

[202] *Id.*

[203] NHA Annual Report, Annex No. 3, R. at 42.

[204] *Id.*, R. at 43.

greyscale increased from 10,012 in 2005 to an estimated 100,000 in 2006.[205] Budgetary setbacks led to the cancellation of the LTA, and its privatization led to savings of 1.2 billion USD, which speaks to the sheer economic impact of greyscale.[206] If Mercuria had given into Atton Boro's demands to keep the discount unchanged, Mercuria's costs would have been over 1 billion USD—a 500% increase in greyscale spending and one third of the total health budget, and that is only to cover the poorest 100,000 patients for one year. This economic burden to Mercuria would have proved unbearable. Contrast this with the hardship to Atton Boro, which merely must compete with local manufacturers without the benefit of an exclusive patent. In light of the extremity of Mercuria's need, the balance should favor Mercuria's interests.

B. Alternatively, The LTA Was A Purely Commercial Contract That Is Not Covered By The BIT.

59. Article 3.3 of the BIT obligates Mercuria to uphold the investments made in the capacity of its State sovereignty. However, obligations under a commercial contract are distinct from those under a BIT. In *El Paso v. Energy International Co.*, for example, the tribunal held that the "umbrella clause" interpreted properly "[would] not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but [would] cover additional investment protections contractually agreed by the State as a sovereign."[207] Similarly, in *Joy Mining Machinery v. Egypt*, the tribunal reasoned that there was no effectual link between the contract and the treaty that could elevate the contract to a level of protection under the BIT.[208] In that case, the dispute was both contractual and commercial, and the tribunal held that it should be governed by the remedies already built into the contract. The tribunal further reasoned

[205] *Id.*

[206] Uncontested Facts ¶ 21, R. at 30.

[207] *El Paso Energy Int'l Co.*, ICSID Case No. ARB/03/15 at 28.

[208] *Joy Mining Machinery Ltd. v. The Arabic Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 17-18 (Aug. 6, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0441.pdf.

that the "umbrella clause" should not have the effect of "transforming all contract disputes into investment disputes under the treaty."[209]

60. Following this line of reasoning, it is important to note that the parties to the contract were Atton Boro and the NHA, not the government of Mercuria.[210] As the *El Paso* tribunal articulated, ordinary commercial contracts entered into by State-owned entities should not be elevated to the level of an international treaty.[211] Furthermore, just as the contract in *Joy Mining* contained its own remedy, this contract contained its own arbitration provision.[212] Thus, Atton Boro has already availed themselves of the remedy that the contract provided and should not be granted two bites at the apple. In summary, because this was an exclusively commercial contract, it should not be covered by Article 3.3 of the BIT.

[209] *Id.* at 20.

[210] Uncontested Facts ¶ 9, R. at 29.

[211] *El Paso Energy Int'l Co.*, ICSID Case No. ARB/03/15 at 28.

[212] *Joy Mining Machinery Ltd.*, ICSID Case No. ARB/03/11 at 17-18.