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ARBITRATION UNDER

THE MERCURIA-BASHEERA BIT,

THE PCA ARBITRATION RULES 2012

[AND THE OFFICIAL RULES AND INSTRUCTIONS OF THE FDI MOOT]

BETWEEN

ATTON BORO LIMITED (Claimant)

AND

THE REPUBLIC OF MERCURIA (Respondent)

PCA CASE NO. 2016-74

Memorandum for the Respondent

Mr. Bob Gallo (President)

Professor Eli Barré-Sinoussi

Ms. Lilly Montagnier

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SUMMARY OF FACTS

On 11 January 1998, the Republic of Mercuria ("Mercuria") and the Kingdom of Basheera ("Basheera") concluded a BIT for improving new outward-looking economic policy.

Meruria is a developing country with total population– a marginal increase observed from 66,955,100 in 2003 to 67,150,133 in 2006. Greyscale is a severe and pervasive epidemic which threatens the well-being of thousands of working-age individuals in Mercuria. Vulnerable demographic – The population of the vulnerable demographic for greyscale i.e. working age individuals (15 – 49 years) has marginally decreased from 48,200,243 in 2003 to 48,198,864 in 2006. Number of confirmed cases of greyscale – A sharp increase in the number of confirmed cases of persons living with greyscale was observed, from 20,485 in 2003 to a total of 266,298 cases as of 2006. Number of estimated cases of greyscale (15-49 years) – The estimated maximum number of cases has increased drastically from 216,900 persons in 2003, to 578,390 persons in 2006. At current prices, it would cost 1 billion USD, or nearly a third of the overall health budget and 500% of the greyscale program budget, to provide drugs for a single year of 1365 FDC just to the poorest 100,000. Additionally, several patients who don't fall within the poorest group struggle with the costs of treatment as well.

Mercuria has acted responsibly, and in accordance with due process of law, in introducing measures necessary to safeguard the health of its people.

Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef ("Reef") and acts as the primary holding company for Atton Boro Group, a leading drug discovery and development enterprise with over a hundred years of operational experience to its credit. While Atton Boro Group's operations span fields as diverse as neuroscience, endocrinology, oncology, and animal health, its most pioneering efforts have been in the arena of critical epidemic diseases that threaten populations in the developing world – AIDS, cancer, tuberculosis, malaria

and greyscale.

In April 1998, Atton Boro Limited was established. It is a wholly owned subsidiary in Basheera which incorporated by Atton Boro Group，a company that synthesized a compound called Valtervite, which it claimed would radically improve treatment for greyscale patients. And Atton Boro Limited ("Atton Boro"), as a vehicle for carrying on business in South American and African countries. For this purpose, a number of patents were assigned to Atton Boro, including the Mercurian patent for Valtervite.

In 1998, Atton Boro Group had an established presence in Basheera's pharmaceutical market since its incorporation. It rented out an office space, opened a bank account, hired a manager and an accountant, and commenced business in Basheera.

Atton Boro entered the Mercurian market by concluding several such agreements with its government and with Mercuria's newly set up National Health Authority (the "NHA"). Atton Boro set up a robust manufacturing base in Mercuria, and eventually expanded into other verticals in the pharmaceutical sector in Mercuria.

In May 2004, the NHA wrote an invitation to Atton Boro to make an offer for supplying its FDC drug, which it marketed under the brand name of Sanior. Following a protracted negotiation process and evaluation of competing offers, the NHA and Atton Boro entered into a Long-Term Agreement ("LTA").

On 25 November 2004, Atton Boro and the Mercuria National Health Authority ("NHA") entered into a Long-Term Agreement ("LTA") for supply of Atton Boro's blockbuster greyscale-treatment drug, Sanior, at a 25% discounted rate. Sanior contains the active ingredient, Valtervite, for which compound Atton Boro holds the Mercurian Patent No. 0187204 granted on 21 February 1998.

Accordingly, Atton Boro set up its manufacturing unit for Sanior in Mercuria and commenced production in 2005. Anticipating a further upsurge, Atton Boro scaled up its operations in Mercuria to ensure timely supply of the required quantities of

medicine. In early 2008, the NHA began demanding further discounts of 40% for Sanior. Atton Boro wrote back reassuring the NHA that it had built capacity to meet the rising demand, and offered a further discount of 10% for the remaining period of the LTA which rejected by NHA later.

Since 2003, the NHA had been engaged in parallel efforts to promote prevention of sexually transmitted diseases like greyscale. The NHA campaign involved actively conducting awareness workshops in educational institutions and workplaces to encourage people to be tested regularly.

In 2003, the NHA's annual report to the Ministry of Health of Mercuria highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals across the country, and cautioned that the situation could spiral into a national crisis within a decade unless aggressive measures were taken to combat it. The report observed that the treatment currently available in Mercuria was only effective if the infection was detected at very early stages, and even then, it required taking 5 to 7 pills every day. This fell far short of global standards of treatment for greyscale, since many parts of the world had moved to the novel fixed- dose combinations ("FDC") contained in a single pill.

The NHA annual report 2006 estimated that nearly 50% of all adults were getting themselves tested every six months, as compared to just over 17% in 2003.

In early 2008, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior, stating that it had "grossly underestimated the number of greyscale cases in Mercuria" and needed to supply medicines for nearly twice the number of patients.

On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance by Atton Boro. In January 2009, a Tribunal seated in Reef passed an award (the "Award") in favor of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. Then arbitral award has been delayed of its enforcement for more than seven years

On 10 January 2012, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters.

In September 2013, a ruling by the Supreme Court of Mercuria clarified that benches constituted under the Commercial Courts Act had jurisdiction only to hear original commercial suits and not enforcement proceedings. All enforcement matters were returned to be heard before regular benches of the Court.

On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09)7, which introduced a provision allowing for the use of patented inventions without the authorization of the owner.

In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court under the new provision, seeking grant of a licence to manufacture Valtervite. The Court heard the matter through a fast-tracked process and granted HG-Pharma a licence on 17 April of 2010 to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atton Boro at 1% of total earnings.

ARGUMENTS

ISSUE (A) THE TRIBUNA DOES NOT HAVE THE JURISDICTION OVER THE CLAIM IN RELATION TO THE AWARD

1. The existence of a Tribunal's power to adjudicate a claim in an investment arbitration is dependent on the existence of a qualified investment made by a qualified investor. In this case, the Award is not an investment, since it is neither an investment of itself (I), nor a part of the overall investment made by the investor.

I. The Award, in and of itself, is not an investment within the scope of Mercuria-Basheera BIT.

2. The definition of investment is found in Art 1(1) of the Treaty. In addition, the word "investment" has its own inherent meaning inferred from the object and purpose of the treaty. The Award in this case is not of itself an investment because it does not fall within the meaning of the BIT (A), and has no any inherent characteristics of an investment (B).

A. The Award is not an investment under Art 1(1) of the BIT.

3. In Article 1(1) of the treaty refers to "every kinds of assets held or invested by an investor into the host state", and provides a non-exhausting list. However, the Claimant, who bears the burden to establish the jurisdiction of the case, has not pointed out how an arbitral award qualifies as an investment, or which one of the five items that an arbitral award can fall into.

4. The investment defined by the BIT, broad as it may be, does not include an arbitral award. It is obvious that an arbitral award cannot be any "movable or immovable assets", participation in a company or entity, intangible assets or rights to conduct economic activities.

5. Moreover, an arbitral award cannot be classified as any "claims to money". Reading the language merely with its ordinary meaning, "claims to money" may be broad enough to enclose everything. However, according to the tribunal in the case *Romak v. Uzbekistan*[1], there must be a bench mark to decide what is the "claims to money". Otherwise, an investment treaty will be interpreted as to protect any kinds of assets in the world. This will clearly frustrate the object and purpose of the treaty which is regarded as equally important as the ordinary language according to Art 31(1) of the VCLT, and will also result in a manifestly unreasonable interpretation of the treaty which is also in violation of Art 32(2) of the VCLT.

6. The inherent meaning or characteristics of investment have been applied by investment tribunals. There are various criteria to decide what is an investment, including the *Salini test*[2] and other more flexible test set forth in cases like *Biwater v. Tanzania*[3] and *Phoenix v. Czech Republic*[4]. Being aware of the different approaches taken by arbitral tribunals, the Respondent here does not request this Honorable Tribunal to find out in this case the exact criteria of an investment. This is a controversy that needs not to be solved in the present case. The Respondent only submits that, with a brief examination, the Award cannot satisfy any of the criteria that have been put forward in the previous cases, since it lacks the most fundamental requirement of commitment of capital in the host state. In the circumstance of an arbitral award, it is obvious that an arbitral award

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[1] *Romak S.A. v. Uzbekistan*, (2009) PCA Case No. AA280, Award, at para. 180 and para. 207.

[2] Cf. *Salini et al. v. Kingdom of Morocco*, (2001) 42 ILM 609.

[3] *Biwater Gauff Ltd v. Tanzania*, (2008) ICSID Case No. ARB/05/22, Award, at paras. 312-316.

[4] *Phoenix Action Ltd. v. The Czech Republic*, (2009) ICSID Case No. ARB/06/5, Award, at para. 67.

does not involve any contribution of capital to the host state or any economic activities, therefore it cannot be regarded as an investment in and of itself[5].

7. Respondent here also respectfully brings to the Tribunal's attention that all the available cases in investment arbitration have clearly rejected or refrained from the idea that an arbitral award is of itself an investment or any "claims to money"[6]. Investment tribunals have shown that an inherent meaning to the word "investment" is necessary. Although the Respondent acknowledges that the criteria for "investment" is more often discussed in ICSID cases, while this is not an ICSID arbitration. However, this does not change the necessity to examine an investment inherently. Tribunals in ad hoc investment arbitration has also held that inherent criteria for investment is necessary, because it is unreasonable that the meaning of "investment" under a treaty would change simply because the chosen dispute mechanism is different[7]. Especially in this case, it can be found that Art 8 of the BIT simultaneously refers to ICSID arbitration, ICSID Additional Facility arbitration and PCA arbitration as options for a potential claimant in investment dispute, which indicates that it is most unlikely that the definition of "investment" under the BIT could result in different substantive protection simply because of the option made by an investor is different.

B. Treaties aiming at the protection of human rights are not applicable, and could not suggest any reference value to an investment arbitration.

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[5] Cf. GEA Group Aktiengesellschaft v. Ukraine, (2011) ICSID Case No. ARB/08/16, Award, at para. 162.

[6] Cf. *Saipem v. Bangladesh*, (2007) ICSID Case No. ARB/05/07, Decision on Jurisdiction, at para. 127; *White Industries Australia Limited v. Republic of India*, (2011) arbitration in London under UNCITRAL Rules, Final Award, at para. 7.6.3; *GEA Group Aktiengesellschaft v. Ukraine*, *supra* note 5, at para. 162.

[7] *Romak S.A. v. Uzbekistan*, *supra* note 1, at para. 180

8. For the clarity of this Tribunal, the Respondent is aware that there are treaties in humanitarian area that have regarded an arbitral award as protected "properties"[8]. However, treaties and laws on humanitarian area, such as the European Convention on Human Rights, simply could not be applied. In this case, neither of the contracting states of the BIT is a contracting party to the ECHR[9]. The applicable law in this case is the BIT and relevant international law[10], and a misapplication of laws and regulations might result in an arbitral award set aside or enforcement refused under Art V(1)(d) of the New York Convention.

9. Moreover, treaties in humanitarian law have distinct objects and purposes from investment treaties, therefore it does not even qualify as a reference or analogy. The object and purpose of ECHR is to protect "possession" as a type of basic human rights, while according to the Preamble of this Treaty, the BIT is to protect investment and ultimately serves the purpose to promote economic development and flow of capital.

II. The Award remains analytically distinct from the original contract, and is not governed by the Treaty.

10. The Award, even if resolving a dispute that eventually arising out of an investment made by an investor, is still analytically distinct from an investor's original investment (A), and the enforcement of this Award is not governed by an investment treaty to receive any special treatment (B).

A. The Award, logically distinct from the original contract, should not be

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[8] *Stran Greek Refineries and Stratis Andreadis v. Greece*, European Court of Human Rights Application no. 13427/87, Judgement, at paras 60-62.

[9] *Problem, PO No. 2*, at p. 48, para. 2

[10] *Problem, PO No. 1*, at p. 26, para. 11.

drawn a link to the original investment.

11. From the facts of the case, an arbitration agreement was contained in the Long-Term Agreement (LTA) signed between the Claimant and the National Health Authority (NHA). Claimant initiated an arbitration in Reef according to that arbitration agreement and obtained an award in 2009[11].

12. Without conceding, the Respondent does not make an argument hereby on whether the Long-Term Agreement, as a contract, is an investment or not. It is the Claimant's burden to establish before this Tribunal that the Long-Term Agreement is an investment. However, the Respondent does contend that, the award, which is a legal instrument, remains analytically distinct from, if any, an "original investment". In the case *GEA Group v. Ukraine* in which Prof. Albert Jan van den Berg sits as the presiding arbitrator, the tribunal holds that, even if the Award is arising out from an investment, the fact that an Award rules upon rights and obligations in relation to an investment does not equate the Award with the investment itself[12].

13. For the information of this Tribunal, the Respondent also acknowledges that there are other cases in which Tribunal has regarded an arbitral award as part of an overall investment of an investor. The discrepancies indicate that, up till today, and from the limited cases that have ruled on this issue, there is no developed jurisprudence over whether an arbitral award can be classified as "investment". The only widely accepted approach, instead, is that this issue is subject to case-by-case analysis by each arbitral tribunals.

14. However, the Respondent submits that cases that affirm jurisdiction over claims in

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[11] *Problem, PO No. 1, Uncontested Facts*, at pp. 29-30, paras. 9-17.

[12] *GEA Group Aktiengesellschaft v. Ukraine*, *supra* note 5, at para. 162.

relation to arbitral awards have obvious flaws in the reasoning. Cases like *Saipem v. Bangladesh*, *Frontier Petroleum v. Czech Republic* and *White Industries v. India*,[13] regard an arbitral award as having crystallized an investor's rights under contracts. However, from the mechanism of international arbitration, instead of having "crystallized" a party's rights, an arbitral award is still subject to the examination of courts at the seat of arbitration in annulment proceedings, and the examination of every court at the place of enforcement in the enforcement proceedings. Moreover, the *Saipem* case, which is the first case found to have affirmed the jurisdiction of a tribunal over a claim in relation to an ICC award, does not reconcile with itself in the reasoning. The tribunal in *GEA v. Ukraine* points out that *Saipem* first says the award is a part of the investment at para. 110, when considering whether Saipem has made investment under ICSID Convention; while then it says the award is not part of the investment at para. 113 by holding "the award only arise indirectly from the investment", when deciding whether the dispute arise directly out of the investment under Art 25 of the ICSID Convention.

15. Tribunals in *Frontier Petroleum v. Czech Republic* and *White Industries v. India* also rely on a provision that provides "change of form of an investment" not influencing the character of an investment. This reasoning is questionable in its logic. As submitted above, the definition of "investment" should have its inherent meaning, the transformation of an investment should still maintain the inherent characters of an "investment". Ever since the Award ceases to have such a character, it is not protected as an "investment" under the contract.

16. Moreover, such an interpretation may not be consistent with the intent of contracting states themselves. In 2016, which is after the decision of White

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[13] *Saipem v. Bangladesh*, *supra* note 6, at para. 127; *Frontier Petroleum Services Ltd. v. The Czech Republic*, (2010) Permanent Court of Arbitration, Final Award, at para. 229 and para. 231; *White Industries Australia Limited v. Republic of India*, *supra* note 6, at para. 7.1.6.

Industries, the Republic of India clarifies in its Model BIT[14]. In Article 1(4) of the India Model BIT 2016, it clearly provides that for the clarity of the treaty, investment does not include, inter alia, an order or judgment sought or entered in any judicial, administrative or arbitral proceeding.

B. The enforcement of an award is governed by the New York Convention instead of an investment treaty, and an investment tribunal is not in a position to become the appellate body of an award.

17. Moreover, the key issue underlying is that an international investment tribunal is not in the position of a supervisory or appellate body to the domestic courts concerning enforcement and annulment proceedings[15]. The enforcement of arbitral award is governed by New York Convention and relevant domestic arbitration law in Mercuria. The Respondent does not contend that it has a general duty to enforce every arbitral award under Art III of the New York Convention providing certain requirements are met. The New York Convention does not have a dispute resolution clause on its own, and should there be a dispute, it should be solved in a state-to-state basis, between the Respondent and the People's Republic of Reef which is the state where the Award was made, not the home state of the Claimant.

18. Affirming jurisdiction over such claims would bring in complicated and problematic mechanisms in international arbitration. Whether the applicant is a foreign investor under a specific investment treaty does not make a difference to the standard of efficiency in an enforcement proceeding. Therefore, in the case *Kaliningrad Region v. Lithuania*, the tribunal rejects its jurisdiction, holding that it is not in a position of an appellate body of a domestic court for its examination on

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[14] Cf. Model Text for the Indian Bilateral Investment Treaty, Art 1(4).

[15] *Le Couvernement de Region de Kaliningrad (Fédération de Russie) v. La République de Lituanie*, (2010) Cour d'Appel de Paris

enforcement proceeding[16].

III. Conclusion

19. In conclusion, the tribunal does not have the jurisdiction over the claim in relation to the award, because the award, tested with the inherent meaning of an investment, is of itself not an investment under the BIT. Furthermore, it is distinct from the original investment that Claimant has made.

ISSUE (B) ALL THE CLAIM BROUGHT BY THE CLAIMANT ARE INADMISSIBLE BECAUSE THE RESPONDENT HOST STATE HAS ALREADY EFFECTIVELY DENIED THE ADVANTAGES OF THE TREATY TO THE CLAIMANT.

20. Art 2(1) of the Treaty entitles a contracting state to reserve the right to deny the advantages of the BIT to those entity that is owned or controlled by national of a third state, and has no substantial business activity in the state where it is organized. The two requirements to deny the benefits to the Claimant have both been satisfied (I); also, the Respondent has timely invoked such a provision by raising the objection in the Response to Request for Arbitration (B).

I. The two requirements to deny the benefits to the Claimant have been satisfied.

21. There are two requirements under Art 2(1) for a host state to deny the benefits to an investor, namely ownership or control by national of a third state, and no substantial business activities. In our case, both requirements have been satisfied, since the Claimant is controlled by a national in Reef (A), and has no substantial business activity in Basheera (B).

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[16] *Ibid.*

A. The Claimant is controlled by a national in a third state.

22. The Claimant, with its shares held by Atton Boro Group affiliates, is ultimately controlled by a company which is organized under the law of the People's Republic of Reef. This fact is uncontested between the party and is enough to satisfy the first limb of Art 2(1).

23. The nationalities of Atton Boro Group affiliates are irrelevant, since the word "ownership" includes direct and indirect ownership, and the word "control" includes control in fact[17]. On the other hand, the Respondent, although bearing the burden of proof at the initial stage, does not have to discover the corporate structure of the Claimant till the very last stage, which is the ownership and control of natural person[18]. The purpose of the clause could be served when the Respondent could prove that at some stage of the shareholding relations among the group companies there is a foreign control or ownership from nationals of a third state. Should there be a small possibility that the Claimant is owned or controlled, at the very last stage, by natural persons who are citizens of Basheera, it is no longer the Respondent's burden to show to the Tribunal that such possibility has been eliminated. The burden of proof has been shifted to the Claimant.

B. Claimant has no substantial business activity in the territory of Basheera.

24. Lack of substantial business activity is the second element under Art 2(1). There is no express standard set forth in Art 2(1) of the BIT. But in order to properly

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[17] *Plama Consortium Limited v. Republic of Bulgaria*, (2005) ICSID Case No. ARB/03/24, Decision on Jurisdiction, at para. 170

[18] Cf. *Pac Rim Cayman LLC v. The Republic of El Salvador*, (2012) ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdiction Objections, at para. 4.81.

interpret the meaning and standard of this element, it should be noticed that the purpose to have a denial of benefits clause in a treaty, is to preclude those shell companies or mailbox companies from the substantive protection granted by the treaty. This is consistent with the legislative history of the BIT between US and Bolivia[19].

25. According to *Black Law Dictionary*, a shell company is "a corporation that has no active business and usually exists as a vehicle for another company's business operation."[20] The Claimant, with no business of its own but only providing services to other companies of Atton Boro Group, is exactly a shell company. Referring to the facts of the case, we can see that the parties have agreed that the claimant is a "vehicle for business in South America and Africa"[21]. For more clarity, it is revealed that what the claimant has been doing in Basheera is only to assist other Atton Boro affiliates in their investment[22]. Having only 2 to 6 permanent employees with the occupancies of accountant, lawyer, or patent attorney, the employees of the Claimant are only advicing on business, but never conducting business themselves.

26. Also, reference to other treaties having clear standard for substantial business activity, it is apparent that an independent decision body or a significant business conducted for the company itself is essential. For example, the US Department of

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[19] Cf. Investment Treaty with Bolivia: Messages from the President of the United States Transmitting Treaty Btween the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of investment, Treaty Doc. 106-26, Letter of Submittal by Department of States, Art 12.

[20] *Black Law Dictionary*, 9th ed. at p. 394, [shell corporation].

[21] *Problem, PO No. 1, Uncontested Facts*, at p. 28, para. 4

[22] *Problem, PO No. 2*, at p. 48, para. 3

State interpret the denial of benefits clause in US-Bolivia BIT highlights the element of existence of central administration or principal place of business as:

> [The denial of benefits clause] permit the US to deny the benefits to shell company organized in Bolivia. This provision would not generally permit the US to deny a company that has central administration or principal place of business in Bolivia."[23]

27. Moreover, reading Art 2(1) of the BIT with the Preamble of the Treaty, which aims at promoting the "mutual economic development" of the two contracting states, the evaluation of the company's economic contribution to the host state should be taken into consideration. This is an appropriate interpretation of the treaty clause. By making analogy to other treaties that have provided a clear standard on what is a "substantial business activity", it can be found that economic significance and contribution to the host state are essential marks for examination. For example, in the COMESA Agreement, it provides that:

> a substantial business activity requires an overall examination on a case by case basis of all circumstances, including the amount of investment brought to the country, the number of jobs created, the effect on the local community, and the length of time the business has been in operation."[24]

28. In this case, the Claimant does not have its own decision-making body to make any transactions of its own. By managing portfolios of patents registered in Africa and South America and providing services for companies in South America and Africa, it is not making any contribution to the Kingdom of Basheera. It should be noticed that Claimant was incorporated in Basheera in April 1998, shortly after Basheera concluded several investment treaties with

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[23] US-Bolivia BIT, see supra note 19.

[24] Cf. Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area, Art 1(4)

other states[25]. The timing of Claimant's incorporation clearly shows that it is only a treaty-shopper trying to take advantages of the treaty advantages. Preventing treaty-shoppers from being protected by an investment treaty is exactly the purpose of having a denial of benefits clause in the BIT. Therefore, the Claimant's business in Basheera could not suffice the standard of having substantial business.

II. The denial of benefits clause has been timely and retroactively exercised by the Respondent.

29. In this case, the Respondent raised the objection to the admissibility of the claims based on Art 2(1) of the Treaty as soon as it received the Request for Arbitration from the PCA Registrar. The notification reached the Claimant in the Response to Request for Arbitration[26]. This is a timely invocation of the treaty, and thus the Respondent has retroactively denied the benefits to the Claimant.

30. The Claimant may argue that Art 2(1) of the BIT only has a prospective effect and requires a prior notification. However, such an argument, if ever made, must fail. According to the language of the BIT, there is no requirement of time period for a host state to deny the benefits to an investor. Therefore, a duty of prior notification with only prospective effect should not be interpreted out from nowhere. According to the Interim Award of *Ulysseas v. Ecuador*[27], for those company that has no substantial business activities in the state that it is incorporated, it should be aware of the risks ever since its establishment that it might be denied of

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[25] *Problem, PO No. 1, Uncontested Facts*, at p. 28, paras. 1-4.

[26] *Problem, Respondent's Response to Request for Arbitration*, at p. 16, para. 5

[27] *Ulysseas, Inc. v. The Republic of Ecuador*, (2011) Permanent Court of Arbitration, Interim Award, at para. 173.

benefits under the treaty. Also, it would only be practicable for a host State to actually exercise the rights under Art 2 when it notices that a dispute has arisen between it and an investor. It would be too unreasonable for a host State to do a one-by-one examination to every foreign investors about their ownership and control, about their business activities in another state, and send notification thereby[28].

31. The Respondent acknowledges that under a limited number of cases, specifically the ECT cases, denial of benefits clause is held to be having a prospective effect[29]. However, the difference in the language of the treaty should be noticed. Tribunals in ECT cases highlighted the purpose of the treaty as to promote the "long-term cooperation in the energy field", and held that predictability and expectation for the investors are necessary for a long-term cooperation. However, this language cannot be found in anywhere of the Mercuria-Basheera BIT, even not in the preamble. Also, in *Plama v Bulgaria*, the tribunal highlighted a reason that the ECT is a multilateral treaty open for other states to accede, and that "it is notorious that that issues as to citizenship, nationality, ownership, control and the scope and location of business activities can raise wide-ranging, complex and highly controversial disputes, as in the present case". Such a circumstance is materially different from a BIT[30]. *In casu*, the Tribunal should consider the interpretation of the Treaty under the context of a bilateral investment treaty, and

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[28] Cf. *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, (2009) ICSID Case No. ARB/05/9, Award, at para. 71; *Pac Rim Cayman LLC v. The Republic of El Salvador*, supra note 18, at para. 4.83

[29] Cf. *Plama Consortium Ltd. v. The Republic of Bulgaria*, *supra* note 17, at para. 149 and para. 156; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, (2010) ICSID Case No. ARB/07/14, Award, at paras. 225-227; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, (2009)PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, at para. 458.

[30] *Plama Consortium Ltd. v. The Republic of Bulgaria*, *supra* note 17, at paras. 156.

interpret it appropriately in alignment with Art 31 and 32 of the VCLT.

III. Conclusion

32. Therefore, the Respondent submits that the requirements to deny have been met because Claimant is controlled by a national of a third state and has no substantial business activity, and the Respondent timely invoked this clause in the Response to Request for Arbitration. Thus, the Claimant's benefits have been denied, and all of the three claims are inadmissible.

ITEM (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 FET STANDARD UNDER THE BIT.

33. The Respondent's enactment Law No.8458/09 does not amounts to the breach of the Mercuria- Basheera BIT for three reasons. First, the Claimant has no standing to bring claims relying on obligations contained in the TRIPS Agreement before a tribunal deciding an investment dispute.(I). Second, Assuming *Arguendo* that the Claimant has the standing before this tribunal, the allegation that the Respondent 's enactment Law No.8458/09 amounts to the breach of the BIT is nonetheless groundless and therefore cannot be established(II).and In any event, The Respondent does not violate the BIT because the exercise of its *police power*. (III).

I. The Claimant has no standing to bring claims relying on obligations contained in the TRIPS Agreement before a tribunal deciding an investment dispute.

A. The WTO DSB has exclusive jurisdiction over the compulsory license disputes.

34. Obligations within TRIPS exist only among member states *per se*. According to article 23 of World Trade Organization's Understanding on rules and procedures governing the settlement of disputes, which stipulate "When Members seek the

redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements,they shall have recourse to, and abide by, the rules and procedures of this Understanding."[31]

35. It follows that private individuals or companies do not have direct access to make a complaint with regard to TRIPS. Nor could such disputes be addressed outside the WTO. Therefore disputes arising out of TRIPS fall within the exclusive domain of Dispute Settlement Body.

B. The TRIPS obligation cannot be incorporated into the BIT under article 11 of the BIT.

36. Article 11 is a rule of "application of other rules" in the dispute. However, this article is too general to be applied here. Firstly, as tribunal of *Grand River Enterprises Six Nations v. United States* noted, the applicable law "does not incorporate the universe of international law into the BITs"Otherwise this article will be an "a vehicle for generally litigating claims based on alleged infractions of domestic and international law. Such incorporation will result in an unreasonable high protection level to investors. Secondly, if the contracting parties intend to incorporate TRIPS, they can incorporate it explicitly." [32]

37. In the BIT, There is no Article in the BIT that incorporates treatments under TRIPS into the treaty implicitly or explicitly. Thus, the preamble shall not be interpreted too broadly, otherwise the standard would become "a vehicle for litigating claims based on all domestic and international law."

C. Notwithstanding the foregoing, The enactment of the Law and the grant

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[31] Article 23 of World Trade Organization Understanding on rules and procedures governing the settlement of disputes.

[32] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award in 2011, p.68.

of the compulsory licence are consistent with the TRIPs Agreement.

38. The TRIPS Agreement expressly presents clauses taking public health under consideration in construing IP rights. When interpreting the TRIPS Agreement, Art 7 and 8 must take into account, which set forth fundamental principles of IP governance, and provide space for reconciliation between private and public interests in IP regulation.

39. Article 7 stipulate that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8 also reflect the importance of protection of public health by stipulating 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 to their social-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."[33]

40. The Doha Declaration on the TRIPS Agreement and Public Health has further reinforced state regulatory space to adopt public health measures, recognizing the WTO members' right to protect public health and to use the flexibilities provided by the TRIPS Agreement. Where clear reference is made to the TRIPS Agreement, international investment agreements incorporate the TRIPS Agreement, including its objectives and principles as stated in Articles 7 and 8, as well as the relevant interpretative background provided by the Doha Declaration. Such provisions then become applicable and may provide guidance in the context of investment disputes. It further provides that " (c) Each Member has the right to grant

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[33] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002)

compulsory licence and the freedom to determine the grounds upon which such licence are granted.

41. Doha Declaration stipulates that We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

42. The principle of Doha Declaration also been recognized thereafter. For instance, the EU has referred to the provisions of the Doha Declaration as an overarching principle in its bilateral trade agreements with Korea, Colombia and Peru, and Central America.

43. The requirement of national emergency has been satisfied by the Respondent. As provided in article 31 of TRIPS, under the title "Other Use Without Authorization of the Right Holder, the procedural requirement, like prior negotiation, might be waived if there is "a national emergency or other circumstances of extreme urgency". As the above mentioned Declaration on The TRIPS Agreement and Public Health issued by World Trade Organization, it emphasizes the urgent to combat health problems, especially epidemics, and reaffirms host state has right to grant compulsory licence, and has the right to determine what constitutes a national emergency or other circumstances of extreme urgency under article 31 of TRIPS. Especially, It notes that, among others, "public health crises, like those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency." Therefore, respondent has the right to declare prevalence of greyscale as a national emergency, as it did appear so in the uncontested fact.

44. The Respondent also complied with other procedural requirement for the enactment of the compulsory licence act. In accordance with TRIPS, the grant of

license is non-exclusive and non-assignable. And it expressly provides that "to grant the license until greyscale was no longer a threat to public health in Mercuria."[34]

45. In addition, with regard to "domestic use" claim, 2003 Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health issued by World Trade Organization, has provided that, "countries, lack of production capability for certain drugs, are entitled to import such drugs from other countries which domestically has granted compulsory license to produce such drugs. Therefore,the Respondent exported drugs to other countries in full awareness of, and in accordance with its international humanitarian law obligation.

46. Greyscale is a severe and pervasive epidemic which threatens the well-being of thousands of working-age individuals in Mercuria. The Respondent has acted responsibly, and in accordance with due process of law, in introducing measures necessary to safeguard the health of its people.

II. Assuming *Arguendo* that the Claimant has the standing before this tribunal, the allegation that the Respondent 's enactment Law No.8458/09 amounts to the breach of the BIT is nonetheless groundless and therefore cannot be established.

A. Fair and Equitable Treatment is a self-standing standard and include the obligation to protect the investors' legitimate expectation.

47. The fair and equitable treatment (FET) standard is a key element in contemporary international investment agreements (IIAs).[35] In our case, the legal source to apply the FET is Article 3(2) of Mercuria- Basheera BIT which provides

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[34] *Problem, PO No. 1, Uncontested Facts*, at p. 31, para. 21.

[35] United Nations Conference on Trade And Development, "*Fair and Equitable Treatment 2012"*, at p.21.

'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.'[36]

48. Pursuant to the treaty interpretation rules in Article 31 of VCLT, The meaning of FET standard was not generally determined. The word "fair" is defined by the Concise Oxford Dictionary as 'just, unbiased, equitable, in accordance with rules'. Therefore, fairness connotes, among other things, equity. The concepts of fair and equitable are, to a large extent, interchangeable.[37] The vagueness of the wording in FET standard has been generally considered as a art of legal language for its gap filling roles in IIA disputes. [38]The ambiguity of the concept of FET standard should not undermine the application of its substantial obligation.

49. As for the content of FET standard, The treaty language and its context in Mercuria-Basheera BIT suggests the interpretation of FET standard in this case should not be the Minimum Standard of Treatment (MST) but rather a self-standing standard of substantial obligation including Prohibition of denial of benefits, due process, legitimate expectation,etc. And therefore the legal threshold of the violation of the FET standard has been crystallized by international investment tribunal.

B. The Respondent has not frustrated claimant's expectation.

50. As pointed out in *EDF v. Romania*, expect when specific promises are made, insurance against any change of legal and economic framework would be neither legitimate nor reasonable.[39] In *Philip Morris v. Uruguay*, "changes to general

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[36] Problem*, Article 3(2) of Agreement Between The Republic Of Mercuria And The Kingdom Of Basheera for The Promotion And Reciprocal Protection Of Investments,* at p. 33.

[37] *The Concise Oxford Dictionary of Current English,* Eighth edition, Clarendon Press, Oxford, 1990, p. 420.

[38] OECD (2004), *"Fair and Equitable Treatment Standard in International Investment Law",* OECD Working Papers on International Investment, 2004/03, OECD Publishing.

[39] *EDF (Services) Limited v Romania,(ICSID CASE NO. ARB/05/13), award, p.216*

legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest".[40]

51. No reasonable investor can expect that Mercuria would not reform its legal framework in legitimate exercise of its police powers when faced with a public health crisis; particularly where nothing in the BIT guarantees investors that the Contracting Parties' laws and regulations will remain immutable regardless of whatever crises their respective governments are forced to confront.

52. It has been recognized that "It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances."

53. In our case, as the sovereign right to regulate public health issues has been expressly stipulated in BIT and relevant International documents, claimant could legitimately expect that respondent would take necessary measures to combat greyscale.

54. The purpose and object of the BIT is not merely to protect investment in contracting parties. Para.6 of the preamble of BIT expresses its purposes to achieve the objectives in a manner consistent with the protection of health, safety, environment and labor right.

55. On the contrary, in light of severe public health crisis and widely international concern for epidemics, the expectation could only have been that more aggressive and effective measures would be carried out.

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[40] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award, para. 287.

C. The enactment of the Law No.8468 fundamentally did not change the investment environment for the Claimant

56. Patent law is characterized by the concept of the "patent bargain". Patents do not confer absolute rights, nor do they create any legitimate expectation that the exclusivity they confer is absolute and will remain without interference which is inherent in the IP system. And compulsory license is a widely-adopted limit contained in IP laws. Therefore, given the inherent balance contained in IP laws, claimant cannot claim that the investment environment has not been fundamentally changed by introduction of compulsory license.

57. In any event, the investment environment has not been fundamentally changed, as respondent has accorded protection provided in TRIPS, and reduce the impacts on claimant.

III. In any event, The Respondent does not violate the BIT because the exercise of its *police power*.

A.The Respondent's exercise its police power is within in the pursuance of a public interest. The alleged measures are not arbitrary

58. As held in *Philip Morris v. Uruguay* tribunal, "changes to general legislation, at least in the absence of a stabilization clause, are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest. Especially, it points out that The responsibility for public health measures rests with the government, and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. [41]

59. And we further submit that the alleged measures are carried out within the normal

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[41] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award, para. 237.

regulatory power, as they are not arbitrary or discriminatory, and do not frustrate claimant's expectation by fundamentally changing the investment. Also, As pointed out in *EDF v. Romania* tribunal, expect when specific promises are made, insurance against any change of legal and economic framework would be neither legitimate nor reasonable.[42]

B. The alleged measures are not arbitrary and therefore is in accordance with international law.

60. As evidence of the evolution of the principles in the field, the police powers doctrine has found confirmation in recent trade and investment treaties. The 2004 and 2012 U.S. Model BITs provide in the section dealing with "Expropriation": "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation." Similar provision is made by the 2004 and 2012 Canada Model BITs. Therefore, these provisions, whether or not introduced *ex abundanti cautela*, reflect the position under general international law.[43]

61. The Challenged Measures were taken by Mercuria with a view to protect public health in fulfillment of its national and international obligations. For reasons which will be explored in detail in relation to claims under Article 3(2) of the BIT, the Claimant submit that the Challenged Measures were both adopted non-arbitrary and were non-discriminatory.

62. The international law standard of arbitrariness set forth by the ICJ in the ELSI case, that "arbitrariness" is defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." When considering this, tribunals generally look to whether the measures at dispute are in

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[42] *EDF (Services) Limited v Romania,(ICSID CASE NO. ARB/05/13), award, p.103*

[43] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award, para. 301.

pursuit of public welfare and whether there is rational relationship between the purpose and the measures taken.

63. Firstly, it is undoubted that the alleged measures are in pursuit of public welfare. The introduction of law and the grant of license are to combat the prevalence of greyscale, and to enable more people to access affordable medicines.

64. Secondly, the alleged measures have rational relationship to its purpose of protecting public health and making medicines accessible to ordinary people. Intellectual property right, while protecting interests of right holder, also bars ordinary people from accessing affordable medicines, and compulsory license is seen as an effective and necessary measure to strike a balance between those, especially during epidemic outbreak. Such relationship is revealed in numerous international documents. For example, TRIPS itself explicitly incorporates clause for compulsory license when necessary. Moreover, in 2001, to fight with public health problems worldwide, World Trade Organization has issued Declaration on The TRIPS Agreement and Public Health, which emphasizes that Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted. Moreover, World Health Organization also publishes documents supporting the importance of compulsory license in combating epidemics.

65. In addition, The law No. 8458/09 is applied to everyone in the territory of respondent, no matter they are domestic nationals or foreigners.

66. In addition, the grant of license to was not a discriminatory measure. Here, it was the HG-Pharma that decided to file an application seeking the grant of license of the claimant’ s invention.[Statement of uncontested facts, para 21.] The high court of Respondent was not in a position where it can decide whose license would be granted. In other words, the high court is not competent of discriminating.

ITEM (D) MERCURIA IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS.

67. The Respondent concedes that a State may, in principle, be liable for the acts of its judiciary. The Court's undue delay in the enforcement do not breaches the obligation to provide effective means of enforcing right(I). and the alleged court's irregularity do not amount to an denial of justice(II).

I.The Court's undue delay in the enforcement do not breaches the obligation to provide effective means of enforcing right

68. The obligation to provide effective means for enforcing right is not applicable in the present case. First, In the BIT, there is no provision which put the Respondent an obligation to provide effective means for enforcing right. Second, the preamble of the BIT cannot create substantial obligation to the Respondent. Third, even if the Respondent has the obligation, such an obligation derives from the New York Convention and this tribunal has no jurisdiction over the disputes regarding the breach of the NY convention.

69. First, The Beasheera- Mercuira BIT, does not have an provision to request the parties to provide the effective means. The Claimant may rely on the white industry's successful allegation in the *white industry v. India* case. However, the white case is factually distinguished from our case in the first place, which is the application of the effective means obligation.

70. The White relied on the MFN clause to introduce the article 4(5) of Kuwait-India BIT, stating "Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations

provide *effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State*, t*he right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority*, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments. " However, there is no provision which put the Respondent an obligation to provide effective means for enforcing right in the Beasheera- Mercuira BIT.

71. Second, the preamble of the Beasheera-Mercuira BIT should not create substantial obligation for the Respondent. According to Art 31 of the VCLT, "a treaty should be interpreted in accordance with the context of the treaty, and in line with its object and purpose."[44] By stating the aims and objectives of a treaty, as preambles often do in general terms, preambles can help in identifying the object and purpose of the treaty." The preamble of a treaty is a part of the text of a treaty as recognized by the VCLT, and it is also regarded as reflecting the object and purpose of the BIT[45]. However, the preamble only play a role for the interpretation of the wording in the treaty and it should not create substantial obligation for the Respondent.

72. Third, Mercuria agrees that it has the obligation to provide the effective means under the 1958 NY Convention. However, this tribunal only has the jurisdiction over the investment disputes under the BIT. this tribunal's jurisdiction is established under article 8(1) of the BIT. It states Any dispute between an investor of *one Contracting Party* and the *other Contracting Party* arising out of or in relation to this Agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall, failing settlement through amicable negotiations, be settled by arbitration. And therefore, this tribunal has no jurisdiction on the breach of or the disputes of the interpretation NY convention.

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[44] 1969 Vienna Convention on the Law of Treaty, article 31(1).

[45] *Romak S.A. v. Uzbekistan*, (2009) PCA Case No. AA280, Award, at para. 181.

II. The Court's undue delay in the enforcement do not breaches the obligation to provide effective means of enforcing right.

73. India concedes that a State may, in principle, be liable for the acts of its judiciary. However, as stated by the *Mondev tribunal*, the test for denial of justice is a stringent one."The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment.[46]

74. The tribunal in Chevron Corporation and Texaco Petroleum Company v Ecuador agreed that: the test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of "a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.[47]

75. Mercuria submits that the events in this case plainly fall far short of this high threshold. It says that the factors to be taken into account in determining whether

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[46] *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, at para. 127.

[47] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, (2008) Arbitration under the UNCITRAL Arbitration Rules, Interim Award, at paras. 182-185.

there has, in the present case. been a denial of justice are: (a) the complexity and sensitivity of the proceedings, as well as the significance of the issues at stake; (b) the need for swiftness in the resolution of the case, including whether the claimant may be compensated for loss by any delays; (c) the conduct of the litigants involved, including the diligence of the claimant in prosecuting the proceedings; (d) the behaviour of the courts themselves; and (e) the circumstances of the host State.

76. With respect to the complexity of the issues at stake, it is clear that the question whether the Mercuria High Court can entertain an application for an arbitral award to be set aside has been and is a hotly debated point of Mercuria law. The progress of the Claimant's application has, accordingly, been hampered by the complexity of the issue requiring resolution.

77. Dealing next with the need for swiftness in the resolution of the case, this has been an issue in the context of proceedings and applications before human rights courts where there is particular need for the urgent resolution of the case. In the present case, those same considerations do not apply.

78. With regard to the diligence of White in prosecuting the proceedings (and the conduct of the litigants), we submits that the time taken in the proceedings before the courts of Meruria is directly attributable to the litigation strategy adopted by the Claimant. Had the Claimant not transferred the jurisdiction of the Mercuria High Court, the application would by now have been heard on the merits and been disposed of.

79. As regards the behaviour of the Mercurian courts themselves, we submits that it is not possible to criticise their conduct. The courts have in fact heard various applications and petitions within a reasonable time period, with, in all cases, without one exception. There simply can be no suggestion whatever that the Mercurian courts have in any way been culpable of undue delay.

80. Finally, this Tribunal must take into account the circumstances of the Host State. And it is clear, as a matter of law, that Mercuria as a developing country, with a population of over 67 million people and an over-stretched judiciary, must be held to different standards than, for example, Switzerland, the United States or Australia.

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

81. Article 3(3) of the BIT provides that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party." The Respondent submits that The conduct of the NHA is not attributable to Mercuria.(I) "Any Obligation" does not include the contractual obligation under the Long Term Agreement(II).

I. The conduct of the NHA is not attributable to Mercuria.

82. As suggested by the word "it" in Article 3(3) of the BIT, the so-called "Umbrella Clause", the Respondent could only be held liable for the breach of those obligations which are entered into directly by the state itself. Although the Respondent duly concedes that NHA is a public body in Mercuria, which bears certain governmental functions, the NHA remains an independent and distinct legal entity from the state. In this regard, even if there were a breach of the LTA, the responsibility lies with the NHA, rather than the Respondent, the state of Mercuria.

83. The issue in which circumstances the state shall be held liable for the conduct of a legal entity has been discussed by several international tribunals. Among which, the two ICSID cases, namely *Impregilo v Pakistan* and *BUCG v Yemen* are the

most factually analogous to the present case. In both cases, the tribunals found for the state, holding that the state shall not be liable for the conduct of a legal entity under the Umbrella Clause.

84. In *Impregilo v Pakistan*, the tribunal states that whether the state of Pakistan shall be liable for the conduct of an entity called WAPDA (Water and Power Development Authority) depends on the legal status of the WAPDA under Pakistani laws. According to Pakistani laws, the WAPDA is obviously a public body carrying out governmental functions. It was established by the Pakistani government, all of its managerial personnel appointed by the government, and even audited by the government.[48] However, the tribunal in that case nevertheless held that "although the government exercises a strict control on WAPDA", the WAPDA is an "autonomous corporate body, legally and financially distinct from Pakistan".[49]

85. The Respondent duly noticed that, in drawing this conclusion, the tribunal emphasized in its decision the fact that under Pakistani laws, WAPDA may "undertake any works, incur any expenditure, procure plant, machinery and materials required for its use and enter into and perform all such contracts as it may consider necessary or expedient". Or more generally, it may take such measures and exercise such power as it considers necessary or expedient.[50]

86. Impregilo v Pakistan is indeed not a stand-alone case. The legal principle that the state shall not be responsible for the conduct of another distinct legal entity is reiterated in one of the most recent ICSID tribunal decisions, BUCG v Yemen, released in May, 2017. In that case, the state of Yemen raised the jurisdictional objection that BUCG, a state-owned entity, is both an agent of the Chinese Government and discharges governmental functions even in its ostensible

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[48] Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Award, para. 200-207.

[49] Ibid, para. 209.

[50] Ibid, para. 205.

commercial undertakings. Accordingly, BUCG does not qualify as a "national of another Contracting State." The issue there was whether there is an identity between the BUCG and the Chinese government. The tribunal held in negative. Quoting CSOB v Slovak decision at para. 20, the tribunal considered that the proper test is the nature of those activities and not their purpose in a particular instance, and that the conduct of an entity is not attributable to the state if the activities themselves were essentially commercial rather than governmental in nature, despite the fact that in performing those activities, the entity was promoting governmental policies and purposes. [51]The tribunal concludes that since in that particular case, the BUCG was awarded the contract through a commercial bidding, and the contract was essentially commercial in nature, the conduct of the BUCG is not attributable to the state of PRC, despite the fact that PRC has strict control over the BUCG as a state-owned enterprise.

87. Based on the above cases, the Respondent respectfully submits that the following standards should be duly considered by this tribunal:(1) Whether the Respondent, the state of Mercuria, has any control over the NHA's decision making mechanism;(2) Whether the NHA is a distinct entity from the state of Mercuria, and particularly, whether the NHA had independent decision making when it entered into the LTA with the Claimant; and(3) Whether the LTA of commercial nature, and in particular, whether the conclusion, performance and termination thereof is capable of being exercised by ordinary commercial parties or involving puissance public.

88. The Respondent submits that the LTA entered into by the NHA, or any breach thereof, is not attributable to the Respondent, because first there is no evidence at hand indicating that the Respondent has any control over the NHA's decision making mechanism; and second the NHA had its independent decision making mechanism when it entered into the LTA; and third the LTA is a purely

[51] Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, Para. 35.

commercial contract.

89. As aforementioned, according to the jurisprudence of the Impregilo v Pakistan case, the NHA's legal status shall be determined the Mercurian domestic law. However, unlike the claiming party in Impregilo v Pakistan, the Claimant in this case has up till now failed to produce any evidence as regard the NHA's legal status under Mercurian domestic law. Since it is not disputed that NHA is a corporate with independent legal capacity, it should be presumed that the NHA has a decision making mechanism independent from the state, unless strong evidences suggest otherwise. The only fact that might be relied upon by the Claimant is that allegedly, there was a meeting between the head of the NHA, the Minister for Health, and the President had a joint meeting prior to the termination of the LTA. However, firstly, the Respondent would like to remind the tribunal that the meeting was private, and this honorable tribunal should not rely on some report which "alludes to reliable source".[52]And secondly, even if the content of the report is true, it merely said that they discussed the budget problem, and there is no indication that the NHA has received any directions from the Minister of Health or the President.

90. It is not contested that the LTA was entered into between the Claimant and the NHA. More importantly, during the whole process, the Claimant was constantly engaged by the NHA, and the Respondent did not participate to any aspect of the process.[53]

91. The LTA is of purely commercial nature. Firstly, the Claimant obtained the LTA through a competitive process,[54]which is highly analogous to that in BUCG v Yemen. Secondly, the LTA is a simple purchase contract, under which the

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[52] *Problem, PO No. 1, Uncontested Facts*, at p. 30, para. 16.

[53] *Problem, PO No. 1, Uncontested Facts*, at p. 29, para. 9.

[54] *Problem, PO No. 1, Uncontested Facts*, at p. 29, para. 9.

Claimant undertakes to sell the medicine to the NHA, and the NHA makes payment to the Claimant. This kind of contract is capable of being entered into, performed or possibly, breached by any ordinary commercial party, and does not entail any exercise of puissance public.

92. Based on the above, the Respondent submits that the LTA entered into by the NHA, and any performance or breach thereof, is obviously not attributable to the Respondent under the test as established by international tribunals.

II. "Any Obligation" does not include the contractual obligation under the Long Term Agreement.

93. Article 3(3) of the BIT provides that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party." Respondent submits that an "umbrella clause" provision in a BIT such as Article 3(3) cannot "elevate a pure breach of a commercial contract into a treaty violation." because an umbrella clause is implicated only if the host state abuses its power or exerts undue governmental interference in breaching a contract or any other type of undertaking.[55] In this case, any ordinary commercial counterpart could fail to pay under a contract, and Claimant has failed to allege that Mercuria committed any other wrongful action constituting an abuse of governmental power.

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[55] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ARB 01/13), decision of 6 August 2003, para 172.