TEAM LACHS

PERMANENT COURT OF ARBITRATION

PCA CASE NO. 2016-74

ATTON BORO LIMITED

(the Claimant)

v.

THE REPUBLIC OF MERCURIA

(the Respondent)

MEMORIAL FOR RESPONDENT

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Salem	Salem (U.S.) v. Egypt, Award (June 8, 1932), 2 R.I.A.A. 1161, 1202.

TABLE OF ABBREVATIONS

ABBREVATION	FULL FORM
¶	Paragraph
Art.	Article
ASRIWA	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CAFTA	Central America Free Trade Agreement
DOB	Denial of Benefits
Ed.	Edition
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
ILC	International Law Commission
IAA	International Investment Agency
IP	Intellectual Property
LTA	Long Term Agreement
Mercuria-Basheera BIT	Agreement Between The Republic Of Mercuria and The Kingdom of Basheera For The Promotion and Reciprocal Protection of Investments, dated January 11, 1998.
NHA	Mercuria National Health Authority
p.	Page
v.	Versus
VCLT	Vienna Convention on the Law of Treaties, dated May, 23 1969.

STATEMENT OF FACTS

Involved Entities

1. On 11 January 1998, the Republic of Mercuria (**"Mercuria"** or **"Respondent"**) and the Kingdom of Basheera ("Basheera") concluded an Agreement for the Promotion and Reciprocal Protection of Investments (the "BIT").
2. The putative investor Atton Boro Limited (**"Atton Boro"** or **"Claimant"**) is a mere "mailbox company" incorporated in Basheera, but owned and be effectively controlled by the Atton Boro Group national to third country, The People's Republic of Reef ("Reef") that does not have any international investment agreement (**"IIA"**) with the Respondent.
3. The Mercuria National Health Authority (the **"NHA"**) is an establishment directed independently to invite offers from pharmaceutical companies for long-term strategic supply of the fixed dose combinations (**"FDC"**) greyscale medicine.

Transaction Summary and Facts

4. On 25 November 2004, Atton Boro signed the Long-Term Agreement (**"LTA"**) which is a commercial supply arrangement with NHA providing for supply of Atton Boro's greyscale-treatment drug. The Respondent did not participate the negotiations of the LTA.

5. On 26 December 2006, the Minister for Health called a press conference to discuss the NHA report 2006. Emphasizing the need for more rigorous campaigning, she stated that "*the government would take every measure it deemed necessary to make ensure that patients of greyscale could avail treatment.*"
6. On 10 June 2008, the NHA terminated the LTA because of the unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA and obtained an award (the **"Award"**) in its favour.
7. The Mercuria is a developing country with an overburdened judiciary struggling to cater to its population of 67 million people, thus the proceedings in enforcement application before the High Court of Mercuria (the **"Court"**) has took long time that is not a failure of the Mercuria's judicial system.
8. In year 2009, Greyscale has threatened the well-being of 485 thousands of working-age individuals in Mercuria. Therefore, Mercuria has acted responsibly, and in accordance

with due process of law, in introducing measures necessary to safeguard the health of its people.

9. On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09), which introduced a provision allowing for the use of patented inventions without the authorization of the owner.
10. 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 license to manufacture Valtervite. The Court heard the matter through a fast-tracked process and granted HG-Pharma a license to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria. Moreover, the Court fixed the royalty to be paid to Atton Boro at 1% of total earnings.
11. On 7 November 2016, Atton Boro brought a claim under the Mercuria-Basheera BIT aimed at providing access to PCA jurisdiction, however the Tribunal has no jurisdiction to adjudicate any claims in relation to the enforcement of the Award dated 20 January 2009. This is because an arbitral award does not qualify as an "investment" within the meaning of the BIT.
12. Moreover, in exercise of the prerogative enshrined in Article 2 of the BIT, the benefits of the BIT are not accessible to Atton Boro because Atton Boro has any substantial business activities in the territory of the Contracting Party in which it is organised, namely Basheera. In any case, Mercuria has not violated any substantive protections of the BIT because Mercuria has acted with due process of law when it faced with public health crisis.

SUMMARY OF ARGUMENTS

JURISDICTION: The Tribunal does not have jurisdiction over the dispute. Claimant does not fulfil *ratione materiae* requirements to commence the proceedings since an arbitral award is not an investment within the meaning of the BIT and even if BIT covers awards, the award cannot form an investment since National Health Authority is not a state-owned entity. Additionally, the Claimant does not fulfil *ratione personae* requirements to commence the proceedings since CLAIMANT is a mere mailbox company that incorporated with the aim of abuse of BIT between Basheera and Mercuria. Finally the Claimant has been denied the benefits of the BIT by virtues of the Respondent's invocation of Article 2 of the BIT because a strategic change of nationality should be considered 'treaty abuse' and The BIT provides reciprocal protection for the Contracting States and conditions for application of Denial of Benefits clause under the Article 2 of the BIT are met, thus the Claimant is not entitled to invoke the BIT.

MERITS: Respondent has complied with its fair and equitable treatment obligation under Article 3(2) of Mercuria-Basheera BIT. Firstly, sovereign power of Respondent shall preclude legal expectation of Claimant and intellectual property rights cannot be subjected to legal expectations. Secondly, conduct of Mercurian courts does not constitute denial of justice and internationally wrongful act therefore Respondent is not responsible under the rules of State liability. Last but not least, as there is no abuse of superior governmental powers by the Mercuria, termination of Long Term Agreement by NHA does not amount to violation of Article 3(3) of Mercuria-Basheera BIT.

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ISSUE 1: CLAIMANT DOES NOT COMPLIE WITH JURISDICTIONAL REQUIREMENTS

I. CLAIMANT DOES NOT FULFIL *RATIONE MATERIAE* REQUIREMENTS TO COMMENCE THE PROCEEDINGS

1. A commercial arbitral award dated 20 January 2009 has passed in favor of the Claimant. The award enforcement proceeding has still been remaining in front of the respectful Mercurian courts. [1]
2. However Article 8 of the BIT entitles the contracting states and investors to initiate arbitral proceedings in a result of investment disputes, Respondent respectfully states that the Claimant does not fulfil *ratione materiae* requirements to commence the proceedings and the Tribunal does not have jurisdiction over the dispute since: **A.** An arbitral award is not an investment within the meaning of the BIT, **B.** Even if the Tribunal considers that Article 1 (1) of BIT comprehends "awards", the Award cannot form an investment.[2]

A. An Arbitral Award is not an Investment within the Meaning of the BIT

3. Applicable definition of "investment" is stated in Article 1 (1) of BIT. According to the article;

> [T]he term "investment" means any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws […][3]

4. Following to the aforementioned definition, the Article lists examples of investments such as "movable and immovable property and any related property rights", "shares, stock, bonds and debentures or any other form of participation in a company", "business enterprise or joint venture", "claims to money, and claims to performance under contract

[1] Statement of Uncontested Facts, p. 30.
[2] Article 8, BIT.
[3] Article 1 (1) (c), BIT.

having a financial value", "intellectual property rights", "rights, conferred by law or under contract, to undertake any economic and commercial activity".[4]

5. An arbitral award can be defined as "a final decision, resolving in full or in part the dispute submitted to the arbitrators, concerning either the merits, the competence of the tribunal, or another preliminary objection putting the proceedings to an end".[5] At the case at hand, the award is directly related to the Long Term Agreement, which is a contract signed between Claimant and National Health Authority. An award, born from such an agreement does not have a direct or indirect economic effect that leads to an investment within the scope of Article 1 (1).
6. On a case undertaken within a highly similar Bilateral Agreement, *Romak SA v. Republic of Uzbekistan,* Romak sought recovery under the applicable BIT since enforcement of a commercial arbitration award in Uzbekistan was being thorny. [6] Notwithstanding the very broad definition of investment in the BIT, the Romak tribunal found that there was an 'inherent' meaning to the term investment, and concluded that the transaction underlying the award was simply a contract for the supply of goods, which had never amounted to an investment.[7] While declining to consider any possibility of the award itself solely constituting investment, the tribunal added:

> If the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment. [8]

7. On another case, *GEA Group Aktiengesellschaft v. Ukraine,* the tribunal concluded "the Award – in and of itself – cannot constitute an "investment".[9] Tribunal of *GEA Group Aktiengesellschaft* stated that "award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself".[10] According to the Tribunal's perspective:

> …[T]he Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT…For the same reason, the (agreements), as well as the Award, cannot be considered as falling within the terminal proviso of Article 1 of the BIT ("Any

[4] *Ibid.*
[5] Marchisio, p. 15.
[6] Bjorklund, p. 107.
[7] *Romak S.A.,* ¶ 211; Bjorklund p.107.
[8] *Ibid.,* ¶ 211
[9] *GEA Group,* ¶ 161.
[10] *Ibid.* ¶ 162.

change to the form in which assets are invested shall not affect their nature as investments").[11]

8. *In casu,* the terminated contract which was the substantive issue of the commercial arbitration process is called as Long Term Agreement. LTA was obligating National Health Authority to purchase Sanior from the Claimant at a minimum guaranteed annual order-value. At the year of 2008, NHA terminated the Long Term Agreement. Followingly, the Claimant invoked the arbitration process and it is ruled in favor of the Claimant.[12]
9. Yet, analogously with *Romak SA* and *GEA Group Aktiengesellschaft,* in the light of the fact that LTA is simply a contract for the supply of goods, it shall never amount to an investment according to Article 1 (1) of applicable BIT. Also, the Award obtained on 20 January 2009 solely does not yield sufficient economic activity or contribution. Therefore the award depending on LTA could also not transform into an investment.

B. The Award cannot form an Investment since National Health Authority is not a State-owned Entity

10. Indeed in some tribunals evaluated awards as investments in certain conditions. One and most significant condition to accept an award as an investment has been the presence of a state-owned entity.
11. For instance, on the case *Saipem S.p.A. v. The People's Republic of Bangladesh* which is also wrongly relied on by the Claimant, Petrobangla's fails to pay certain monies under the contract, Saipem fills a request for arbitration before the ICC Court of Arbitration.[13] Followingly, the award has been recognized as an investment by ICSID Tribunal.[14] In that case, Petrobangla was a state-owned entity that acting dependent to the Bangladesh.
12. Also on another case, *The ATA v. Jordan*, the ICSID Tribunal found the commercial arbitration award taken by the APC adequate to initiate the proceeding.[15] But again,

[11] *Ibid.*
[12] Statement of Uncontested Facts, p. 29-30.
[13] *Saipem.* ¶ 10; Sasson, p. 15.
[14] *Ibid.* ¶ 114.
[15] *ATA.* ¶ 118.

most significantly APC was also a Jordanian state-owned entity acting dependent on Jordanian government and it was acting for the sake of public service.

13. Moreover, on a third case *White Industries Australia Limited v. Republic of India* which is under Permanent Court of Arbitration, the tribunal decided that the award taken by "Coal India" was a "crystallization" of the original investment made in the form of the Contract, consequently agreed on the fact that White Industries completed all *ratione materiae* requirements to commence the arbitral proceedings. [16] "Coal India" was also another state-owned entity, acting with the direction of Indian government and lacking independency.
14. In this point, the question of "what makes an entity state-owned?" shall be answered. According to the *Salini v. Morocco* tribunal, being controlled and managed by a state through the medium of a Minister and various political organ, being held the majority stake by the state within the fact that several ministers being sit on the board of directors are key factors to evaluate an entity as state-owned.[17]
15. *In casu*, different from cases mentioned above, National Health Authority is an entity operates independently and inholding private contributions.[18] Additionally, there is no record of direct participation by Mercurian officials in the negotiation of the LTA between NHA and the Claimant.[19] That is also another evidence showing that NHA is not being controlled and managed by the Respondent. Those all explained above concludes to the fact that NHA shall not be considered as a "state-owned entity" according to the extensive valuation.
16. Consequently, even if the honorable Tribunal considers that the Article 1 (1) of BIT comprehends "Awards", the Respondent respectively states that National Health Authority is not a "state-owned entity", hence the award cannot form an investment. Accordingly, the Claimant does not comply *ratione materiae* requirements to initiate the arbitral proceedings.

[16] *White Industries*. ¶ 7.6.10, Mansinghka & Srikumar, p. 17.
[17] *Salini* ¶ 32-33.
[18] Procedural Order No.3 ¶ 1590.
[19] *Ibid.*

II. CLAIMANT DOES NOT FULFIL *RATIONE PERSONAE* REQUIREMENTS TO COMMENCE THE PROCEEDINGS

17. Republic of Mercuria and Kingdom of Basheera signed the BIT with the aim of promoting investments and providing secured and reciprocal atmosphere for bot investors and states. The BIT signed at the date of 11 January 1998 and following to this date Republic of Mercuria fulfilled all of the obligations that burdened on Respondent by the virtue of BIT. However, due to nature of the BITs, protections and benefits arose from them open to the abuse of nationals of non-signatory states.[20] Further, the BIT between Basheera and Mercuria unjustly exploited and abused by Atton Boro Group with the incorporation of a mailbox company subject to laws of Basheera called as Atton Boro Limited that also Claimant of this arbitration. Notwithstanding Atton Boro Limited's position in this arbitration, Claimant is not subjected to protections and benefits of the BIT since it is not the "real" investor that defined in Article 1 of the BIT and excluded by its second Article. Moreover, Claimants corporate veil must be lifted in order to reveal real investor.
18. In international law, as a general principle, legal entities get recognized separate from each other, from their shareholders, directors and officers.[21] All corporations have their own legal entities and their liabilities cannot create a burden for other corporations. However, separateness of legal entities carries a potential for unfair utilization of this situation. Therefore, in existence of certain conditions a tribunal or a court can disregard the separateness and accept two corporations as single one or transfer one's liabilities to other.[22] Even Lord Denning produced single economic theory, which allows the tribunal to treat two different legal entities as a single one.[23] In order to achieve these conclusions, lifting corporate veil theory must be applied between the different entities.
19. Since the general principle is the separation of entities of the corporations, lifting the corporate veil theory must be applied reluctantly and with the strong legal bases. Although there is not determined criterions for applying said theory, tribunals ruled some conditions for exercising it. In the VSPL case tribunal tried to lift the corporate veil in order to understand existence or non-existence of a foreign control.[24] Foreign

[20] Nikiema, p.6.
[21] Thompson p.1036.
[22] Sher p.51.
[23] Cheng pp.331-332.
[24] VSPL, ¶ 30.

control is determined as a reason for lifting the corporate veil by the arbitral tribunal. So if there is a foreign control claims, it is possible to disregard different legal entities. Furthermore, in the TSA case another tribunal reached to a similar conclusion.[25] The real source of control must be determined in order to answer the jurisdiction question and while doing it, tribunal can lift the corporate veil.

20. In the present case, relationship between the Claimant and its parent company goes beyond the usual parent-subsidiary relationship. Atton Boro Limited incorporated in April 1998 by Atton Boro Group – incorporated in reef-. Claimant incorporated following to execution of BIT between Mercuria and Basheera with the aim of exploiting BIT's protections and benefits. Further, parent company holds whole shares of the Claimant. Atton Boro Group manages and administers the Claimant since the Group is the sole owner of its shares. Further, Claimant incorporated as a vehicle of Atton Boro Group. Even in this arbitration, Claimant lacks power of representing itself and it is represented by a national of Reef, Allama Iqbal.[26] In the light of these information, Claimant's corporate veil must be lifted and the dispute must be addressed to the entity that holds the actual power and liable for the actions, which is the parent company of the Atton Boro Limited, Atton Boro Group.
21. Atton Boro Group is a company that incorporated in the Reef. The BIT defined the investors as the nationals of contracting states. Therefore, Atton Boro Group cannot enjoy the benefits of the BIT. Moreover, Claimant is a mere mailbox company that incorporated with the aim of abuse of BIT between Basheera and Mercuria. Control of the Claimant in the hands of 3rd party national Atton Boro Group, since the Atton Boro Group holds all shares of Atton Boro Limited, their separate entities must be disregarded and Atton Boro Group must be accepted as a sole addressee of the relationship with Mercuria.

[25] TSA ¶ 147
[26] Statement of Uncontested Facts ¶ 860

III. THE CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE MERCURIA-BASHEERA BIT BY VIRTUE OF THE Respondent'S INVOCATION OF ARTICLE 2 OF THE BIT

A. The Mercuria-Basheera BIT is not Accessible to the Putative Investor Claimant

22. The Claimant is a mere "mailbox company" set up in Basheera by investor of a third state, The People's Republic of Reef [27] that does not have any IIA with the Respondent. The Claimant brought a claim under the Mercuria-Basheera BIT, however the Mercuria-Basheera BIT is not accessible to the putative investor Claimant.

1) A Strategic Change of Nationality Should be Considered "Treaty Abuse"

23. The shares of the Claimant are currently held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company.[28] Actually, Atton Boro Group has constituted a mailbox company, the Claimant, aimed at providing access to PCA jurisdiction.
24. Treaty shopping has become a practice that is ever more widely recurred to due to its potential to cross the jurisdictional threshold of arbitral proceedings and 'import' more favorable procedural or substantive protections.[29]
25. Moreover, the doctrine of the prohibition of abuse of rights is an undoubtedly accepted particularization of the principle of good faith by scholars and international jurisprudence, as a general principle of law or as part of customary international law.[30]
26. The Atton Boro Group had changed its nationality by constructing Atton Boro Ltd in Basheera during that continuous practice foreseeing of a specific future dispute which is Respondent's measure against greyscale, thus manipulating the process under PCA and the exercise of such jurisdiction are in bad faith to gain unwarranted access to international arbitration.
27. Consequently, the change of nationality constitutes an abuse treaty shopping and the tribunal should decide on the fact that the Claimant is a so-called shell or mailbox company and has acted in bad faith, thus this situation constitutes a bar to its jurisdiction.

[27] Response to the Notice of Arbitration, ¶ 480.
[28] Procedural Order No. 2, ¶ 1510.
[29] Baumgartner, p.33.
[30] *Ibid*, p.202.

2) The BIT Provides Reciprocal Protection for the Contracting States

28. Treaty shopping violates the reciprocal nature of the treaty, which is expressly mentioned in the title of the Mercuria-Basheera BIT.[31] According to the principle of free and sovereign consent of treaty-negotiating states, the Tribunal should make its decision based on the wording of the BIT. The title of the BIT is "reciprocial protection of investment" and "reciprocial" must have some meaning.[32]
29. Furthermore, commerntators have explained that if the State party to the BIT demands compliance, it is reciprocal. In contrast, if a third party demand complience from the breaching State, it can be considered "beyond reciprocity", that is, "beyond the bileteral relationship between the parties".[33] Thus, Mercuria-Basheera BIT imposes no liability on Mercuria to protect investors from The Republic of Reef.
30. To conclude, the Claimant's claims are inadmissible because the benefits of the BIT are not avaliable to Claimant. In other words, the Claimant is not a proper investor from a contracting party to the BIT.

B. Conditions for Application of Denial of Benefits under the Article 2 of the Mercuria-Basheera BIT are Met, Thus the Claimant is not Entitled to Invoke the BIT

31. When the contracting States, Mercuria and Basheera, decided to negotiate BIT with each other, they agreed to limit the treaty shopping by including a denial of benefits clause[34] which has the express purpose of excluding treaty shopping mailbox companies from the benefits of advantageous treaty.[35]
32. Under the Article 2 of the BIT, the parties to the BIT have denied the protection of the treaty to a company which does not have any substantial business activities in the home state territory and is owned or controlled by nationals of a non-Party.

[31] Procedural Order No. 1
[32] Standard Chartered Bank Award, ¶ 270.
[33] Baumgartner, p. 44.
[34] BIT Article 2.
[35] Baumgartner, p. 47.

1) The Right to Deny Benefits out of the Mercuria-Basheera BIT did not need to be exercised by the Respondent State

33. Article 10.12.2 CAFTA stipulates that 'a Party may deny the benefits', both Article 17(1) ECT and Article I (2) of the US– Ecuador BIT and the US– Argentina BIT enable each Contracting Party 'to reserve the right to deny' the benefits. Baumgartner reasonable analyzes that the difference in wording 'may deny' and 'reserves the right to deny' does not appear to present any different meaning so as to support divergent conclusions.[36]
34. It is accepted that under normal circumstances, host state officials will never know at the time they must take action whether a given company is covered by a given treaty. [37] Sinclair criticizes the idea of the need of exercising DOB clause that the host State often not even being aware at the time of the existence of a new investment made in its territory let alone the nationality of that investor, the extent of its business activities in its home State, and the nationality of its underlying owners or controllers. The host State may only learn of the conditions that would justify invoking Art. 17 at such time as an investor notifies it that a dispute under the ECT has arisen and quite possibly not even then.[38] Therefore, Claimant's claim about the need of exercising the right to DOB is unreasonable.

2) Even If the Tribunal Would Decide On the Need of Exercising the Right, This Exercise Will Have Retroactive Effect

35. Many DOB clauses simply provide identical sentence with Art. 2 of the BIT without clarifying in any way how and in particular when this right must be exercised in order to become effective.[39]
36. The Tribunal in *EMELEC* found for a denial of benefits clause under the US– Ecuador BIT that the Respondent announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction. [40]

[36] Baumgartner, p. 120.
[37] Legum, p. 4.
[38]Baumgartner, p. 2.
[39] Article XII of the 1998 US-Bolivia BIT; Article I(2) of the 1994 US-Ukraine BIT; Article I(2) of the 1993 US-Ecuador BIT; Article 17 ECT.
[40] EMELEC Award, ¶ 71.

37. The Tribunal in *Ulysseas* also noted that there is no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.[41]
38. Similarly, the *Guaracachi America* Tribunal found that the very purpose of the denial of benefits was to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits and it was proper that the denial is "activated" when the benefits are being claimed. Additionally, the Tribunal stated that as a jurisdictional issue, the denial of benefits objection must be raised at the latest in the Respondent's statement of defense. [42]
39. The Respondent denied the claims advanced by Atton Boro with its Response to the Notice of Arbitration dated 26 November 2016.[43] It was Respondent's first opportunity to consider Claimant's situation related to applicable BIT and announce the denial of benefits to Claimant. Therefor the exercise of the DOB clause was timely and this exercise has retroactive effect that means Claimant is denied the benefits of the BIT from the first of its investment.

3) In Any Case the Claimant does not Have Substantial Business Activities in the Territory of Basheera Thus a Mailbox Company

40. The Contracting States of the BIT decided to include the requirement that the investor has to have its substantial business activities in its home State to qualify as protected investor under the IIA.
41. The tribunal in *Pac Rim* held that the requirement of 'substantial business activities', for a traditional holding company not to qualify as a prejudicial mailbox company, required 'usually a board of directors, board minutes, a continuous physical presence and a bank account' and an 'active holding of the shares in subsidiaries' as opposed to 'nominal, passive, limited and insubstantial activities'.[44] Also, Jagusch and Sinclair find

[41] Ulysseas Award, ¶ 173.
[42] Guaracachi America Award, ¶ 376-81-82.
[43] Response to the Notice of Arbitration, ¶ 470.
[44] Pac Rim Jurisdiction, ¶ 4.72- 4.75.

'substantial business activities' to exist when the company is: engaged in buying, selling, and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence such as corporate registration and administration, including holding requisite board or shareholders' meetings and the payment of associated taxes and corporate registration fees. [45]

42. However, the Claimant has not its own board directors or board minute. There is no exclusive management of the Claimant separated from Atton Boro Group. The Claimant was unable to establish number and type of its clients, type of its operations, kind of contracts it enters into, nature and composition of its managing bodies.[46] The Claimant is an investment vehicle controlled by the Atton Boro Group, with no commercial activity in the territory of Basheere.[47] In other words, Atton Boro Limited is simply a mailbox company.
43. Under the foregoing circumstances, the Claimant is far from meeting the standard imposed under the Article 2 of the BIT. The Respondent objects the tribunal's jurisdiction *ratione personae* on the grounds that the Claimant is a shell company incorporated in Basheera without any substantial business activities there and owned by a third company from a third state, Reef. The tribunal should dismiss Claimant' claims on the grounds that the putative beneficiary Claimant was not the investor under the Basheera-Mercuria BIT.

ISSUE 2: RESPONDENT HAS COMPLIED WITH ITS OBLIGATION OF FAIR AND EQUITABLE TREATMENT

I. RESPONDENT DID NOT VIOLATE THE ARTICLE 3.2 OF THE MERCURIA-BASHEERA BIT AND FAIR AND EQUITABLE TREATMENT

44. Respondent has been facing public health crisis and Claimant is investor in Republic of Mercuria. To preventing to serious effect of greyscale illness, Respondent used its rights about taking measures. In this context, governmental actions of Respondent did not violated Mercuria-Basheera BIT and FET (**A**). Thus, enactment Law No: 8458/09 is lawful according to Mercuria-Basheera BIT (**B**). Finally, patent of Claimant as an IP right is not a source of legal expectation (**C**).

[45] Jagusch, p. 20.
[46] Alps Finance and Trade Award, ¶ 221.
[47] Response to the Notice of Arbitration, ¶ 480.

A. Governmental Actions and Policies of Respondent are Lawful according to Article 3.2 of the Mercurian-Basheera Bit and Fair and Equitable Treatment

45. To begin with, any grating of IP rights cannot a cause for creating legal expectation for investor. "The grant of the patent certainly does not and cannot create any legitimate expectation.[48]" Generally, the scope of legal expectation is under the provisions of the Mercuria-Basheera BIT and other IIA's between the Respondent and Claimant. First of all, Respondent did not violate its obligations under the BIT and Fair and Equitable (FET). The scope of obligations of Respondent is limited by the Mercuria-Basheera BIT with FET.
46. To examine the FET in present case, FET just includes the obligations from Mercuria-Basheera BIT does not includes provisions of other conventions or agreements which are out of the scope of Mercuria-Basheera BIT. In other words, the scope of FET is that legal framework of host state, undertakings and representations from host state explicitly or implicitly at the time of investment[49]. Therefore, the important point is the actions of Respondent for detecting whether acts of Respondent did not violate FET.
47. To explain the process of acts of Respondent at the time of investment, Respondent and Claimant made a product development partnership for *HIV/AIDS* at the period of 1999 and 2004. Minister of Health of Mercuria made a press statement to declare the success of partnership at 19 June 2004. In following day, the President of Mercuria stated that "Mercuria will do away with red tape and roll out the red carpet for investors." on his Twitter platform[50]. Besides, the National Health Agency (NHA) which is directed by Ministry of Health of Mercuria, invited offers from pharmaceutical companies for long term strategic supply of FDC greyscale medicines at discounted rates for estimating the requirements of Mercuria. Therefore, the NHA sent an invitation to Claimant to offer for supplying its FDC drug[51].
48. Actions of Respondent, as mentioned above, did not include explicitly or implicitly any undertaking or giving right to Claimant about protection of IP rights. Thus, there are no

[48] Ruse-Khan, p.27.
[49] Dolzer-Schreuer, p.145.
[50] Statement of Uncontested Facts, p.29.
[51] *ibid*, p.29.

undertaking and representation from Respondent to Claimant about not making enactment Law No: 8458/09 or granting of a licence of Claimant. Claimant just has legal expectation about only having rational, reasonable, non-discriminatory and non-arbitrariness business relationship with Respondent. In other words, Respondent did not create any legal expectations on Claimant out of the scope of Mercuria-Basheera BIT and LTA which is one of the IIA based on Mercuria-Basheera BIT.

49. Moreover, an investor should know sovereign power and right to regulate of host state on the basis of its public health needs. Therefore, Claimant cannot have a legitimate expectation about not making enactment Law No: 8458/09. Claimant should be aware that "host states remain sovereign in their territory and, as part of their public function, they have the power and the duty to regulate within their borders.[52]" Thus, Respondent not only has right to regulate the conditions but also is bound its duty to service its population in base of public health needs.
50. Additionally, granting of a licence of Claimant did not violate legal expectations of Claimant, FET and Mercuria-Basheera BIT. Besides, "wherever the protected investment consists of an IP right, the grant of this right as such does not result in legitimate expectations.[53]" As Philip Morris v. Austria declares that "investments are only protected to the extent that they are admitted by the relevant contracting party"[54]. Mercuria-Basheera BIT is an admit, between the Respondent and Claimant, for protecting investment in the scope of BIT and FET. Respondent did not admit any specific protection of IP Rights to Claimant. Granting of a licence of Claimant is based on rational and reasonable policy of Respondent. Therefore, there is no violation of legal expectation of Claimant or FET and Mercuria-Basheera BIT with granting of a licence of Claimant.
51. Consequently, legal expectations of Claimant which is based on FET are limited by the Mercuria-Basheera BIT and LTA which is an IIA's based on BIT. In this limit, legal expectations of Claimant include having rational, reasonable, and non-discriminatory and non-arbitrariness business relationship with Respondent. Enactment Law No: 8458/09 and granting of a licence of Claimant are result of right to regulate of Respondent in based on public health needs and its rational policy. Thus, Respondent did not violated the legal expectations of Claimant.

[52] Vanhonnaeker, p.112.
[53] Ruse-Khan, p. 29.
[54] Philip Morris I ¶ 7.17.

B. Enactment Law No: 8458/09 is Result of Sovereign Power of Respondent and did not violate the Article 3.2 of the Mercuria-Basheera BIT and Fair and Equitable Treatment

52. Mercuria-Bashera BIT, FET or any international laws cannot prevent sovereign power of host states. Legal expectations of investors are to be protected its investment relationship on the basis of stability, predictability, rational, non-discriminatory. Thus, "no expectation for a stable and predictable business environment can go so far that the circumstances prevailing at the time the investment is made must remain unchanged.[55]"
53. Moreover, article 12 of the Mercuria-Basheera BIT declares that "Nothing in this agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of essential security interests …other emergency in international relations.[56]" Mercuria-Basheera BIT clearly gives the right of taking any action, or in other words right to regulate, for Respondent.
54. Respondent has been suffering serious public health crisis. To explain the public health crisis, single FDC pill cost is USD 27 and the annual cost of FDC medicine is approximately USD 10,000 per patient. In 2005, the cost of the greyscale program reached 1 billion USD which is %500 of greyscale program budget even poor group of patients did not reach FDC medicines[57]. These situation and costs covered only 2005 and need to treatment of greyscale was increasing. Working age group of Respondent that is approximately 48,000,000 people were under the threat of illness and extremely high budget of FDC medicines. In this situation, firstly, Respondent is under the duty of making service and protecting health of its country and secondly, Mercuria-Basheera BIT gives authority to Respondent about taking measures at the time of crisis such as public health crisis.
55. Furthermore, although FET is recognized as protection regime of investor, FET gives authority to host states with fair balance between host states' public interest and investors' property. "The fair and equitable treatment standard also involves a balancing

[55] Saluka ¶ 305.
[56] Mercuria-Basheera BIT.
[57] Annex No.3, p.43.

exercise that might take into account "the host State's legitimate right subsequently to regulate domestic matters in the public interest.[58]" Therefore, when host states build fair balance between its public interest and investors' benefits, host state can take any kind of measures.

56. In the present case, Respondent built a fair balance between its public health requirements and benefits of Claimant. Respondent made enactment Law No: 8458/09 and granting of a licence of Claimant. Firstly, enactment Law No: 8458/09 is non-discriminatory and non-arbitrariness because this provision became valid for all investors which have been making investment in Mercuria. Additionally, enactment Law No: 8458/09 is a result of rational policy to provide public health. Therefore, Respondent can grant of licences from owners because of its public health crisis.
57. To explain the fair balance between the Respondent and Claimant. Respondent granted the licence of Claimant and when HG-Pharma granted the licence from High Court of Mercuria, High Court determined the payment based total earning of licence from HG-Pharma to Claimant.
58. Consequently, Respondent has legitimate and reasonable right to take measures against the public health crisis. Firstly, Respondent has sovereign power and right to regulate. Secondly, Mercurian-Basheera BIT gives right to Respondent about taking measures under the title of essential security interest. At last, Respondent built fair balance in favour of Claimant. Thus, Claimant cannot argue legitimate expectation about enactment Law No: 8458/09.

C. Granting Licence of Claimant is not Violation of Article 3.2 of the Mercuria-Basheera BIT and FET

59. To begin with, Atton Boro has two important patents which have been given under the Mercurian Patent Law. However, Mercuria granted licences of Claimant because of that public health crises in Mercuria had reasoned to hundreds deaths by Greyscale. Meanwhile, international IP norms and agreements such as TRIPS and Paris Convention are not source of Mercuria-Basheera BIT and legal expectations of CLAIMENT as a part of FET (**1**). Moreover, granting licence of Claimant is lawful,

[58] Frank Charles, ¶ 537.

non-discriminatory and arbitrary. Also, Respondent did not violated any international obligations, Mercuria-Basheera BIT and FET (**2**). Finally, negative character of IP rights gives authority to Respondent about taking measures (**3**)**.**

1) IP Norms Cannot be Source of Legal Expectation of Claimant in Regard to Mercuria-Basheera BIT

60. The protection of legal expectations of investor is seriously contested concept[59]. The main contested part of legal expectations of investor is about scope of protection. BIT and FET are the sources of legal expectations of investors. IP norms are not part of the BIT and also FET.
61. One investor lawfully has legal expectations linked with at the time of investment. Legal expectation is a directly part of FET which is based on BIT. However, IP norms mostly are not parts of BIT and IIA's based on BIT. In the present case Mercuria-Basheera BIT and LTA does not include any provision to provide assurance or undertakings about protection of IP rights. Similarly, claims about legal expectation based on IP rights clearly outside of the scope of protection of the BIT and legal expectations which is based on FET and BIT.[60]
62. Besides, granting of a licence to investor does not mean legitimate expectation and protection of patent in the context of FET and BIT. Granting of the patent cannot create legal expectation[61]. For instance, in case of Eli Lilly vs. Canada, "the investor hence cannot legitimately expect from the grant of patents by the Canadian Patent Office (CPO) that those remain free from any validity challenges in the courts[62]". Thus, patent as an IP rights cannot produce any legal expectation in favor of investor. In the present case, not only Mercuria-Basheera BIT but also LTA did not give rights to Claimant about protection its patent. By these reasons, IP rights are not source of legal expectation rather than BIT and IIA and Claimant has no legal expectation based on International IP norms.

[59] Ruse-Khan, p.23.
[60] Philip Morris I ¶ 34.
[61] Ruse-Khan, p.27.
[62] *Ibid*, p.27.

2) Even If International IP Norms are Valid, International IP Norms Gives Rights to Respondent in the Scope of Its Public Health Purposes

63. If it is accepted that international IP norms are valid in present case, Respondent has rights from international IP norms to grant licence of a Claimant in order to its public health duties.

64. Although, IP rights have protection under the international IP norms, host states have right to restrict or terminate IP rights of investors when public purposes such as protecting environment or public health occurred. Respondent has been facing public health crisis. According to NHA's annual report at 2003, Ministry of Health of Mercuria emphasized that the imminent public health anxieties was the increasing sphere of influence of greyscale among working-age individuals across the Mercuria.[63] To emphasize the level of crisis, total population of Mercuria is approximately 67,000,000 and approximately 48,000,000 people of Mercuria who is in working age under the risk of greyscale.

65. Especially, in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use Respondent not only can use the patents without authorization of the right holder but also can take some measures or regulate ıts IP law system. As it is known that public health is a type of "national emergency". Article 31 of TRIPS shows that in situations of national emergency or other circumstances of extreme urgency, patents can be used by the government or third parties authorized by the government[64]. Also the regulation of Mercuria (Law No. 8458/09) and granting licence to HG-Pharma absolutely are not commercial using. Thanks to taking the measures, Mercuria aimed that blocking to negative effects of the Greyscale disease.

66. In addition to these, regulation of Mercuria (Natıonal Legıslation Law No. 8458/09) which including using patent without authorization of the right holder do not regulate just by taking Claimant into account. Mercuria state has been regulating laws, measures and regulations by not only taking Atton Boro into account but also taking all investors of Mercuria into account.

67. If any investors in Mercuria had pharmacural patents across to Greyscale like Atton Boro, all measures and regulations could apply like applied to Atton Boro. All

[63] Statement of Uncontested Facts, p.28.
[64] Article 31 of the TRIPS.

companies existed under the Mercurian laws. Therefore, there is no difference between Atton Boro or any Mercurian companies from implementation of Mercurian Laws. Because of that any international IP norms and FET is not violated by Respondent.

68. Moreover, Respondent can take measures about Claimant's patent in light of fair balance. According to IP law, only responsibility of Respondent is making fair balance for Claimant. When, public health crisis happens, Claimant has no opportunity to prevent measures of Respondent about public health issue. "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.[65]" Expectation about not changing host states' legislation as time and needs change is unconscionable[66]. Besides, Respondent has reasonable right to take measures, "the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.[67]"
69. FET standard and legal expectation of investor cannot be separate with the public health issue. Thus, public policies are relevant to interpret FET standards[68]. Moreover, "the FET standard in general will not operate in a way that allows an IP right holder as investor to claim a legitimate expectation in the host state's compliance with international IP norms.[69]" Public health needs and character of FET standard do not create any legal expectation in favor of Claimant about implementing international IP norms such as TRIPS.

3) The Negative Character of IP Rights Gives Authority to Respondent for Taking Measures and Affect the Legal Expectations of Claimant

70. The quality of positive rights and negative rights seriously affect to legal expectations and protection of IP rights. To explain the differences between positive and negative rights, positive right owner has authority to prevent any kind of interference about its IP rights and host states cannot take measures about IP rights. However, negative rights only provide a possibility to owner to protect commercial use of its IP rights by third parties.

[65] Saluka ¶ 305.
[66] Continental ¶258.
[67] Frank Charles, ¶ 537.
[68] EDF ¶ 1005.
[69] Ruse-Khan, p. 31.

71. Positive right character becomes valid only if host state gives right or makes undertakings to investor. In present case, there are no undertakings or any kind of event that may be interpreted as undertaking of positive rights. Thus, patent of Claimant is a negative right.
72. On the side of international IP norms, remarking IP rights as a negative right is dominant approach. For example, "the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts.[70]" The importance of differences between positive and negative rights are about creating legal expectation of investor because positive right requires undertakings from host state in regard FET. However, in the present case no undertakings were given to Claimant. "The grant of an IP right again cannot create any expectations.[71]" Thus, Claimant's patent which has negative character, is not a source of legal expectations of Claimant and Claimant's arguments on the basis of granting of a licence and FET are not acceptable in present case.
73. As mentioned above that FET is not including any international obligations under TRIPS, Paris Convention or other Agreements because fundamental elements of FET is constituted by Mercuria- Basheera BIT. For example, in AHS vs Nigeria case, AHS claimed that host state has some international obligations under the Bengui Agreement[72]. AHS also complained about infringements of its IP, OAPI, and a regional IP Organization in Francophone Africa to which Niger is Member.[73] However, "arbitrators rejected the complainants' arguments based on breaches of international IP obligations of Niger under the Bangui Agreement"[74] because international IP norms which is uncompiled by Respondent do not provide any legal expectations for Claimant. Because of that international IP obligations are not part of FET and BIT.
74. As mentioned above TRIPS is a part of international IP norms. However TRIPS is not part of Mercuria-Basheera BIT and FET.

> "The TRIPs Agreement does not provide for FET as standard of treatment as understood in the realm of international investment law. it is

[70] European Communities – Geographical Indications, Panel Report (WT/DS/174R) 15 March 2005.
[71] Ruse-Khan, p. 27.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*

necessary to note that failure to enforce international agreements on the part of the Host State does not necessarily lead to a breach of the FET standard.[75]"

75. Consequently, Respondent did not violated the legal expectations of Claimant based on its patent. Firstly, IP rights and also patent of Claimant cannot be a source of legal expectations. Secondly, even if IP norms become valid in present case, Respondent used its right from IP norms and thirdly, Claimant cannot argue legal expectations based on FET because IP rights have negative character and negative character of IP rights only prevent the use of IP rights by third parties with commercial goals. In the present case the cause of granting licence is public health crisis not commercial goal.

II. REPUBLIC OF MERCURIA IS NOT LIABLE FOR THE CONDUCT OF THE JUDICIARY UNDER ASRIWA AND ARTICLE 3(2) OF THE BIT

76. First and foremost, Respondent holds the position that Republic of Mercuria cannot be held liable for the actions of its judiciary. Even though the acts of the courts could be attributable to a State, Respondent has not subjected Claimant's investment to a internationally wrongful act in any event. To prove that, the two cornerstones of State responsibility and relevance of ILC's Articles in connection with applicable rules to the present dispute will be examined (**A**). Afterwards, as the courts of Mercuria did not give cause for denial of justice, it will be explained on three factual grounds that Respondent fulfilled its obligation under Article 3(2) of BIT. (**B**).

A. Prerequisites of State Responsibility are not satisfied in the Present Dispute

77. To begin with, Respondent postulates that ILC's Articles on State Responsibility and Internationally Wrongful Acts (ASRIWA) will be determinant in the first instance on the matter of whether the Republic of Mercuria can be held accountable for the conduct of its judicial bodies. In accordance with the general acceptance, Respondent acknowledges that Part One of ASRIWA which regulates the determination of internationally wrongful acts is applicable in the context of investment treaty arbitration.[76] Thus, it is undisputed that an internationally wrongful act must exist in order to claim state responsibility in the investment arbitrations as well. Both Article 2

[75] Vanhonnaeker, p.109
[76] Crawford, p. 193.

of ASRIWA and international jurisprudence highlight two necessary and sufficient elements as violation of an international obligation and imputability for State responsibility to arise.[77] Therefore, the case at hand will be subjected to the same test to decide on the responsibility of Republic of Mercuria.

1) Respondent concedes that Conduct of its Judicial Organs is Attributable to a State under ILC's Articles

78. Although Claimant's view on the issue of international obligation will be refuted extensively, Respondent concedes that a State inherently can be held liable for the actions of its judiciary. Thus, investment tribunals often found that States can be readily held accountable for the acts of their judicial organs, since the authorities of international investment law have reached the consensus that domestic courts are natural organs of the State.[78] One can also observe in the ASRIWA that actions of the courts are attributable to the State, as Article 4 does not distinguish the organs of the State based on their functions.[79]
79. Consequently, Respondent has no objection that conduct of Mercurian courts can be attributed to Mercuria. Put it differently, Respondent contends that test of State responsibility would prevail on the pillar of attributability but it will eventually fail as there is no violation to be found in regards to international obligation of Mercuria.

2) Mercuria-Basheera BIT Provides Lex Specialis on the Determination of International Obligation

80. Respondent also acknowledges that ILC's Articles on State Responsibility have a 'residual character' and only applies in the absence of *lex specialis* between the parties. It is stipulated under Article 55 of ASRIWA that special rules on State responsibility agreed between the Parties precludes the application of the Articles to the extent that they are governed by special rules of international law.
81. As it has widely accepted that "international investment treaties provide a *lex specialis*"[80], one should review Mercuria-Basheera BIT with the object of determining whether two elements of state responsibility fall under the scope of BIT to consider it sole applicable law. In this regard, despite Mercuria-Basheera BIT does not offer a

[77] *Bosnian Genocide*, ¶ 385.
[78] *Azinian* ¶ 97-103; *Loewen* ¶ 47-60; *RosInvestCo* ¶ 602-3.
[79] Dolzer & Schreuer, p. 181; Olleson, p. 471
[80] Sasson, p.16.

binding definition on the issue of imputability, Article 3(2) of BIT should govern the search for a breach of international obligation.

82. Hereby, Respondent is willing to align its legal basis for its arguments with the Claimant's position for the decision on internationally wrongful act and concludes that disputed international obligation of Mercuria shall be fair and equitable treatment standard under Article 3(2) of the BIT.

B. Respondent Has Complied with its International Obligation of Fair and Equitable Treatment as Denial of Justice has not Constituted

83. First and foremost, Respondent highlights the consideration that has been accepted by the investment tribunals on *"the test for establishing a denial of justice sets ... a high threshold"*.[81] Respondent stipulates that Claimant's claim falls far short of the high treshold for constituting an internationally wrongful act on the part of a national court.[82] Without reservation to prevention of denial of justice is being a vital element of fair and equitable treatment standard[83], Respondent sets forth that compelling conditions of denial of justice are not satisfied in the given case.

84. On the other hand, regardless of the applicability of VCLT, encouriging wording found in Preamble of Mercuria-Basheera BIT concerning the fair and equitable treatment standard will led to an interpretation that is always favourable to investors.[84] Respondent takes the position of the *Plama* tribunal on the matter as "...placing of undue emphasis on the 'object and purpose' of a treaty, [...] will even deny the relevance of the intentions of the parties."[85] Thus, accepting Preamble of Mercuria-Basheera BIT which have no binding obligation attached to it as dominant tool of interpretation would lead to biased conclusions.

85. Contrary to Claimant's understanding, denial of justice can be pleaded only if "the legal system […] has performed […] so badly that it falls short of international minimum

[81] *Chevron*, Partial Award on Merits, ¶ 244.
[82] Response to Notice of Arbitration, ¶ 510.
[83] Choudhury, p. 305, Dolzer & Schreuer, p. 178, Kotuby Jr. & Sobota, p. 77, *Rumeli Telekom* ¶ 609, *Saluka* ¶ 308.
[84] "...providing effective means of asserting claims and enforcing rights with respect to investment under national law...", Mercuria-Basheera BIT, ¶ 980, p. 32.
[85] *Plama*, Decision on Jurisdiction, ¶ 193.

standards".[86] If the Claimant claims that conduct of the Mercurian courts is unfair or inequitable, then it needs to prove that there is either convincing evidence of 'egregious violation of due process' or 'manifest arbitratiness' that resulted in a total failure of the judicial system.[87] As it will be explained below, mere delay of proceedings in the enforcement proceedings does not amount to absoulte failure of the legal bodies. Therefore, it can be observed that Mercurian courts showed no acts that reflects manifest injustice to give rise to international responsibility of Respondent.

86. Hence, it will be proven on three grounds that conditions claimed by the Claimant do not constitute denial of justice. Therefore, Respondent has not violated its international obligation of fair and equitable treatment and acts on behalf of Mercurian courts are not wrongful.

1) Alleged Delay in Enforcement Proceedings in the High Court of Mercuria Does Not Amount to Denial of Justice

87. Respondent takes the position that the delay subject to present dispute is not equal to level of maladministration of justice although the proceedings is somehow lengthened. As with the denial of justice, treshold for delay is also likely to be high in the investment disputes. Some investment tribunals openly disclosed that investors could not allege ruinous delay in legal system and considered the topic irrelevant to determination of denial of justice.[88] Also an ICJ judgement found that a case that is languishing 10 years in domestic courts is not unreasonable.[89]

88. Needless to say, judicial bodies of Mercuria worked in tandem with each other to enforce the arbitral award timely in the present case. Likewise, Respondent assents the finding of the *Toto SpA* tribunal on "international law has no strict standards to assess whether court delays of denial of justice".[90] On the other hand, if one needs to consult the global data about the lenght of pending enforcement applications, the studies would still support the Respondent.

[86] *Philip Morris*, ¶ 500.
[87] *Loewen*, ¶ 132. Response to Notice of Arbitration, ¶ 510.
[88] *Rumeli Telekom* ¶ 639.
[89] *Interhandel*, p. 6.
[90] *Toto SpA*, Decision on Jurisdiction, ¶ 155.

89. Moreover, Claimant itself did not continue with the proceedings after it has been transferred the proper bench of the High Court, while time of pending was still under two years. Based on worldwide studies made in 2012, it takes an average of one and a half years to recognize and enforce foreign arbitral awards, while the process may stretch to more than seven years based on the level of development of the countries.[91]

90. Atton Boro, as a foreign investor which is deemed to "take a foreign legal system as he finds it, with all deficiencies and imperfections".[92] In other saying, even though the Republic of Mercuria is a party to New York Convention, Claimant ought to have known the current situation of the overburdened judiciary of the host State which has a population of 67 million. This consideration is also approved by the *White Industries* tribunal as stated:

> [...] India, as a developing country, with a population ... and an over-streched judiciary, must be held to different standards than, for example, Switzerland, the United States or Australia.[93]

91. Analogically, *White Industries* tribunal found no denial of justice in the case of enforcement proceedings that delayed more than nine years. Although the Tribunal described the delay as 'regrettable', denial of justice in related to fair and equitable treatment is not constituted since there is "no suggestion of bad faith, [...] particularly serious shortcoming or egregious conduct that shocks [...] a sense of judicial proprietary".[94]

92. Accordingly, *AMTO* tribunal rejected to evaluate the mere delay as excessive that results with denial of justice "[...] in the light of procedural complexities arising from the need to resolve procedural objections [...]".[95] Respondent reaches the same conclusion for procedural complexities of the present dispute, as the enforcement proceedings witnessed two possible areas of jurisdiction and several procedural objections were made from both Parties. Another investment tribunal acknowledged that denial of justice is not present through delay "given the highly complex and techincal nature of issues".[96]

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[91] World Bank. 2012. FDI Regulations Database.
[92] *Salem*, 1161, 1202.
[93] *White Industries*, ¶ 5.2.18.
[94] *Ibid*, ¶ 10.4.23.
[95] *AMTO*, ¶ 83.
[96] *Jan de Nul*, ¶ 204.

93. In the light of the explanations, Respondent stipulates that alleged delay in the Enforcement Application No. 873/2009 cannot be the basis to invoke the obligation of fair and equitable treatment in the form of denial of justice.

2) Even If Alleged Breaches of Mercurian Procedural Law Exists They Do Not Violate the Article 3(2) of BIT

94. Claimant alleges that on four occasions the Mercurian procedural law had breached and the competent court remained silent.[97] Apart from the fact that form and substance of alleged braches of procedural law are challengable, they would be still incapable of forming the conditions of denial of justice.
95. Thus, *Loewen* tribunal adhered to the main question of whether the proceedings have satisfied minimum standards of international law, while finding that they "need not resolve the domestic procedural disputes which arose at the trial".[98] Furthermore, *Azinian* tribunal noted that the the national judicial organ made "an error of law does not constitute denial of justice".[99]
96. It is accepted by the doctrine that non-compliance with the domestic law by courts entails State responsibility if three conditions are satisfied. The violation of municipal law must be "flagrant and inexcusable", decision must be rendered by "a Court of last resort" and must cause "palpable injustice".[100] Discernibly, alleged violations of Mercurian procedural law did not cause palpable injustice as the both Parties were allowed to make submissions and pursue their cases. Therefore, Mercuria is not liable for the assumed breaches of law under the rules of State Responsibility.
97. Consequently, when we take these decisions into consideration, it is obvious that alleged breaches of procedural law are not necessarily need to be subjected to test of denial of justice. And even if the errors of law are accurately detected, they are not sufficient to constitute denial of justice on their own.

[97] Exhibit I, ¶ 205, 235, 265, 320.
[98] *Loewen*, Award, ¶ 121
[99] *Azinian*, ¶ 99.
[100] de Aréchaga, p. 281.

3) Phase of Determination of Jurisdiction Has No Relevance With Regards to the Fair and Equitable Treatment Standard

98. Last but not least, contrary to what Claimant asserts, determination of competent court on the matter of enforcement of the Award cannot be considered as a contributing cause to delay of proceedings. It is ungenous that Parties might be confused on the jurisdiction when the courts with a similar scope have established with the Commercial Courts Act 2012. Investment tribunals hold the position that procedural irregularities are not denial of justice if they are not "egregious misapplication of procedural law [or] a procedure which is tainted by bad faith".[101] Respondent contends that decisions made by High Court and Supreme Court of Mercuria on the jurisdiction of proceedings were good faith attempts to determine proper place of the hearings.
99. Consequently, Republic of Mercuria cannot be held responsible for the violation of fair and equitable treatment under Article 3(2) of Mercuria-Basheera BIT.

ISSUE 3: REPUBLIC OF MERCURIA HAS NOT VIOLATED ITS OBLIGATIONS UNDER UMBREALLA CLAUSE OF MERCURIA-BASHEERIA BIT

100. Owing to the Long Term Agreement which contains only commercial capacity, National Health Authority acted as a purchaser and termination of the contract is its own decision. It also has a separate personality from Respondent. Thus NHA's activities cannot be attributed to Mercuria **(I).** Even if it is possible, the Article 3(3) of the Mercuria-Basheeria BIT should be interpreted narrowly in any respect **(II).** Finally**,** although the BIT contains an umbrella clause in Article 3(3), it nevertheless does not cover the LTA and as such the Claimant's submissions regarding the guarantees provided in the LTA are not admissible

I. THE ACTIVITIES OF NHA CANNOT BE ATTRIBUTED TO THE RESPONDENT IN THE TERMS OF UMBRELLA CLAUSE

101. After the entrance of Atton Boro in Mercurian market, Claimant entered into the Long Term Agreement ("LTA") with Mercurian National Health Authority ("NHA") without any record of directly participation of any Mercurian official.[102] Accordingly, NHA is being conducted independent from Respondent and only has political responsibility to the

[101] *Frank Charles*, ¶ 489.
[102] Procedural Order No.3, ¶1595.

state. Further, NHA is a separate entity to act without any need of governmental power on the public health.

102. The negotiations of Long Term Agreement issued by NHA and Atton Boro were without any legal guidance from state, and all of this process took place under commercial interests. For instance, LTA is a purchase agreement that parties negotiated and agreed on a fixed discount rate for 10 years.[103] So, it can be clearly seen that parties purely acted for their commercial interests.

103. For the purposes of attribution, there is a need to make a distinction between commercial acts and sovereign acts. As Dolzer&Scheuer asserts that:

> **"**In the some decisions, tribunals found that umbrella clause was inapplicable where the state had not contracted in its own name. Such as in Impregilo v. Pakistan; "… contracts concluded by a separate entity of Pakistan and would not be protected by an umbrella clause**"** [104]

104. In the *Impregilo* tribunal, Claimant tried to invoke umbrella clause in the Italy-Pakistan BIT which is inapplicable where the state had not entered contract with Claimant in state's own name. In the present case, NHA did not enter into any contract in the name of Mercuria instead, contracted on its own.

A. To Decide Violation Article 3(3) of the BIT Superior Governmental Powers of Mercuria Must Be Abused

105. Besides, to prove the violation of umbrella clause, it is necessary to prove the abuse of sovereign authority power. *Bayindir Insaat* tribunal concluded that:

> **"**Because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power.**"** [105]

106. In return for this, neither Respondent nor NHA did not use any sovereign force or governmental superior authorization. NHA, likewise Claimant is a contractor of LTA, decided to terminate the contract, as a purchaser, for its own commercial impetus.

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[103] Statement of Uncontested Facts, ¶895.
[104] Dolzer&Scheuer, p.175.
[105] Bayindir Insaat v. Pakistan, Award, ¶180.

107. On the other side, NHA executed its own decisions as a purchaser under the commercial contract (LTA). The termination of contract has blatantly done in commercial capacity and cannot be attributed to Respondent. Similarly, a controversy arose in the tribunal of *Vivendi* and it is found that:

> **"**[…] tribunal had found the rights in question under the French–Argentine BIT to have been 'inseparable' from the contractual rights under a 30-year provincial concession contract. Also the Annulment Committee, however, considered treaty and contractual rights to be separate and distinct.**"** [106]

108. To wit, a strict difference of claims arising from a commercial contract and arising from a treaty must be considered at this point.

109. The umbrella clause is a catch for all agreements to guarantee the obligations to be observed. However, there is no room to resort for all claims of a party to be covered. Even if the Art. 3(3) of BIT could be invoked, due to wording of the article, it is not possible to put the Respondent under liability from contractual obligations. Primarily, the Article 3(3) states: "*Each Contracting Party shall observe any obligation it may have entered into […]*" which is including the precisely the term of "*any obligation*" not "*any contractual obligation*". Secondly, the term of "*entered into*" is not targeted for every single contractual obligations. As in the tribunal of *Tulip BV* it was mentioned that:

> **"**The Respondent relies in particular on the assertion that the term "entered into" in Art. 3(2) of the BIT denotes an obligation other than general instrument, targeted obligations specifically undertaken by the State.**"** [107]

110. The evolution of umbrella clause from early jurisprudence, today's tendency also denies international responsibility to attribute to the state, stem from contractual violations. In the *Bosh v. Ukraine*, tribunal maintained that the alleged contract breach was not attributable to the state, but even if the alleged breach had been attributable to the state, the tribunal would have deferred to a forum selection clause in the contract and have denied the umbrella clause claim.[108] Hence, there is a need for the existence of specific undertakings within the contract. In opposition to that, Respondent or any official authority got involved in a special undertaking while negotiating or in the signing of Long Term Agreement that contracted between NHA and Claimant.

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[106] Lim, p.355.
[107] Tulip BV v. Turkey, Award, p. 131.
[108] Grané and Bombassaro, p.4.

111. In addition, to constitute international responsibility, it should be scrutinized that state's wrongful acts points out as governmental responsibility namely, *acte iure gestionis.* Every commitment of state (realized with sovereignty) cannot be evaluated under the provision of umbrella clause. According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts:

> **"**Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant […]**"** [109]

112. So that, Respondent cannot be attributed responsible for neither every contractual commitment nor NHA in regard to Art. 3(3) of BIT.

B. LTA Provides for Recourse to a Specific Dispute Resolution Forum

113. Lastly, parties came to an understanding on a specific dispute resolution forum in the LTA[110] as *lex specialis*. The umbrella clause can't transform ordinary contract claims into the treaty claim. For this reason, contracts' jurisdictional clauses which constitute lex specialis must prevail over the more general treaty provision.[111] Thus, even if Respondent violated its contractual obligations, this must be issued under the specific dispute resolution forum.

II. THE ARTICLE 3.3 OF THE BIT SHOULD BE INTERPRETED FEASIBLY NARROW IN ANY CASE

114. The main issue about umbrella clause is the internationalization of contractual commitments. Respondent submits that the clause have to rely upon straightforward applications. There is a need to shed light on the issue that every contractual commitment cannot be elevated by the umbrella clause to the international plane.[112]

115. However, Professor M. Sornarajah asserts that the idea of internationalization is a 'myth' not least because the argument has tended to rely upon the 'low-order sources' of international law as the basis for claiming the sanctity of contracts under international

[109] ILC Draft Articles, p.41.
[110] Response the Notice of Arbitration, ¶505.
[111] Daimler v. Argentina, Award, p.14.
[112] Voss, p.238.

law.[113] Remarkable number of tribunals followed the way of interpretation the purpose of umbrella clause.[114] As stated in the *Noble Ventures* tribunal, the clause provides substantial support for an interpretation to become as a real umbrella clause.[115] In doing so, reference has to be made to Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") which reflects the customary international law concerning treaty interpretation. Accordingly to article; a treaty shall be interpreted in good faith in accordance with the ordinary meaning in the light of its object and purpose.[116] Thus, Article 3(3) of BIT required to be interpreted narrowly. Also interpretation should be made to the *principle of effectiveness (effet utile)*. Otherwise with the acceptance of wide interpretation it would render whole treaty as ineffectual.

116. In consideration of this interpretative approach, existence of any other understanding, gains a far-reaching effect. Two arguments can be presented to support this position. Firstly, conventional view could also cover non-contractual obligations including smallest types of them causing excessive number of lawsuits before international tribunal. Secondly, this view leads to transform other guarantees in investment treaties unnecessary, since even a small violation would prompt to lawsuit. Therefore, wide interpretation is not an effective method in the application of umbrella clause.[117]

117. The notion of narrow interpretation is pursued by different tribunals as one of them *SGS v. Pakistan* case. Tribunal rejected Claimant's argumentation about the elevation of clause's to the treaty level because of breaches of the contracts. Afterwards, in the case of Joy Mining v. Egypt decision, tribunal followed a similar way stating with: "A treaty cause of action is not the same as a contractual cause of action; it requires clear circumstances to the relevant treaty standard."[118] Furthermore:

> **"***In El Paso v. Argentine*, the tribunal rejected a broad approach categorically. Except for minor differences, the exact formulation is applied again in *Pan American Energy v. Argentine*. The tribunal in this case, consisting of two of the three arbitrators in the El Paso tribunal, nearly copied the El Paso decision concerning the interpretation of the

[113] Sornarajah, p.304.
[114] See *SGS v. Pakistan, SGS v. Philippines, Joy Mining v. Egypt, Noble Ventures v. Romania, El Paso v. Argentina, CMS v. Argentina* cases.
[115] Noble Ventures v. Romania, Award, ¶51.
[116] Article 31(1) of the VCLT.
[117] Dolzer&Scheuer, p.172
[118] Joy Mining v. Egypt, Decision on Jurisdiction, p.18

umbrella clause. Both tribunals applied a narrow interpretation and thus followed the decision in *SGS v. Pakistan*.**"**[119]

118. All in all, wide interpretation of clause will cause a far-reaching responsibility for the host state and lead unjust decisions to be given. In addition, it will diminish the protections given from other clauses of BIT. Hence, in the case at hand, restrictive interpretation of umbrella clause must be adopted.

A. Claimant Cannot Appeal to Tribunal Due To an Arbitral Award is Not a Proper Investment under the BIT

119. Claimant's allegations upon arbitral award and non-observance of international obligations in BIT are merely sought to invoke umbrella clause. As maintained by *Noble Ventures* tribunal: "Umbrella clauses are only intended to create a treaty obligation on states to protect the investment against the exercise of sovereign powers"[120] However, to invoke the clause, primarily, there must be a proper investment. As accentuated at great length above, an arbitral award is not a investment under Mercuria-Basheeria BIT. Therefore, invocation of umbrella clause is superfluous and Claimant's allegations should be fallen.

[119] Voss, p.243.
[120] Noble Ventures v. Romania, Award, p.58.

REQUEST FOR RELIEF

For the above-mentioned reasons, the Respondent respectfully request the Tribunal

a) To find that:

1. The Tribunal has no jurisdiction to hear the case in relation to enforcement of the Award and Claimant's claims are inadmissible;

2. The Claimant cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;

3. No act of the Respondent's violates the substantive protection of the BIT, including the obligation of fair and equitable treatment to the Claimant;

4. Respondent is entitled to reimbursement for all the costs of these proceedings, including all legal and other professional fees and disbursements;

b) Order the Respondent:

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

Respectfully submitted on 25 September 2017 by
Team Lachs

On behalf of the Respondent
Republic of Mercuria