TEAM: KORETSKY

PERMANENT COURT OF ARBITRATION

IN THE PROCEEDINGS BETWEEN

ATTON BORO LIMITED

(CLAIMANT)

V.

THE REPUBLIC OF MERCURIA

(RESPONDENT)

PCA CASE NO. 2016-74

RESPONDENT MEMORIAL

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LIST OF ABBREVIATIONS

¶	Paragraph
BIT	Agreement for the Promotion and Reciprocal Protection of Investments
Chap.	Chapter
ECT	Energy Charter Treaty
EU	European Union
ICSID	International Centre for Settlement of Investment Disputes
Notice of Arbitration	Notice of Arbitration, FDI Moot Problem 2017
p.	page
PO no. 2	Procedural Order no. 2, FDI Moot Problem 2017
PO no. 3	Procedural Order no. 3, FDI Moot Problem 2017
Statement of uncontested facts	Statement of uncontested facts, FDI Moot Problem 2017
The Award	An award rendered by the Tribunal in commercial arbitration in Reef on January 2009
the BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
the Claimant	Atton Boro Limited
the Respondent	The Republic of Mercuria

the Tribunal	Tribunal of the Permanent Court of Arbitration appointed to resolve current dispute
Mercuria	The Republic of Mercuria
Protocol	Draft Treaty, Basic Protocol to the European Energy Charter, 20 August 1991
VCLT	Vienna Convention on the Law of Treaties
Reef	People's Republic of Reef
Basheera	The Kingdom of Basheera
NHA	National Health Agency
LTA	Long-term agrrement between Atton Boro Limited and National Health Agency

Statement of facts

On 11 January 1998, Mercuria and Basheera concluded the BIT. Mercuria is a state that desires and welcomes enterprises and employers from different jurisdictions in order to improve the well-being of its population, that has been struggling with greyscale disease since mid 1980's.

Atton Boro and Company is a company established under the laws of Reef and acts as the primary holding company for Atton Boro Group, a drug discovery, and development enterprise.[1] Its shares are held by a mix of private entities and private individuals of a wide variety of nationalities. Its directors come from several different countries, including Basheera and Mercuria.[2] In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, the Claimant. This company rented out an office, opened bank account, employed several people and conducted business activities in Basheera.[3]

In May 2004, the Claimant entered into a LTA with NHA.[4] NHA was ordered to buy drugs that could have helped with the Greyscale epidemic that was affecting large number of the working age population.

On 10 June 2008, the NHA terminated LTA while violating its Clause 6, citing unsatisfactory performance by the Claimant. NHA was open to price renegotiations, however the Claimant rejected the NHA's offer claiming it would not make any profit.[5]

Pursuing unilateral termination of LTA, the Claimant invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed the Award in favor of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.[6]

On 3 March 2009, the Claimant filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy.[7] The enforcement proceedings

1 Statement of uncontested facts, p. 28, ¶ 2.

2 PO no. 3, p. 50.

3 Statement of uncontested facts, p. 28, ¶ 4.

4 *Ibid*., p. 28, ¶ 5.

5 *Ibid*, p. 29, ¶ 15.

6 *Ibid*., p. 29, ¶ 17.

7 *Ibid*., p. 29, ¶ 18.

remain pending.[8] The Claimant refuses to acknowledge the one and only fact that is also the reason why the Claimant came to Mercuria, namely the situation in the state. Claimant claims denial of sufficient remedies for its situation, criticizing the 7-year delay in the proceedings, the exercise of Respondent's regulatory powers as well as the termination of LTA. The Respondent however is in hideous situation and tries to provide for its people and fulfil the main and most important objective of the state.

On 7 November 2016 the Claimant informed the Respondent about commencement of proceedings before PCA.[9]

8 Procedural order No. 3

9 Notice of Arbitration, p. 3, ¶ 1

PART ONE: JURISDICTION OF THE TRIBUNAL

I. The Tribunal lacks jurisdiction over the claims in relation to the Award, the Award is not an Investment According to Article 1 of the BIT

1. The Respondent submits that Article 1 (1) defines the term "investment" and provides a non-exhaustive list of the asset which can be regarded as an investment thereof.

2. Even though the BIT uses its own definition of term investment, there are additional elements/criteria which need to be examined in order the asset can be considered as protected under the BIT. The term investment is a broadly used term under the investment law and because of that it should be interpreted in its ordinary meaning, since the term automatically implies some elements. This can be also seen in the historical development of this term:

> *"Customary international law and earlier international agreements did not use the notion of investment but the one of "foreign property" dealing in a similar manner with imported capital and property of long-resident foreign nationals. According to Juillard the static notion of property has been substituted by the more dynamic notion of investment which implies a certain duration and movement."*[10]

It means that the term investments by itself automatically implies some group of assets **and the purpose of the definition stated in the BIT is to narrow the group of assets usually understood as investments under the investment law (not containing the Award, as will be addressed later), according to the will of the contracting parties.** Moreover, this has basis also in the fact, that every language has its limits and so it is almost impossible to create a perfect definition, which is also a reason for using non-exhaustive list when defining something.

3. Every investment shall meet the material qualities/elements of the term investment under investment law, otherwise it would be just a concept giving protection to literary every kind of asset. It has been already acknowledged by other tribunals (except ICSID tribunals e.g. *Salini* for example also by the tribunal operating under UNCITRAL Rules in *Romak*[11]

10 OECD, p.41

11 ROMAK, ¶ 207

case) that some objective criteria seeking the nature of the investment, except the wording of the BIT, has to be examined. In light of aforesaid facts, the Respondent hereby submits that these criteria/elements should be examined also in current dispute. *"Therefore, 'investment' should be defined both for the purposes of the ICSID Convention and of international investment treaties as dedication of some assets according to a plan in order to achieve some benefits."*[12] Such basic elements, needed to be examined are:

a. Contribution that extend certain period of time[13]

b. Presence of investment risk[14]

c. Contribution to economic development[15]

4. Aforesaid criteria has been acknowledged also for example by OECD[16] or by Demirkol.[17]

5. To sum up, the asset seeking the protection of the BIT has to meet i) aforesaid criteria and in the same time ii) meet the definition under Article 1 (1) of the BIT (to be at least in compliance with the non-exhaustive list given by the BIT in this article), however meeting just one of these criteria is not sufficient. Prof. Schreuer has clarified that these features (e.g. duration and risk) should be understood as typical characteristics of an investment.[18]

6. To interpret the meaning of the term investment, the Respondent hereby suggest to use VCLT. Article 31 (1) of VCLT provides that "*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". Regardless of the fact that VCLT has not been yet ratified by the Respondent, it will be used as source of interpretation guideline. The rules of interpretation contained in VCLT are regarded as a codified customary international law and international community upholds it as a standard of interpretation and so it does have logical and argumentative relevance. The Respondent

12 DEMIRKOL, p. 10

13 Acknowledged for example by trinunals in: ROMAK, AFT, Joy, Jan

14 Acknowledged for example by tribunals in: ROMAK, AFT JOY, JAN

15 Acknowledged in: JOY, JAN

16 OECD, p. 3

17 DEMIRKOL, p. 10

18 SCHREUER, p. 139-141.

considers it to be an applicable rule of international law in the sense of Article 9 (1) of BIT. Moreover, also in the past the VCLT was relied on by tribunals even though the respondent had not ratified it (e.g Bayindir).

7. The ordinary meaning of the term investment is the meaning taking into account aforementioned criteria, since these are the criteria commonly used by tribunals when interpreting the BIT. To provide the Tribunal with the scope of dealing with elements of an investment by other tribunals, the Respondent hereby presents two examples, which are thanks to their similar nature, suitable also for resolving the current dispute:

8. In *Romak*, the tribunal noted as follows:

> *"The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk."* Similar conclusion has been brought by the tribunal in *AFT*.

9. The tribunal in *AFT* held that "*when the asset arises from a contract, the contract itself should qualify as an investment. For thatpurpose, the contract must meet certain minimum characteristics, such as duration, contribution and risk."*[19]

10. By following arguments, the Respondent explains, that the Award meets non from aforesaid criteria. (In some cases these number of criteria have not been found as sufficient test anyway and so even stricter criteria have been used on the term of investment - for example in *Phoenix* - however, the Respondent finds sufficient to examine the Award under criteria stably used by tribunals, in order to completely comply with Article 31 (1) of VCLT.)

11. The Award is just a legal instrument lacking the essence of time. It is inconceivable to consider the Award as meeting the criteria of duration, because it cannot be understood as a matter extending, lasting, a certain period of time. Exercising the Award is just one time action and its mere existence does not represent any development, change or periodicity during the time.

19 MUSURMANOV, p. 122–123

12. The Award lacks the presence of risk as well. The investment risk is the risk, which shall be, logically, examined when speaking about the term of investment, not any other risk, such as the commercial or the political one. Mere commercial risk is inherent in any commercial activity and as such is not sufficient for the investment to avail itself of the protection provided by the BIT. Political risk is insufficient as well, since it is sovereign right of any state to change the legislation. It is also obvious, that the government can be change in any time and all these politically related issues can surely affect every commercial activities, not just the investments. It means that the investment risk is the only kind of risk that should be considered. It is the kind of risk in which the success and failure is uncertain but at least partly dependent on the investor - the investor has to have some control over the profitability. The control of profitability is not and cannot be present in the nature of the Award.

13. Going further and examining the Award under the criterion of contribution to economic development, we are facing the fact that the Award obviously does not contribute any economic development for the state. The importance of this criterion is highlighted in current dispute consideration in present dispute since the contribution to economic development is highlighted also by the preamble of the BIT stating:

> *"Recognizing that agreement on the treatment to be accorded to such investment will stimulate the flow of private capital and the economic development of the Contracting Parties."*

14. Even though some claims to money, as assumed in Article 1 of the BIT, can meet elements of aforesaid criteria, it was clearly proved above that the Award is not that case and so cannot be considered as protected under the BIT.

15. Additionally, the Respondent submits findings of other tribunal dealing with the matter whether the award shall be considered as an investment - *GEA*. It is necessary to emphasize that the definition of an investment used by the treaty in that case is almost identical to the definition in the BIT in current case. The tribunal has found itself to lack jurisdiction and had made a remark to previous stream of arbitration tribunals, specifically with respect to ***Saipem,*** as the reaction to the different approach of this tribunal. *GEA* tribunal noted as follows:

> *"The Tribunal made statements that are difficult to reconcile." It held that the award is nothing more than "a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an "investment)".*

16. It is important to emphasize, that the Award is analytically distinct from the dispute the Award arise off[20] and so it cannot be considered as a changed form of an investment.

17. The tribunal in *GEA* case also confirmed the economic development element being essential and so the Award cannot be recognized as an investment neither in *GEA* case, nor in case under the BIT being examined in this particular case.

18. With regard to the fact that the *GEA* tribunal has reassessed the attitude of previous tribunals and supported by all of the arguments stated above, the Respondent submits that the *GEA* as the rational decision is a good ground for the interpretation of the BIT in light of these findings.

19. Mentioning the decision of the Saipem tribunal above, the Respondent hereby submits that even in the event, the Tribunal would not agree with arguments presented above, the outcomes taken by the Saipem are not applicable to this case anyway, because, that this decision was adopted under different circumstances – the treaty in that case defines investment using non-exhaustive list including also *credit for sums of money or any right for pledges or services having an economic value connected with investments* and not the phrase used in this case in the BIT: *claims to money, and claims to performance under contract having a financial value;*

20. Firstly the credit for sums of money is not equal to the meaning of claims to money. Secondly, the wording e*conomic value connected with investments* is essential as the main condition needed to be met so the credit for sums of money may be protected under the treaty. The BIT in this particular case does not include such wording. This is clear demonstration of the fact, that purpose of the BIT in this case is to protect real investments, meeting by itself the aforementioned elements of the inherent meaning of the term investment, and not just legal instruments somehow connected to the investment.

20 GEA, ¶ 162

The interpretation stream based on the *Saipem* decision should be disregard, such it was adopted with regard to different assumptions and circumstances.

21. To sum up, the Award lacks the material quality of an investment since it lacks the element of i) contribution that extend certain period of time, ii) presence of an investment risk and also of iii) contribution to economic development. Because of that, it is not an actual investment protected under the BIT as that term should be understood within the whole context of the BIT, including the preamble, the purpose of entering to such treaty and the circumstances of its adoption. It also should be understood with regard to the whole scope of the investment law.

22. The Respondent therefore respectfully suggests the Tribunal to recognize these arguments, to **do not** consider the Award as an investment and to find itself to lack jurisdiction over the current dispute.

II. Claimant has been denied benefits of the BIT by the Respondent´s invocation of Article 2 of the BIT

23. In the event, the Tribunal would qualify the Award as an investment, the Respondent submits that the Tribunal lacks jurisdiction over the current dispute based also on the fact that the Claimant has been denied benefits by virtue of invocation of Article 2 of the BIT. The Respondent claims to have full right to deny the benefits since the conditions imposed by Article 2 of the BIT are met with regard to the fact that the Claimant i) is an entity owned by citizens of a third state and ii) has no substantial business activities in the territory of Basheera.

Claimant's business activities in Basheera are not substantial

24. The BIT clearly states the condition of **substantial** business activities, not just some business activities, and so the substantial character has to be properly examined, because it is obvious, that "general" activities have not been found by the contracting as the sufficient. So it is necessary to examine it in detail in order to interpret this properly.

25. The Respondent submits that the Claimant´s only connection to the territory of Basheera has been described in the Statements of facts.

    In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, 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. Atton Boro Group had an established presence in Basheera's pharmaceutical market. Atton Boro rented out an office space, opened a bank account, hired a manager and an accountant, and commenced business.[21]

26. The BIT does not define the term substantial and so, with regard to the fact the relevant case law does not provide us with sufficient definition either, it is necessary to interpret the term in its ordinary meaning.

27. To define what substantial business activities are, firstly we have to find out what is understood by basic/standard business activities. Then we can compare these standard

21 Statement of uncontested facts, ¶ 860

business activities to activities of the Claimant. If the Claimant exceeds threshold of standard business activities, then they can be regarded as substantial.

28. Every business has to be seated/registered somewhere. To do so, it is necessary to own/rent some space/office. It is a basic obligation stated by the legislation and also a need for operation on the market. It means that to rent an office is just a standard business activity.

29. Every company has to have some basic capital in order to be registered. This capital has to be present on the bank account when the company is being registered. It means that to have a bank account is also a must and so open the bank account is the standard issue as well.

30. To run the company, some personal element is needed and so we can assume that having up to ten employees (or maybe even more) does not represent anything nonstandard. It is a basic assumption to run business. It means that two employees of the Claimant cannot represent substantial business activity either.

31. Cambridge dictionary defines patent as "the legal right to be the only one who can make, use, or sell an invention for a particular number of years". For example EU citizens have right to work in all EU member states. It does not mean that all EU citizens work in all EU member states. The existence of a right is distinct from the exercise of that right. Holding the right has nothing to do with having (substantial) business activities. It is also clear that none of these activities represents effective and continuous link with the economy of Basheera.

32. Additionally, aforesaid matters are completely purposeful and so unsubstantial by its nature. Any other conclusion would disregard the essence of such activities, would break Respondent´s right to deny benefits of the BIT and would be the example of the treaty shopping in its worst form:

> *"Treaty shopping is alarmingly vulnerable to bad faith manipulation by investors and leads to the violation of the principle of reciprocity, internationalization of domestic investments, abuse of rights, aggravation of the governance gap, and generally an illegitimate manipulation of the*

investment protection system."[22] *Denial of benefits clause represents the ability of state to redress such perceived abuses.*[23]

33. To prevent any doubts, the Respondent hereby ads also other, supporting arguments, why activities of Atton Boro should be seen as unsubstantial not just by its nature but also from the point of view of the contribution for the state, to show that activities are not substantial from any possible perspective.

34. To do so, the Respondents hereby presents the definition of a the terms substantial from a law lexicon. Lectric Law Library's Lexicon defines term substantial as "significant in size or amount as distinguished from some relatively insubstantial, insignificant or trivial amount". Reasons, why the activities of Atton Boro does not comply with this definition either, follows.

35. It is undeniable that a company with two employees (or maximally 6 employees in past – which is not relevant anyway due to decisive time) and one rented office does not represent any significant value for Basheera, since even the smallest countries, such as Liechtenstein, Malta or Aruba, hosts much bigger companies such as banks, factories or worldwide advisory firms, e.g. "Big Four" firms with tens or hundreds of based employees.

36. Opened bank account cannot be considered as substantial business activity either, because almost every person can open bank account in almost every country, most of the time for free, regardless of any connection to any territory, regardless of the requirement of substantial activities, and with the same approach should be seen the matter of the rented office.

37. It was already argued above, that holding the patents is not activity at all and so none of these "activities" can be consider by itself as substantial. The character of these activities is so far from being substantial, that it cannot be considered to achieve the respective threshold even when being taken into account as the sum of all activities.

22 TEKIN.

23 WAIBEL, p. 11

38. Activities of Atton Boro also represent virtually no value when they are being compared to the operations of Atton Boro Group.

39. Any other possible contra – argumentation would represent just marginal stream being based on very specific regulations such as Energy Charter Treaty (ECT), which cannot be used for the interpretation of the BIT in this current case, as explained later in paragraph 44 et seq.

Denial of benefits has retrospective effect

40. The Respondent denied the benefits to the Claimant by virtue of Article 2 of the BIT at the latest in the Response to the Notice of Arbitration, so when the benefits were claimed.

41. It is the very purpose of the denial of benefits is to give the State the possibility of withdrawing the benefits granted under the BIT to investors who invoke these benefits[24]. The Tribunal in *Cayman* found that:

> *"it is proper that the denial is /activated/ when the benefits are being claimed. The right to deny the benefits of the BIT can be invoked at the time the objections to jurisdiction are raised, and it is not necessary to notify separately before such time."*[25]

42. The Respondent hereby adds that it is the liability of the investor to qualify itself as the investor who could/could not be denied the enjoyment of the benefits under the BIT, because states are not able to foresee which investor feels like being protected by some treaty. It would be unacceptable to require from the State to qualify every single investor and to notify them before the benefits have been actually claimed for the first time, since the number of investor can be significantly higher than is the administrative capacity of the State. States are unable to follow all investments being made on their territory. Such approach would be economically and administratively unsustainable and it is unimaginable to assume that any state would voluntarily conclude such an agreement.

43. Moreover, Respondent´s position (with regard to the possibility of invovacation of Article 2 of the BIT when the benefits are claimed) is in accordance with the mainstream position

24 RULELEC , ¶ 49

25 BILLET, p. 4

adopted for example by the arbitral tribunal constituted under the UNCITRAL Rules in case *Rulelec* or by ICSID tribunal in *Cayman* and the Respondent hereby confirms the intention to deny the benefits to the Claimant.

44. The Respondent is aware of the different approach took by tribunals dealing with denial of benefits under the ECT, however it is important to remind that this approach cannot be used to interpret denial of benefit closes under BITs, because "*the Energy Charter Treaty is a unique instrument for the promotion of international cooperation in the energy sector"*[26] and so, surely, needs unique and specific approach, since for example:

    d. ECT protects energy projects, not investments in general.

    e. ECT have been create under different circumstances and with different purposes, such as to promote free and opened market.[27]

    f. Energy projects has such a nature that can be delivered by the pure mailbox companies, however projects in other sectors could be represented also by entities having for example few employees and still would not be reaching threshold of substantial business activities in the meaning of investment law. It means that because of the specifics of the energy projects, the ECT may protect activities not reaching a threshold of being substantial according to BIT because they still might be substantial under the ECT.

    g. Unlike most investment treaties, the denial of benefits clause provided for under the ECT, Article 17(1) does not operate as a denial of all benefits to a covered investor under the treaty but is expressly limited to a denial of the advantages related to the substantial protection under Part III of the ECT[28]

45. What is more, using the ECT outcomes on disputes on general investments would in the same time lead to situations, where the burden of proof on substantial business activities lies on the investor, not the state who is actually invoking the denial of benefit close, which would, by the way, put the Claimant into even more difficult situation, than in

26 ECT Foreword, p.4

27 PROTOCOL, p.1

28 GAILLARD, p. 67

which the Claimant actually is at this time. Respondent is strongly convinced that the Claimant is unable to prove reaching the threshold of substantial business activities.

46. This statement also supports the unique nature of the ECT and shows us the inappropriateness of using BIT for interpreting ECT and of course of doing so *vice versa*.

> *"When interpreting a BIT that is the subject matter of the dispute, the tribunals often pay regard to the practice of the respondent state with respect to other BITs entered into by the same state. Such practice can only be considered an implied agreement if it is accepted by other contracting states as well. The current case law to the ECT does not suggest that, when interpreting the ECT, the tribunals will pay regard to the practice of the respondent state under other (international) treaties."*[29]

47. To sum up: the right to deny benefits was exercised when the benefits were claimed, at the latest in the Response to the notice of arbitration. Such action represents the invocation of Article 2 of the BIT. Benefits can be denied retroactively because: i) the very purpose of the denial of benefits is to give the State the possibility of withdrawing the benefits granted under the BIT to the investors who invoke these benefits and so the right to deny the benefits of the BIT can be invoked at the time the objections to jurisdiction are raised, and it is not necessary to notify separately before such time. ii) any other approach would lead to an extreme administrative burden. The right to deny benefits could have been exercised because conditions stated in Article 2 have been met: i) Atton Boro is an entity wholly owned by citizens of a third state, ii) Atton Boro has no substantial activities in the territory of Basheera. The condition of no substantial activities has to be examined ad hoc with regard to specifics of every single case. In this case, it is obvious that the "activities" of Atton Boro in Basheera should not be considered as substantial because the only activities could be seen in i) having bank account, ii) holding patens, none of them presenting by itself any business activity at all and iii) renting out an office space and iv) having two employees. None of these activities reaches the threshold of being substantial nor when compared to standard business activities, neither with regard to the circumstances of the current dispute.

29 BELOHLAVEK, p. 127

48. The Respondent therefore respectfully suggests the Tribunal find itself to lack jurisdiction over the current dispute.

PART TWO: MERITS

III. The enactment of Law No. 8458/09 and/or granting of license for the claimant's invention does not amount to a breach of the Mercuria-Basheera BIT, in particular the fair and equitable treatment

49. The Claimant argues that enactment of the Law 8458/09 and subsequent granting of a license to the third party does violate the Atto Boro's legitimate expectations rising from the BIT. The Respondent strongly disagrees that the action taken by the state does amount to these alleged violations and holds these opinions incorrect for several reasons which will be addressed accordingly in order to sustain clarity of the arguments.

50. The facts are that on 10th of October 2009 the President of Mercuria promulgated National Legislation for the Intellectual Property Law (Law no. 8458/09) which introduced a provision allowing for the use of patented inventions without the authorization of the owner. Moreover, in November 2009 HG-Pharma - a Mercurian generic drug manufacturer filed an application before the High Court under the new provision seeking a grant of a license to manufacture Valtervite. Court fast-tracked process and granted HG Pharma a license on 17 the of April 2010 to manufacture until greyscale was no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atto Boro at 1% of total earnings.[30]

Alleged violation of the BIT with regards to the WTO's agreement on TRIPS

51. The alleged violation of legitimate expectation and consequential violation of FET is based on the notion that the Respondent did break their international binding obligation - in other words, the Claimant is of the opinion that the enactment of the law and connected issuing of licences were not in line with an obligation imposed on the state by TRIPS Agreement. However, the questions regarding any alleged violations of the TRIPS belong to the exclusive jurisdiction of Dispute Settlement Body (DSB) created by the General Council and managed by World Trade Organisation[31]. The DSB has not as of now decided or even has been in the process of discussing the idea that the Respondent had broken the TRIPS. Therefore, the basis of Atto Boro´s claim is unreviewable and as such, no

30 Statement of uncontested facts, p. 30

31 DSU, Art.2

conclusions on this matter can be reached during this arbitration process since current Tribunal does not possess juridical power over this claim. Without this basis, all subsequent allegations have no merit and the Respondent cannot be found in breach of these violations.

52. However, in case that the tribunal should conclude that the TRIPS obligations are reflected in the general international obligation that is connected to the investments in the meaning of Art 3 (3) BIT and Tribunal have jurisdiction over this matter, the Respondent hereby presents set of arguments that disprove the notion of the alleged violation.

53. TRIPS in Article 8 allows certain flexibility to the state in the process of implementation of international obligations to the national legal system. Generally compulsory licensing and government use are allowed but the State needs to respect certain provisions and the legal process they introduce.

54. This allowance for providing non-voluntary licences have been also cleared by the additional Declaration on the TRIPS Agreement that is known under the name DOHA Declaration. It is important to remember that DOHA Declaration was specifically made to address some concerns of developing and least-developed countries regarding the effect of the price of medicine on the overall public health[32]. This Declaration has identified specific options available to states - also known as flexibilities - that are at their disposal when addressing the issues of public health. The Respondent has acted in line with these flexibilities and as stated in Article 4 of DOHA.

55. By taking into consideration the above-mentioned provision of the declaration, when applied to this case, the Respondent is confident their government acted within given permissions. It was within Respondent´s prerogative to enact the Law no. 8458/09 as a legal ground on which the licences are granted and therefore the Law is not against TRIPS (later other possible issues with the law will be addressed accordingly). In the same way, it was state's right to determine whether the health crisis caused by greyscale illness had breached the red line differentiating between what constitutes a national emergency and what not. According to a latest known annual report from National Health Agency from 2006 estimated number of cases of greyscale has been 578 390 persons with 266 297

cases confirmed. With this number, estimated 100 000 patients depended solely on public health schemes to obtain the medicine[33]. This is a significant number of ill citizens and it would cost 1 bld USD just to tend to the poorest 100 thousand for one year which exceeded the greyscale state treatment budget by 500%.[34] Taking into consideration number of patients and that the treatment would need longer time than one year and the general goal of Respondent to provide universal free health care, this can clearly be constituted as national crisis.

56. The provisions of Article 31 of TRIPS establishes quasi-checklist that needs to be met for a state to fulfil the requirement of consistency introduced in Article 8. This mainly regards issuing the licenses and the actual permit to use patented drug manufacturing process by other than the previous legal owner of the patent. Just to remind the Tribunal, the establishment of the new license has been made by the High Court with the following conditions - there was clear time limit established for the HG-Pharma - the company loses the right to manufacture generic version of Valtervite when the greyscale no longer poses a threat to public health (in other words, till there will be significant improvement of community health in terms of number of people infected and the diminishing rate of spreading the infection). The second conditions were given with regards to compensation - royalty should be paid to Atton Borro at 1% of total earnings.[35]

57. The requirements given by Article 31 of TRIPS are as follows:

    a. The authorization shall be considered upon individual merits and such use may be permitted only if the proposed user has made effort to obtain authorization from the right holder on reasonable commercial terms and conditions and these efforts must be unsuccessful. However, this requirement of prior effort to obtain authorisation can be waived in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use. At this point the disease was widespread and the state was left without any effective tool to combat this disease that was financially available. National Health Agency tried to renegotiate the contract and maintained that the right owner -

33 2006 NHA Annual Report

34 *Ibid*

35 Statement of uncontested facts, p. 30, ¶ 21

Atton Borro - would remain the sole distributor of the drug[36]. As was established above, members are free to determine what constitutes and national crisis or emergency and why the situation of the Respondent can be correctly considered as a national crisis.

b. Scope and duration of the use shall be limited for the purpose for which it was authorized and this use shall not be non-exclusive. This requirement has been fulfilled so far as well. All voluntary licenses are given after court approval and the scope of use is limited by the Law no. 8458/09. There is no provision or court order that would prevent the Claimant to manufacture and sell the drug.

c. This use primarily shall be non-assignable, authorized predominantly for the supply of the domestic market of the Member authorizing such use. Once again, the legal basis for the licenses does not allow for the transfer of the user rights to the third parties. Regarding the territoriality issue, the supply is mainly designed to fulfil the needs of the Respondent. However, in the spirit of solidarity, the Respondent provided humanitarian aid in form of the medicine, which is allowed by additional protocol DOHA.

d. Authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances. Non-voluntary licenses include in itself the limitation of the use of the license and also its termination period - the license will expire after the greyscale will not be a threat to public health[37]. The court is given the right to grant a "*license upon such terms as it may deem fit"* by the legal norm, which includes the duration of the process and the authority to review a necessity of this license given the circumstances.

e. The legal validity of any decision relating to the authorization or question of remuneration of such use shall be subject to judicial review or another

36 Statement of uncontested facts, p. 29, ¶ 15

37 Statement of uncontested facts, p. 30, ¶ 21

independent review by a distinct higher authority in that Member. The power of decision in this matter is left to High Court of Merkuria and thus this requirement is fulfilled.

f. The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.

- State practice regarding the determination of "adequate" remuneration or royalty is varied from state to state or even within the state and there is no single accepted approach. There are various guides that determine the accepted range of royalties. Royalty guidelines proposed by the Japanese Patent Office (1998) and UNDP (2001) set royalties from 0 to 6% of the price charged by the generic competitor and the 2005 Canadian royalty guidelines for the export of medicines set royalties at 0 to 4% of the generic price[38]. In 2009-2010, royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases ranged from 0.5% to 3% of revenue.

- According to WHO guidelines, the amount of royalty should not present the limitation of access to medicines.[39] The purpose of compulsory license, when issued on consumer product, is to improve access and therefore the remuneration mechanisms should be designed to assist this purpose. In other words, the Respondent needed to provide a non-compulsory licenses because otherwise, the economic situation would impose too much barrier to access the medication – more people would have to buy the drug without any subsidy by state or the state would not be able to provide the drug for free to the poorest and most vulnerable. If then the royalty required to be paid by the generic manufacturer HG-Pharma would be too high, the price of the drug would be higher as well and as such the whole purpose of licenses would be destroyed. Therefore the WHO adds that *"when countries are facing difficult resource constraints, and cannot provide access to medicines for all, royalty*

38 LOVE, s. 7

payments should normally not exceed a modest fraction of the generic price." [40]

- The mechanism of establishing the appropriate amount of royalties also differs with different philosophies adopted by different guidelines. Canadian guideline operates between scale ranging from 0,02% to 4% of the price of the generic product – this is based upon the country rank in the UNDP Human Development Index (UNHDI). For most developing countries the rates are less than 3% and for most countries in Africa the rate is less than 1%.[41]

- Similarly, the *Ramsey pricing model* works with the budget and social welfare weights[42]. There is an extreme inequality in the distribution of world income and the adjustment in standard pricing prescriptions are needed. Poor countries should not necessarily cover their own marginal cost of drug production and should not share in any of the cost of research and development (R&D)[43]. When the market for medicine in developing countries is but a small fraction of the global market, remuneration will not have an impact on global R&D. Moreover, the benefits of increased access to the medicine are greater than benefits of higher contribution to global R&D made from high royalty payments.

- There is also need to take into consideration the fact, that a price chosen by monopolist – which the Claimant in this situation absolutely is – is not chosen in a proportional way as it would in free economic competition. Therefore, deriving the adequate royalty amount from the combination of a number of resources invested by the Claimant together with the potential loss of earning would be grossly unfair with regards to the socio-economic context of the present case.

40 LOVE, s. 83

41 *Ibid*, p. 8

42 *Ibid*, p. 53

43 *Ibid*, .p. 62

- In conclusion, any higher royalties would undermine the urgently needed access to the medicine and would make the whole process of issuing licenses for this purpose void. As such, for these reasons mentioned above the Respondent fulfilled the requirement of adequate remuneration.

58. Bearing in mind all above together with the lasting objective of promoting access to medicine and the core philosophy DOHA Declaration 2001 together with TRIPS, the Respondent strongly refuses the notion that it violated its international obligations.

Alleged violation of the BIT with regards to fair and equitable treatment provision

Overview

59. The FET clause is included in Article 3 (2) of the BIT. The Respondent has to address the ambiguity of the meaning of fair and equitable treatment and subject it to interpretation in accordance with the BIT and in accordance with international standards as well. Fair and equitable treaty standard is a legal standard and despite its seemingly general implications it is not a subjective term and does not confer upon a tribunal the right to determine the case before it *ex aequeo et bono*. Tribunals have to decide the dispute on the notion of customary or general international legal system including the interpretation of provisions of the treaty[44]. Similarly, according to Professor Muchlinski, the concept of FET strongly depends on the interpretation of specific facts for its content.[45]

Interpretation of Fair and Equitable Treatment

60. In order to understand the meaning of the provisions, we need to interpret their meaning.[46] Article 31 (1) of VCLT provides that "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[47] To look for context and purpose we have to

44 For example the tribunal in ADF Group or Mondev v. the United States

45 HAN, ¶ 11

46 Please refer to ¶ 6 of the Memorial regarding the basis for use of VCLT

return to the BIT- In interpreting FET tribunals have in the past tended to rely on treaty preambles.[48]

61. Therefore, we can conclude that the provision of FET has a purpose of reaching the promotion of greater economic cooperation between contracting parties, stimulate the flow of private capital and economic development and all these purposes should be consistent with the protection of health, safety, and the environment.[49]

Meaning of Fair and Equitable Treatment

62. Fair and equitable treatment provision should be given ordinary meaning and should be interpreted in the context of other treaty provisions and consistent with the purpose of BIT. According to Professor Schreuer, essentially the purpose as used in BIT practice is to fill gaps which may be left with more specific standards in order to obtain a certain level of protection bearing in mind the limitation set by VCLT.[50]The concept connotes the principle of non-discrimination and proportionality in the treatment of the foreign investors. Another usual and majority lead opinion within the tribunal decision is to based the merit of FET on the role of stability, transparency and the investor's legitimate expectations. All these three components of FET are closely connected. Whether the treatment enjoyed by foreign investment is fair and equitable depends on the actual circumstances in host country

63. The principle of proportionality aims to balance conflicting benefits depending on concrete circumstances and is one of the key elements to the FET since what is fair and equitable cannot be unproportional - the notion of fair in its core is based upon balance. In the light of above-mentioned facts, we can conclude that the principle of FET contains various elements of protections that state agreed in bona fide to grant the investor. This includes. protection of legitimate expectations, non-discrimination, transparency. The tribunals have often stressed that the host State´s right to regulate domestic matters in the public interest has to be taken into consideration and the balance between investors rights and state´s public interest has to be established. Tribunal in *Lemire v. Ukraine* said that

48 For instance *Saluka* Tribunal

49 Preamble of the BIT, Lines 986-987

50 SCHREUER, p. 352

protection of the legitimate expectations *"must be balanced with the need to maintain a reasonable degree of regulatory flexibility*[51]*".*

64. However, the BIT provision that coins the FET includes other doctrinal standards of treatment - the absence of discriminatory or unreasonable measures directed towards the investors are doctrinally separated standards - namely protection against arbitrary unreasonable or discriminatory measures. Since they are singled out we can assume that these standards are not included in the FET provision since both parties knew these standards can be included in the FET and yet decided to name them separately. Therefore, honouring the intentions of the contracting parties, this particular FET shall be then focused on legitimate expectations and proportionality of the Respondent conduct.

Legitimate expectations

65. The legitimate expectation can arise as a result of investor reliance on state conduct. However, as Tribunal in Suez v. Argentina concluded," the tribunals must not look single-mindedly at the Claimants´subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view."[52] Therefore, legitimate expectations of the investor may be derived either from a) specific commitments personally made to the investor or b) rules that are not specifically addressed to a particular investor but which are put in place with specific aim to induce foreign investment and on which the foreign investor relied when making the investment[53]. If either of these requirements was fulfilled, an investor could claim that the change of legal framework did violate their legitimate expectations as was stated in EDF v. Romania.[54] However, in this case, there are no specific commitments of the state towards the Claimant that would specifically guarantee that the legal system in the country will not change. Neither the state enacted any rules whose sole purpose would attract investors. In conclusion, the Claimant cannot have a legitimate expectation that existing rules will not be changed and therefore the enactment of the law does not break Claimant's expectations.

51 *Lemire v. Ukraine*, ¶ 500 as cited in SCHREUER, p. 141

52 *Suez v. Argentina*, ¶ 265

53 *EDF v. Romania*, ¶ 217

54 *Ibid*

66. Expecting the legislation to never change as an essential element of fair and equitable treatment would be unrealistic and if strictly applied would mean that purpose of the BIT is to ensure that economic and legal conditions in which investment take place would remain unaltered and frozen. It is established that host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest[55]. Therefore, the requirement of fair and equitable treatment must be understood as implying that the changes are made fairly, consistently and predictably.

Regarding the condition of predictability of state conduct the investor has joined the Merkuria economy in the middle of a widespread health crisis which as a consequence had weakened the economic power in the country. Therefore, there were no stable conditions from the beginning onto which investor would have been able to build their legitimate expectations. The public interest has been the main objective of the Merkuria in conducting this specific economic partnership from the beginning. The state has executed its legitimate regulatory powers in issuing the Act that allows granting non compulsory licenses.

Use of regulatory powers by the Respondent

67. The Respondent would like to remind the Tribunal and it is a contracting state to the ICESC. In Article 12 there is written:

> *The States Parties to the present Covenant* ***recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.***

68. This further underlines the Respondent heightened commitment to the health of its population. This is visible also through the use of regulatory powers of the state when the protection of public interest is at play. These regulatory powers are a basic attribute of sovereignty under international law[56]. The right to regulate is not granted by trade and investment agreements. It is the restriction of the right to regulate that is usually part of IIAs it is necessary to recognize that such restrictions ought to be applied within the

55 *Electrabel v Hungary*, ¶ 7.77

56 MANN, p. 5

reason and the state needs to be able to exercise its regulatory powers demonstrably if it is in the public interest to do so.[57]

69. The protection of human rights undeniably meets the requirement of public interest. The respondent would like to draw an analogy with one of the recognized human rights and on the example, show that the same rules of regulatory powers should apply to this case as well.

70. The right to water in itself is not without controversies and is yet to be fully established. However, when talking about the access to life-saving medicine or the right to water, there is one strong sharing point. And that is – as one of the commentators mentioned - *"without water, other human rights become meaningless."*[58]The same can be said about the medicine that is supposed to combat illness such as Greyscale. Both these rights are the building basis for other rights and generally living. The Respondent would like to also point that both of these rights are protected by ICESC - the right of access to water is a prerequisite to the realization of an adequate standard of living provided for in Article 11 of ICESC[59].

71. Respondent also stresses that while it is implicitly understood that the right to water contains the prerequisite of the right to water *"in the amount and quality sufficient to meet vital human needs."*[60] The right to medicine contains, in the same way, the inherent condition of efficiency and availability of such medicine. Providing unsafe water or inefficient medicine would be contrary to human rights and would make the state responsible. The right to water also corresponds to the obligation of States "*to respect, protect, and fulfil*" it within their jurisdiction.[61]

72. In Biwater v. Tanzania, the privatization project regarding the water supply was not meeting the performance targets and was in a financial rut and as a result, the water rates increased substantially. The city's public water authority decided to terminate the contract with BGT, to which the latter responded with a notice of arbitration pursuant to the

57 *Ibid*, p. 6

58 *MESHEL, p. 3*

59 *Ibid, p. 4*

60 *Ibid*

61 *Ibid, p. 5*

contract. Tanzania argued that the Biwater company created a threat to public health and welfare and *"considering the importance of the issue at hand…[it] acted well within the Republic's margin of appreciation under international law.*[62]*"*

73. The high price of the Valvertine would impose a threat to public health and would be in contrary to the right to health as protected by Article 12 of ICESC. The Respondent bound by this Article, by enacting the Law and issuing license, held up the duty to provide access to medicine to its citizens and was compelled to act so by the human rights law. The respondent agrees with the argument present by Tanzania. The margin of appreciation is based on the notion that *"sovereign nations should be afforded or in Suez case that some latitude or discretion when making decisions about how to resolve conflicts between individual human rights and national interests, as national States are sometimes in a better position than an international judge to assess a particular situation".*[63] This need for exercising the regulatory powers is visible also from Procedural order no 3 that states that "*between the LTA termination and the start of HG-Pharma Valtervite deliveries, medical consensus is that there was no effective greyscale treatment for patients in Mercuria"*[64]

74. The Respondent argues that the use of regulatory power in the name of human rights should have a wider margin of appreciation and as such no violation of fair and equitable treatment shall be found. The motivation was to protect the essential interest of the state – the health of the population and therefore the goal that the Respondent wanted to achieve was legitimate.

75. However, if Tribunal should not find this judgment sufficient, the Respondent submits that its actions were proportional to the objective it wanted to achieve.

Proportionality of the Respondent´s conduct

76. In the light of FET, the state must take into consideration the concerns of investor while protecting the public goals. Any action taken must be balanced and not grossly unfair to the investor. Recognizing the importance of these principles, the Respondent submits that

62 *BiWaters v Tanzania, ¶ 436*

63 MESHEL, p. 21

64 PO no. 3, p. 50, ¶ 1585

the treatment of the investment was proportional to the protection of public interest and therefore no breach of the BIT has taken place - including the treatment standards and other provisions.

77. It is necessary that the tribunal uses the proportionality principle in this case where public and private interest are posed against each other. In order to be able to draw a logical conclusion the question of proportionality should be divided into three sub-principles - the principle of suitability the principle of necessity and principle of proportionality *strict sensu.*

Principle of suitability -

78. The principle of suitability requires the means to be suitable and capable achieve its objectives. The objective itself should possess legality and justification of the process.[65]

79. Regarding the object of the government actions, courts and tribunals have exhibited an understanding that national authorities should be the main determinant of the public interest. Provided that a measure does not pursue a discriminatory, protectionist or otherwise impermissible objective, the tribunals should display restraint in evaluating host states' regulatory objectives and should refrain from second-guessing the importance of the objective or the desired level of protection or achievement of it. Tribunal in *Continental v Argentina* tribunal stated that it was *'not its mandate to…censure Argentina's sovereign choices as an independent state'* or to *'make any political or economic judgment on Argentina's policies and of the measures adopted to pursue them'.*[66]

80. As was explained above the issuing the law and granting the license were made in the name of public health and in its best interest. The estimated more than 578 390 people were affected by the greyscale and the enactment of the patent law and granting the non-voluntary license were able to overcome the financial shortcomings of the Respondent and provide an effective solution to the health crisis. Therefore, the first part of proportionality test is fulfilled.

65 HAN, p. 636 ¶ 3

66 *Continental v Argentina*, ¶ 199

Principle of necessity

81. The principle of necessity demands that the means are necessary to achieve the objective and that there is no less restrictive to applicants´ interests and capable of producing the same result.[67]

82. Firstly, the economic situation in Mercuria did not allow in continuing to pay for the medicine at the rate that as set by Alto Borro.[68] Therefore, without the necessary changes in the legal framework, the supply of medicine would cease to exist and the epidemic would spread in horrific rate.

83. Secondly, the Mercuria tried to reason with the investor, explained the situation and unsuccessfully tried to create a new deal that would allow for an investor to continue to distribute the medicine as sole distributor and Mercuria would be able to pay for this supply. This negotiation was denied by the investor.[69] Therefore, at that point, there were no less restrictive measures available to the stat that could achieve the same result.

Principle of Proportionality stricto sensu

84. The principle of proportionality *stricto sensu* demands that the means does not have excessive restrictive effects on the applicant's interests, compared with the interest pursued by it.[70]

85. When comparing the health of public with the temporary lower income of monetary returns of the investor (the law grants non-compulsory licenses only during the period of the crisis), we have to come to the conclusion that the state´s actions were in compliance with the proportionality test and other international restraints that are set to the state police powers. The investor did not lose the distributor power completely since the non-voluntary license in any way did not exhaust the legal rights of the Claimant. They were still able to sell the medication directly to the Merkurians and other citizens. On the other hand not applying these methods, the Respondent would act irresponsibly towards its

67 HAN, p. 636 ¶ 3

68 NHA Report, line 1365

69 Statement of uncontested facts, line 923

70 HAN, p. 637 ¶ 3

citizens and by preferring the wellbeing of investment would proportionally burden the vulnerable ill people.

Conclusion

86. In overall conclusion, the state actions – specifically the Act no. 8458/09 and the granting of license – did not amount to violations of investor´s rights. The Respondent has chosen means that were proportional and adequate to the goal it wanted to achieve improvement of the public health. Therefore, the regulatory powers were used lawfully and in accordance with the international law.

87. On the basis of the facts and legal considerations set out in this Memorandum, the Respondent respectfully suggests the Tribunal adjudge and declare:

- That the Respondent has not breached the BIT with respect to the claims introduced by the Claimant and that the Claimant´s claims are thereby rejected

IV. Respondent is not liable for the conduct of its judiciary in enforcement proceedings under article 3 of the BIT

88. The Claimant commenced enforcement proceedings of the Award in 2009 in the High Court of Mercuria. The Award was issued by Tribunal seated in Reef – where Claimant's corporate mother is seated as well – against the NHA, an independent private company established under laws of Mercuria. The enforcement proceedings took seven years and are still pending due to the Respondent's effort to accord the litigants a fair and due process which it is under both international and national law.

89. The Claimant claims that the unreasonable delay of over seven years in disposing of enforcement proceedings in relation to the Award plainly shows that Mercuria failed to provide an effective means to Atton Boro of asserting its rights.

90. First of all, Respondent will examine the meaning of FET under the BIT taking into consideration the objective stated in the Preamble. After that, it will resort to the alleged breach of BIT taking into account elements of FET identified by case law.

Fair and equitable treatment

91. The Respondent submits that the FET clause is contained in Article 3 (2) of the BIT. As the meaning of FET differs from treaty to treaty and is generally vague[71] without an examination, the Respondent submits that it shall be given plain and ordinary meaning. Such an approach derives from Article 31 (1) of the VCLT – which is made usual reference to in the majority of arbitral proceedings.[72] According to Dolzer and Schreuer, the plain meaning is not, however, sufficient to examine the whole context of an investment treaty. They add that „*one must also consider decisions of tribunals in other cases to gain a better understanding of a term now found in virtually all investment treaties*"[73] This is because the FET is an autonomous standard that shall be interpreted independently on any other standards – such as international minimum standard, which is acknowledged almost purely by NAFTA tribunals (and scholars).[74] The

71 DOLZER and SCHREUER, p. 244.

72 *Ibid*, p. 251.

73 *Ibid*, p. 252.

74 *Ibid*, p. 247.

„independence“ approach is supported by several authors, such as Mann[75], Dolzer and Stevens[76] and Vasciannie.[77]

Following tribunals have faced the same issue when interpreting FET. The Tecmed tribunal has found that it had to interpret the FET concept autonomously, taking into consideration the wording of Article 31 (1) of the VCLT.[78] The *Tecmed* tribunal has even taken the preamble of the relevant investment treaty into consideration. The *MTD* tribunal also concluded the applicability of the preamble[79] and then went even further when finding that the FET means „just“, „even-handed“, „unbiased“, „legitimate“, which is not, unfortunately, sufficient to have the full picture about FET. Therefore, the Respondent submits that according to above-cited case law and the provision of Article 31 of the VCLT the FET shall be given its meaning by using the Preamble of the BIT.

92. In the Preamble of the BIT, both parties expressed the desire to deepen economic cooperation and recognized the effective means. However, the Respondent submits that concluding that FET contains „effective means of asserting claims" standard would exceed the purpose – which is to shed light on ambiguous provisions or provision containing a lacuna[80] – and meaning of the preamble. The Respondent submits that general object of the Preamble is to explain the background of the BIT, not separately establish new standards of protection in the BIT that have not been provided for by the parties in the first place.

93. The Respondent submits that it could be concluded from the relevant case law that effective means standard has to be explicitly stated in the BIT by the parties, which was the case of two most cited decisions, *Chevron-Texaco*[81] and *White*. The BIT, on the other hand, does not contain a specific „effective means“ provision from which the tribunal can derive the undertaking of the Respondent to provide such a standard. Chevron-Texaco tribunal also found that effective means is *lex specialis,*[82] Respondent deems, however,

75 MANN, p. 241, 244.

76 DOLZER AND STEVENS, p. 60, fn. 14.

77 VASCIANNIE, p. 104-105 and 139-144.

78 TECMED, ¶155 and 156.

79 MTD, ¶ 112 and 113.

80 DOLZER and STEVENS, p. 20.

81 CHEVRON-TEXACO, ¶ 242

82 CHEVRON-TEXACO, ¶ 242.

that as *lex specialis* could effectively serve only a particular provision, not feelings and objectives of the parties to the BIT expressed in the Preamble. Moreover, effective means standard asks the state to a) maintain an effective system of justice; and b) not interfere with judicial proceedings. However, no case law explains such an obligation. The Respondent deems it too vague to be effectively enforceable.

94. Based on the aforesaid, the Respondent claims that the „effective means of asserting claims" is merely an interpretative instrument that could be triggered by virtue of VCLT and Article 31 (1) thereof, nevertheless would not be able to formulate an independent provision as it is not the purpose of a preamble.

95. In accordance with Dolzer and Schreuer[83], there are several issues acknowledged by tribunals when answering the question whether or not FET was breached. Those mean weighing whether the state has: (1) failed to protect the investor's legitimate expectations; (2) failed to act transparently; (3) acted arbitrarily or subjected the investor to discriminatory treatment; (4) denied the investor access to justice or procedural due process; or (5) acted in bad faith.[84] The most important to the present dispute is the issue whether or not the Claimant has been denied access to justice or procedural due process which has overlap to another issue which is whether or not the Respondent acted arbitrarily or in a discriminatory manner, which derives from the idea that discriminatory conduct cannot be equitable.[85]

Breach of Article 3 (2) of the BIT

96. The Respondent will examine the circumstances under which the 7-year delay has occurred as well as the two elements of FET named at the end of the previous paragraph. The Respondent reminds that the delay has occurred in enforcement proceeding between two private litigants such as the Claimant and the NHA. As stated above, the „effective means of asserting claims" standard cannot be deemed an element of FET.

83 DOLZER AND SCHREUER, p. 253.

84 *Ibid*, p. 253.

85 VASCIANNIE, p. 130.

97. Therefore the Respondent will examine the conduct of its judiciary from the point of view of denial of justice, whose prohibition is a vital part of FET.[86] The Respondent submits that even if the tribunal finds that „effective means of asserting claims“ standard is somehow provided for in the BIT, it will be shown that the conduct of the Respondent is not tantamount either to effective means or denial of justice threshold. The Respondent will below examine the access to justice provided to Claimant.

Access to justice

98. The Respondent submits that procedural fairness is a basic requirement of rule of law. The United States model BIT 2004 states in Article 5 (2) thereof that *“fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world* " and gives us a closer examination of the concept. According to Wirth, the concept as developed by *Chevron-Texac*o and *White* is, however, vague when we take into account that it imposes a positive obligation to maintain a functional and effective justice system, which is too vague to be effectively enforceable.[87] Despite the fact that it is a developing country, the Respondent pleads that it is a normal country that makes every effort to maintain functional and accessible justice system for both its nationals and aliens. The fact that the High Court of Mercuria took the Claimant’s case testifies to the fact that Respondent’s judicial system cannot be distorted and ineffective.

99. Failure to provide access to justice can under certain circumstances amount to the denial of justice. The denial of justice has three possible meanings, according to García, Sohn, and Baxter[88] those are a) broad, b) narrow and c) intermediate. The first cover state responsibility for all discrepancies, even minimal, the second refers strictly to governmental intervention to judiciary with direct intent to harm the investor, the last one is

> *“related to the improper administration of civil and criminal justice with respect to a foreigner, including a denial of access to courts, inadequate procedures, and*

86 UNCTAD, p. 29.

87 WIRTH, p. 340.

88 GARCÍA, SOHN and BAXTER, p. 180.

> *unjust decisions."*[89] *García, Sohn and Baxter claim that "the term may thus be usefully employed to describe a particular type of international wrong for which no other adequate phrase exists in the language of the law,"*[90]

100. The scope of the denial of justice differs, however, several tribunals (including NAFTA tribunals) have alongside with García, Sohn, and Baxter cited above (fn. 16) concluded that there are various situations, actions or omissions that can be subsumed under the denial of justice. The usual situation considered by case law as a violation was that the investor was not heard. The Respondent concludes that the alleged conduct must be harmful to the investor and has to show clear lack of due process or failure of the judicial system as a whole. Thinking otherwise would give the investors the unlimited power to hold states liable for what one could classify as merely a procedural error that might occur from time to time as the judges are not machines but human beings.

101. In the present case, the Claimant commenced enforcement proceedings in Mercuria seeking to recognize and enforce the Award against the NHA. The proceedings were commenced in the High Court of Mercuria. The Claimants says the delay 7-year delay is unreasonable, which is not entirely true. The Respondent is aware of the delay, however, submits that the delay has occurred only because the Respondent chose to accord fair trial to both of the litigants, not only to Claimant. While it is true that there might have been some procedural missteps, the Respondent submits that those do not constitute grounds for concluding a breach of FET. The Respondent submits that the facts that judge was on the leave or that have made comment on the Claimant's behavior during the proceedings, do not show lack of due process in the present case.

102. The White tribunal concluded that when examining the actual behavior of the courts, it is important to bear in mind that [the host state] is a developing country […] with a seriously overstretched judiciary.[91] The Respondent is a developing country struggling to gather its overburdened judiciary during such a hard time for the nation – greyscale epidemic. The Claimant knew, when entered the country, that there was an epidemic of Greyscale. Actually, the Claimant made a very profitable business out of the situation. In order to do

89 DOLZER and SCHREUER, p. 264.

90 GARCÍA, SOHN and BAXTER, p. 180

91 WHITE, ¶ 10.4.18.

so, the Claimant was established three months after Mercuria concluded an agreement on the BIT with Basheera (the country of the Claimant's origin). The Greyscale was present in Mercuria from early 1980's which means that the Claimant was or should have been aware that such a poor country as the Respondent faces a high risk of being dragged into a health crisis. Therefore, the Claimant cannot complain about the length of the proceedings as it should have expected that the epidemic could have affected the course of handling disputes at courts.
Moreover, developing countries usually struggle with delayed proceedings. In the study conducted by Court, Hyden and Mease, the following countries classified as developing by UN[92] have scored very high in the justice arena, which means that they have certain problems with their judiciary in terms handling cases in time.[93] Moreover, the caseload per judge is substantially higher in developing country than in developed countries.[94] The Respondent, therefore, submits that the expectations of any reasonable investor could not be as same in a developing the country as in a developed country with sufficient resources to financially and personally secure the judicial system in order to prevent the cases from being delayed.

103. As for the delay, that is 7 years in the present case, the Respondent submits that several tribunals found no violation of due process in cases that even exceeded the present number. In *Jan*, the claimant took over 10 years to be served the first instance judgment in proceedings against SCA (a public agency established under the law of Egypt) regarding contract under which the claimant had had to do some work in the southern part of the Suez Canal. The ICSID tribunal concluded that 10 years to obtain first instance judgment was unsatisfactory in terms of efficient administration of justice, however, did not amount to a denial of justice.[95] In *Amto*, the Claimant – a Latvian investment company – has been buying stocks of former state entity EYUM-10 and In 2003 had owned over two-thirds of the company. ZAES/Energoatom was the biggest nuclear power plant and a division of the respondent's company Energoatom. ZAES was EYUM-10's largest debtor. The claimant obtained several decisions against ZAES and commenced

92 UN, p. 146.

93 COURT, HYDEN, MEASE, p. 14.

94 DAKOLIAS, p. 98.

95 JAN, ¶ 204.

bankruptcy proceedings in 2002 and 2003. The proceedings were delayed by more than 5 years which was not concluded as a denial of justice by the SCC tribunal that noted that *"Claimant complains of various procedural irregularities that delayed these proceedings, but the Tribunal considers these irregularities insignificant"*[96]. In *White*, the respondent invited the claimant in order to be supplied with mining technology. The claimant entered into a contract with Coal India – a state-owned company – shortly afterward some disputes arose between Coal India and the claimant as to whether Coal India was entitled to penalty payment and/or the claimant was entitled to the bonus. The claimant filed arbitration before ICC tribunal, which decided for the claimant. Afterwards, the claimant applied for enforcement proceedings in 2002 and the case was still pending in 2010 when the claimant commenced proceedings under BIT. The UNCITRAL tribunal has not found the denial of justice because in its view the delay has not reached the stage for concluding so.
As stated above, there is no general time for concluding denial of justice (access to justice). However, the Respondent deems that it is clear from the aforesaid that similar or even more serious delay in cited cases was not considered as constituting a denial of justice.

104. The Respondent submits that there has not been a final judgment yet. In fact, as of this date, the proceedings are still pending. The Respondent is of the opinion that the state should be given an opportunity to remedy the alleged breach. Moreover, before bringing successful denial of justice claim, the investor should exhaust local remedies,[97] which the Claimant has not.

105. Finally, The Respondent, therefore, concludes that the delay was not unreasonable, but occurred in order to accord justice to both the litigants. As was shown above, it follows from the case law, the tribunals have not found a breach in cases where the delay was bigger. Moreover, the Claimant was aware of the health situation in Mercuria that has a substantial effect on the functioning of its judiciary. Claimant's assertion is only a blatant attempt to take advantage of the situation.

96 AMTO, ¶ 79.

97 DUGAN, p. 347.

V. The termination of the long-term agreement by the Respondent's NHA does not amount to violation of Article 3 (3) of the BIT.

106. The investor claims that the termination of the Long-Term Agreement that was concluded with the National Health Agency establishes the state responsibility for this alleged breach of the claimant´s rights. The Respondent strongly disagrees with this opinion and maintains that NHA is a separate and autonomous entity and is not a party to the PCA arbitration and termination of the contract is a purely contractual and thus this claim cannot be elevated into the status of treaty claim as the Claimant is trying to achieve.

107. The investor claims that the termination of the Long-Term Agreement that was concluded with the National Health Agency establishes the state responsibility for this alleged breach of the claimant´s rights. The Respondent - the Republic50, of Mercuria strongly disagrees with this opinion and maintains that the termination of the contract is a purely contractual claim that was agreed upon with an independent legal entity and thus this claim cannot be elevated into the status of treaty claim as the Claimant is trying to achieve.

108. NHA entered into a contractual relationship with Atton Borro in 2004 in a form of Long-Term Agreement. Under the LTA the NHA would purchase Santior from Atton Borro at 25% discounted rate by periodically placing purchase orders. Subsequently, the NHA began the distribution of the drug.

109. The provision that is at the center of attention is Article 3 (3) of BIT (so-called umbrella clause) - Each contracting party shall observe any obligation it may have entered into with regard to the investment of investors of the other Contracting Party. As explained in ¶ 6, the interpretation will be directed according to VCLT. By using the interpretation rules of VCLT Art 31, "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

110. The Respondent concludes that there are two main requirements that need to be met in order to activate the protective power of Article 3 (3). Firstly, it must be a contracting party which is always a state that needs to enter into an obligation and secondly the contract relationship has to be with the investment from the state that is protected by the BIT - ie contracting state. Moreover, when taking into consideration also international

law doctrine, there are inherent limits given to the protective power of the umbrella clause. Therefore, even in case of establishing the existence of a link between state and the given obligation, there is a need to establish whether the contractual obligation assumed by the state are able to amount to a violation of Article 3 (3) of the BIT.

Conduct of NHA cannot be attributable to the Respondent

111. There are preconditions of the ILC Articles that need to be met in order to establish attributability. The Respondent hereby present the arguments that will prove these prerequisites are not fulfilled in this case.

112. Attribution can be based on either Article 4 that refers to the conduct of state organ, Article 5 refers to attributability of persons or entities exercising elements of governmental authorities or Article 8 that refers to the conduct directed or controlled by the state. In other words, there must be proved either structural, functional or control governmental elements are present in the entity that carried out the conduct.[98] At this point, closer analysation of NHA nature is necessary.

113. NHA is a legal entity established in Merkuria. The government and NHA have a close working relationship. It is politically accountable to the Respondent. NHA is regularly submitting reports to the Minister of Health that relate to the monitoring of health issues in Merkuria - especially the evolvement of greyscale disease. NHA operates independently of government and is organized by NHA trusts which are legally established by National Health Authorities Act and consequently they constitute public sector corporations. With respect to above analysis of NHA, the Respondent can show that respective Articles cannot be used in this case.

Regarding the use of Article 4

114. There is no uncertainty that Article 4 cannot be applied since NHA is not a state organ. Respondent submits that NHA is a distinct legal personality under Merkurian law as is apparent from the existence National Health Authorities Act and the existence of NHA Trust that in itself is built upon the presence at least two separate legal entities. This can be proven also by the uncontested facts themselves where there is written - *"It (note-*

98 FEIT, p. 148

Atton Borro) entered the Mercurian market by concluding several such (long term) agreements with its government and with Merkuria newly set up National Health Agency."[99] There is a clear distinction between the government and NHA and the Claimant at that time understood this distinction.

115. Tribunals in many cases in the past have concluded that an entity is not a State organ when it has an independent personality. [100]In cases where the tribunals came to the conclusion that in their respective cases the state entity could be regarded as state organ or de facto state organ, there was a strong link between the state and the entity present. For instance, in *Fleminco DuryFree Shop v. Poland,* the state entity in question needed to have approval from Minister before taking any official steps towards third parties.[101] Moreover, the property was regarded as national property and Minister also appointed the managerial staff.[102] All these elements are missing in this case. The decisions of NHA are done independently and do not require a government approval. In order to establish independence from the government in the financial and managerial sphere, NHA Trust was established that controls NHA. This is a very important distinction that needs not to be forgotten. As such the Respondent submits that the NHA cannot be understood as state organ in either meaning – the structural nor or de facto one.

Regarding the use of Article 5

116. The Respondent submits that also Article 5 does not refer to this case. Article 5 ILC reads as follows:

> *"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provide the person or entity is acting in that capacity in the particular instance.*

Fairly often we cannot with 100% certainty label an organization as purely governmental or commercial and the Respondent does not deny that the NHA is empowered to exercise

99 Statement of uncontested facts, line 869

100 For example *Bayindir v. Pakistan, Ltd. v. Romania, Hamester v. Ghana, Almas v Poland*

101 *Fleminco DuryFree Shop v. Poland* , 427

102 *Ibid*, ¶ 446

elements of governmental authority. However, Article 5 mentions that the entity must be acting in that capacity *in that particular instance.* We cannot therefore automatically attribute the conduct to the Respondent based on general affiliations of NHA. In order to determine whether NHA acted on governmental authority the Commentary to ILC Articles proposes to rely on the particular society, its history and traditions[103]. Therefore, the functional test of Article 5 needs to applied on case-by-case basis. Only if tribunal finds the conduct to be governmental in nature can it be attributed to state and can give rise to the dispute.

117. The Respondent submits that NHA´s activities in managing the technicalities of the contract cannot raise any questions of enforcement or dominion by the Respondent. The conduct in the centre of this dispute – the termination of the LTA – does not possess any signs of it being carried out under the direction of the government. The termination of any contract is a somewhat normal action taken by contracting parties when there is either disagreement or virtually any other reason may be used as an explanation for the termination. Whether the termination itself was according to the contract or was set against it is not of importance. The Respondent suggested that the Tribunal will look at the situation in reverse. If the investor had terminated the contract, no one would have questioned whether there are any secret governmental powers at play. There is no power imbalance present in the act. Therefore, the Respondent concludes that Article 5 cannot be used to establish attributability of the conduct to the Respondent

Regarding the use of Article 8

118. Article 8 reads as follows:

> *"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.".*

The Respondent submits that there would need to be a proof that the act of termination of the contract was directly carried out on the instructions or direction of the Respondent. The Respondent did not participate in the negotiations nor there can be proven

103 UN Commentary, Article 43

interference in the progress of the relationship between NHA and the Claimant. The decision to terminate the contract was one of NHA´s and as a contracting party, they simply used available means to act according to their will and responsibility.

Conclusion

119. NHA possesses an independent legal personality. It does possess public government power, but this power was not exercised in termination of the contract. NHA has contractual rights that are derived from it being the contracting party and they were demonstrated in this case without any use of possible governmental powers it may have had possessed. When an entity engages on its own account in nongovernmental conducts, even if these are important to the national economy, there is a unified opinion based on both case law and international legal doctrine that conclude that we cannot link this activity to the state. NHA passed through structural, functional and control tests of attributability based on ILC Articles without having the Respondent implicated in any of it.

Breach of the LTA does not amount to violation of the umbrella clause

120. The Respondent argues that the termination of the LTA was purely contractual action and since the Claimant thus is not eligible for the special protection arising from the BIT. Moreover, the decision on the termination of the LTA was already given by the commercial arbitration court in Reef which is in the Respondent opinion obstacle in seeking the Treaty protection.

121. The Respondent agrees with Pakistan that asserted in the *Bayindir v Pakistan* case, that it is not a role of the tribunal to substitute itself for the contractual tribunal to which the Claimant could have taken its case against the NHA. It is well established that a breach of Contract by the State is not in itself a breach of international law and provisions included in Article 3 (3) of the BIT does not magically transform all contract disputes into investment disputes under the BIT.[104]

122. The Claimant chose to take action against the Respondent by instituting the commercial arbitration proceedings. This claim is the same in both proceedings – to establish whether

104 *Bayindir v Pakistan*, ¶ 255

the termination of LTA breached the contract. The protection of investment treaties is not granted to purely contractual claims especially in cases where the control mechanism is put into place.

123. The Respondent submits that the Treaty should protect the investor from the use of State public power that deprives the investor of the rights that are protected by the Treaty. In this particular case there was no breach of the BIT, since the control mechanisms arising from the LTA itself are present.

124. The claimant was aware of the nature of the contract when invoking commercial arbitration. If Atton Borro would have considered the State as a second contractual party, it would have invoked the protection of the Umbrella Clause right then. It does not make sense to willingly seek a lesser protection of the commercial arbitration with a risk of it not being accepted in the state when the more prominent protection is available.

125. In the light of findings of the tribunal in case *Joy Mining v. Egypt* and other tribunals[105], which concluded that a party should not be allowed to rely on contract as the basis of its claim where the contract itself refers that claim exclusively to another forum. This is our case where the LTA referred to the commercial tribunal as a means to solve the conflict between parties.

REQUESTS FOR RELIEF

126. With respect to all previous submissions, the Respondent respectfully requests the Tribunal to:

a. Find it lacks its jurisdiction over the claims and find these claims inadmissible;

b. Declare that the Respondent is not liable for alleged violation of the BIT;

c. Find that Respondent is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements;

d. Grant such further relief as counsel may advise and that the Tribunal deems appropriate.

105 *For example SGS v Philipines or Malicorp v Egypt*

Respectfully submitted on 25 September 2017 by:

Team Koretsky

On behalf of the Respondent

The Republic of Mercuria