TEAM ALIAS; LADRIET

FORIGN DIRECT INVESTMENT INTERNATIONAL ARBITREATION MOOT

ARBITRATION PERSUANT TO PERMANENT COURT OF ARBITRATION RULES 2012

MEMORIAL FOR THE RESPONDENT

IN THE PROCEEDING BETWEEN

ATTON BORO LIMITED

(Claimant)

V.

THE REPUBLIC OF MERCURIA

(Respondent)

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LIST OF ABBREVIATIONS

Abbrivation	Full Citation
Art. / Arts.	Article / Articles
Basheera	The Kingdom of Basheera
BIT / BITs	Bilateral Investment Treaty / Bilateral Investment Treaties
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FDC	Fixed Dose Combination
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICSID	International Center for Settlement of Investment Disputes
LTA	Long Time Agreement
Mercuria	The Republic of Mercuria
NHA	National Health Authority
OECD	Organization for Economic Cooperation and Development
Para/Paras	Paragraph / Paragraphs
PCA	Permanent Court of Arbitration
TRIPS	Agreement on Trade Related Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar
V.	Versus
Vol.	Volume
WTO	World Trade Organization

STATEMENT OF FACTS

1. The claimant, Atton Boro Limited (Atton Boro) is a wholly owned subsidiary in Basheera incorporated by Atton Boro Group as a vehicle for carrying on business in South American and African countries. The shares of Atton Boro Limited are currently held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company.The Respondent, the Republic of Mercuria, signed Agreement (Mercuria-Basheera BIT) with The Kingdom of Basheera for the promotion and reciprocal protection of investments on 11 January 1998.

2. On May 2004, the Claimant, Atton Borro, entered in to a Long term agreement (LTA) with National Health Authority (NHA). Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders. They have agreed that Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance.

3. NHA had been engaged in parallel efforts to promote prevention of sexually transmitted diseases like Greyscale. NHA campaign involved actively conducting awareness workshops in educational institutions and workplaces to encourage people to be tested regularly.

4. The 2003 NHA's Annual Report indicated the increasing occurrence of Greyscale epidemic as an imminent threat to public health in Mercuria with a possibility that it may emerge to a national health crisis within a decade. On 26 December 2006, the Minister for Health called a press conference to discuss the NHA 2006 Report. She termed the success of the NHA workshops as a "*triumph with a sting in the tail*", and expressed concern that the incidence and prevalence of Greyscale emerging from the data far exceeded even liberal estimates projected by the NHA.

5. In early 2008, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior, stating that it had grossly underestimated the number of

Greyscale cases in Mercuria and needed to supply medicines for nearly twice the number of patients. The NHA demanded an additional discount of 40%, stating that it would be compelled to terminate the agreement if its terms were not met.

6. On 15 May 2008, the Minister for Health and the President of Mercuria met privately with the Director of the NHA. Newspapers carried reports that the agenda for the meeting was to resolve budgetary problems that had arisen in several government healthcare programs. The reports alluded to a reliable source close to the Director.

7. On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed an award of 40,000,000 USD in favour of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

8. On 3 March 2009, Atton Boro 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. 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 application for compulsory license for the use of patented inventions without the authorization three years after grant of the license.

9. 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. HG-Pharma obtained a license on 17 April of 2010 to manufacture Valtervite until Greyscale becomes no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atton Boro.

10. On 20 September 2016 Atton Borro notified Mercuria, through Foreign Ministry of the state, its intent to initiate arbitration. No response to the letter has been received from Mercuria on the matter. Atton boro initiate arbitration against the respondent; republic of Mercuria Pursuant to Article 3 of the PCA Arbitration Rules 2012

ARGUMENTS

PART I: ARGUMENTS ON JURISDICTION OF THE TRIBUNAL

11. The Respondent submits that this tribunal has no jurisdiction over claims brought before it by Atton Boro and puts the clarification of arguments as follows.

A. Personal Jurisdiction

I. THE CLAIMANT DOES NOT QUALIFY AS AN INVESTOR UNDER ART 1(2) (B) OF THE MERCURIA-BASHEERA BIT

12. The Respondent submits that the Tribunal does not have jurisdiction over the claims brought before it by the Claimant because the Claimant does not qualify as an investor under Art 1(2) (b) of the Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments (Basheera-Mercuria BIT). Article 1(2) (b) defines the legal person that qualifies as an investor under the agreement and provides:

> *The term investor means:*
> *(a)……*
> *(b) any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of that contracting party.*

It follows from this definition that for the claimant to bring a claim before this Tribunal while relying on the provisions of the Mercuria-Basheera BIT, it must be an investor that is national to either contracting parties under Art.1 (2) (b) of the Mercuria-Basheera BIT.

13. The Respondent submits that in the present case, Atton Boro is not national of Kingdom of Basheera. Atton Boro Limited is a subsidiary of Atton Boro Group, both of which are owned and controlled by Atton Boro and Company[1], which is investor of and was incorporated under the laws of Republic of Reef.[2] When we see the type of test applied by the BIT regarding to the determination of nationality of the investor, it is incorporation test as clearly understood from the terms '*incorporated or duly constituted*' used under Art 1(2) (b) of the BIT. Here, only a legal person incorporated or duly constituted in accordance with the applicable laws of Basheera is considered as an investor in Mercuria. Atton Boro, being a subsidiary of Atton Boro & Company family, which is incorporated under the laws of Reef, cannot be considered national of Basheera. As a national of third party state, the claimant cannot avail itself of the BIT benefits.

14. In conclusion, the Respondent submits, the Claimant fails to qualify as an investor for the purposes of the Mercuria-Basheera BIT. In turn, this leaves the Claimant without the necessary standing to bring arbitral proceedings before this Tribunal.

II. MERCURIA HAVE A RIGHT TO DENY THE CLAIMANT BENEFITS UNDER THE BASHEERA-MERCURIA BIT SINCE THE CLAIMANT DID NOT MAKE A SUBSTANTIAL BUSINESS ACTIVITY AS PER ART.2 (1)

15. The Respondent submits that if the Tribunal finds that the Claimant qualifies as an investor under Art. 1(2) of the BIT, we submit for this tribunal that; according to Art.2 (1) of the BIT, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized; in Basheera, Mercuria have a right to deny a benefit.[3] When we assess the right of the respondent to deny benefit in light of substantiality of business and control test, the shares of Atton Boro Limited are currently held by Atton Boro Group

[1] FDI FDI Case 2017 2017 (hereinafter 'FDI case 2017'), Para. 1510
[2] FDI Case 2017, Para. 845
[3] Art 2(1) of Mercuria-Basheera BIT

affiliates (Atton boro Group), which are all ultimately controlled by Atton Boro and Company which is a national of third state, republic of Reef, which is not contracting to the BIT.[4]

16. When we assess the substantiality of business in which Atton Borro engaged in Basheera, they have had only between 2 and 6 permanent employees from 1998 to 2016.[5] The claimant mentions that they have opened a bank account; they have rented an office and do other moves. But when we see the wording of the bilateral investment concluded between the contracting parties under its article 2(1) it is not only about commencing business but it clearly state that it should be substantial. As we can clearly understand from the fact of the case, Atton Boro does not make significant economic contribution because it is an affiliate of Atton Boro and Company found in Republic of Reef; it ultimately controlled by the parent company and it does not pass the test stated above.

17. In case of *Malaysian Historical Salvors v. Malaysia*, in which Arbitrator Hwang concluded that, in order to say a substantial business activity; it require a significant contribution to be made to the host State's economy.'[6] Thus, transaction activities to be considered as an investment it should pass the limitus test, contribution to the economy of the host state, and this contribution should be have a substantial effect on the economy of the country.[7]

18. In our case, Atton Boro has no substantial business activity in Basheera and it has had employees working only for managing its portfolio of patents registered in South America and Africa.[8] Even when we see the employment opportunity it create in Basheera; it is almost zero when it compared an employment opportunity in which they should create since they are a trans-national company who invest a billion dollar.[9] Therefore, according to of Mercuria –Basheera BIT; Mercuria reserves a right to deny the

[4] FDI Case 2017 ,para 1510
[5] FDI Case 2017 ,para 1510
[6] *Malaysian Historical Salvors v. Malaysia (*n. 160) Para. 123 (underlining in original)
[7] *Malaysian Historical Salvors v. Malaysia* (n. 160) Para 130, 135.
[8] FDI Case 2017, para 1515
[9] FDI Case 2017,para 965,1600

advantage of the agreement if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized, Basheera, in the case at hand.[10]

19. Thus, the respondent submits that the Republic of Mercuria has a right to deny the claimant rights originating from the BIT by exercising its right to deny under Article 2 of the BIT.

III. THE RESPONDENT HAS NOT GIVEN ITS EXPLICIT CONSENT ON WAIVER OF IMMUNITY, AS REQUIRED UNDER ARTICLE 1(2) OF PCA RULES FOR A CLAIM FOR EXECUTION OF ARBITRAL AWARD.

20. Article 1 (2) of PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State stipulate that agreement by a State, State-controlled entity, or intergovernmental organization to arbitrate under these Rules constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. However, under the second statement, this article has an exception that goes saying that waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.

21. In matter relating to the execution of an arbitral award wavier of immunity must be explicitly expressed. In our case no fact of the case shows that the Mercuria has given an explicit wavier of immunity. So, since states are sovereign and the PCA Rules is not applicable on them with regard to arbitral award unless they explicitly waive their immunity; the respondent invokes immunity to stand against the jurisdiction of this tribunal so long as a claim for enforcement of award is concerned.

[10] Art 2(1) of Mercuria-Basheera BIT

B. SUBJECT MATTER JURISDICTION

I. THE LTA IS A COMMERCIAL AGREEMENT AND IT HAS NOTHING TO DO WITH THE INVESTMENT

22. The respondent submits that claim on termination of Long Term Agreement (LTA) has been settled in arbitral proceeding and cannot be brought twice. In any case, the respondent argues that NHA entered in to the LTA as a commercial contract and the liability emerging out of it cannot be attributed to the State of the Republic of Mercuria. The LTA was a purely commercial supply arrangement between the NHA which is an independent body[11] and Atton Boro. The termination of the LTA was NHA's decision acting as a purchaser based on their agreement under the LTA.

23. When we see article 1(e) of Mercuria-Basheera BIT, it state that "*Rights, conferred by law or under contract, to undertake any economic and commercial activity…''* The decision of tribunal in case of *Quiborax v. Bolivia*; *Romak v. Uzbekistan* and *Saba Fakes v. Turkey*, state that the ordinary meaning of the term investment includes 3 elements: contribution, certain duration and an element of risk.[12] These three elements are the certain minimum requirements to be examined.[13]

24. The *Romak v. Uzbekistan* tribunal stated that if an asset does not correspond to the inherent definition of investment, the fact that it falls within one of the categories listed in BIT article does not transform it into an investment. In accordance with this approach, the tribunal found that a wheat supply contract did not amount to an 'investment', despite the broadly-worded definition of 'investment' in Article 1(2) of the Switzerland–Uzbekistan BIT.

25. In our case, Atton Boro and NHA are just in a commercial transaction agreement (LTA) as a purchaser and as a supplier. By any means, it does not amount as an investment. Like

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[11]. FDI Case 2017, para 1595

[12] *Quiborax v. Bolivia*, para 215; *Romak v. Uzbekistan*, para 237; *Saba Fakes v. Turkey*, Paras 99-102.

[13] *Alps Finance v. Slovakia*, para 231

Romak vs. Uzbekistan, medicine supply does not meet any criteria we have mentioned to take the transaction as investment.

26. With regard to the interpretation of the umbrella clause to grasp all contractual claims to investment claims, the respondent submit that the umbrella clause should not be understood to capture all contractual relations between an investor and host state. As decided by tribunal in *El Paso v. Argentina*, "an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims."[14] *SGS v Pakistan* tribunal also holds this position.

27. Thus, the respondent submits that the claimant does not make any investment since the LTA is a purely commercial agreement and the tribunal also lacks a jurisdiction to entertain the case.

II. ARBITRAL AWARD DOES NOT AMOUNT AS AN INVESTMENT UNDER MERCURIA- BASHEERA BIT.

28. Article 1 of Mercuria – Basheera BIT mentions type of activities which amount as investment and it does not indicate arbitral award as an investment. Many tribunals have stated that arbitral award does constitute an investment.

29. The tribunal in *GEA Group Aktiengesellschaft v Ukraine*[15] held that an award is just 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]. Thus an award given to Atton Borro is not an investment and it cannot bring a case before this tribunal since the tribunal is deciding on investment matter.

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[14]. *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, § 82

[15] *GEA v Ukraine* , ICSID Case No. ARB/08/16, Para 163

[16] Id., Para 161

30. Moreover, in *Romak S.A. Vs. the Republic of Uzbekistan* Permanent Court of Arbitration (PCA) tribunal refused to establish that an award is a covered investment under the Switzerland-Uzbekistan BIT because the underlying transaction was not an investment.[17] In our case, the LTA is not an investment since it is a purely commercial agreement between NHA and Atton Boro. The underlying contract, LTA, is not an investment and so does the arbitral award resulting from this the agreement.

31. Furthermore, the tribunal should note finding of *Romak S.A.* tribunal that while determining what "investment" means, it is necessary to have regard to the context, and the object and purpose of the BIT and while determining non-listed assets whether they constitute an "investment" within the meaning of BIT.[18] As we clearly understand from that decision, arbitral award is not an investment. Moreover, even if the BIT stated a certain activity as an investment, the term investment has an inherent meaning and element it should include contribution to the national economy and risk sharing. These elements should be assessed while determining whether certain activity is an investment.

32. Therefore, Arbitral Award in which Atton Borro got in arbitration does not amount as investment and the tribunal lacks a jurisdiction to entertain the case at hand.

III. The claim brought for violation of TRIPS falls under the exclusive jurisdiction of World Trade Organization's Dispute Settlement Body and this tribunal cannot entertain it.

33. The respondent submit that Atton Boro has no standing to bring claims relying on obligations contained in the TRIPS Agreement before a tribunal deciding an investment dispute because those obligations exist only between member States *inter se*, and disputes arising out of them fall within the exclusive domain of the WTO's DSB.

[17] Romak S.A. (Switzerland) v The Republic of Uzbekistan (2009) (Award, PCA Case No. AA280)
[18] Romak vs uzbek para 180 ,last seen on aug 8/2017

34. Under Art 23 (2) (a) of the DSU, Members agree that any determination with regard to violation of WTO agreements should not be done except through recourse to dispute settlement in accordance with the rules and procedures of the DSU; whereby the binding decision comes from the findings contained in the Panel or Appellate Body Report adopted by the DSB or an arbitration award rendered under this Understanding. In the case at hand, the claim Atton Boro brought before this tribunal is claim relying on obligations contained in the TRIPS Agreement and this claim should be entertained by rules and procedures of the understanding. This tribunal is an investment tribunal and lacks jurisdiction to entertain the case that falls under exclusive domain of WTO DSB.

35. Moreover, it must be observed that giving investors the right or opportunity to challenge WTO violations would be a radical departure from the normal rules of WTO dispute resolution.[19] Under those rules, only states can assert WTO rights. Individuals have no standing to request dispute resolution no matter how harmful the WTO violation is to their personal interests. Atton Boro lacks necessary standing to bring a case depending on WTO rules.

36. In conclusion, the respondent submits that the alleged violation of TRIPS falls under exclusive jurisdiction of WTO DSB and it is not arbitrable before the investment tribunals and therefore the tribunal lacks a jurisdiction to entertain the case.

C. Conclusion on jurisdiction

37. The respondent respectfully requests this tribunal to find that it does not have jurisdiction over the claimant's submissions. Firstly, Tribunal does not have jurisdiction over the claims brought before it by the claimant because the claimant does not qualify as an investor under Art 1 (2) (b) of Mercuria-Basheera BIT. Secondly, the claimant does not make any substantial business activity and the respondent have a right to deny benefit as per article 2(1) of Mercuria-Basheera BIT. Thirdly, arbitral award does not amount as an

[19] *Charles Owen Verrill, Jr., Are* WTO Violations Also Contrary To The Fair And Equitable Treatment Obligations In Investor Protection Agreements?

investment so the tribunal lacks a jurisdiction. Finally, the dispute regarding the violation of TRIPS Agreement is an issue which is an exclusive jurisdiction of WTO and cannot be subject of arbitration before an investment tribunal.

PART TWO: ARGUMENTS ON MERIT

I. AUTHORIZATION OF COMPULSORY LECENSE AND THE NEW LAW UNDER WHICH IT IS AUTHORIZED ARE NOT AN INDIRECT EXPROPRIATION IN THE WORDS OF BASHEERA-MERCURIA BIT.

38. Basheera – Mercuria BIT recognizes host state's right to regulate its domestic matter for public interest. There are two techniques of reinforcing contracting parties' commitments to safeguard some values which are; including general treaty exceptions and using positive language[20] and the BIT adopted combination of the two. While its preamble adopts positive language clarifying that parties desired to achieve protection and promotion of investment without encroaching upon protection of certain public interests[21], the substantive provisions[22], make clear that there is a room for regulatory right. When seen in line with these provisions, there is no reasonable ground that makes measures of Mercuria, which was taken for public health purpose, arbitrary measure.

39. Article 6(4) of the BIT recognizes that a host state can designate and apply non-discriminatory measures to protect legitimate public welfare objectives. This article provides:

> *Non-discriminatory measures of a Contracting Party that are designated and applied to protect legitimate public welfare objectives, such as public*

[20]. UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 77, (2007)
[21]. The last statement of the preamble reads: "*Desiring to achieve these objectives in the manner consistent with the protection of health safety, and the environment, and the promotion of internationally recognized labour rights*.
[22]. Articles 3 (2), 4 (3) and 6 (2) of the BIT recognizes right of states regarding their domestic law is untouched.

health, safety and the environment, do not constitute an indirect expropriation under this Article.

40. This provision provides only two conditions that a measure has to fulfill so that it does not fall under indirect expropriation. The first one is non-discriminatory nature of the measure. The new law that authorizes the compulsory license is applicable to any one holding Mercuria patent, not only to claimant or other foreign investors. It, thus, fulfills the condition of non-discrimination. The second condition is justification by legitimate public welfare objective. The new law represents Mercuria's designation of new measure for legitimate purpose of protecting public health which is triggered by outbreak of greyscale epidemic and is justified under this sub-article. The compulsory license, on its part, represents implementation of the legitimate policy, under the law, to ensure treatment for patients of greyscale, whose number is ever increasing. Authorization for public policy reason is clear from the fact that the compulsory license is given only until greyscale is no more treat to the public health.[23]

41. The respondent also argues that Mercuria acted in line with a notion of good faith since the authorization of compulsory license has a reason to justify it. In *Eureko B.V. v. Republic of Poland*, the tribunal clarified that an obvious application of the notion of good faith is the duty to act for cause, and not for purely arbitrary reasons of domestic politics.[24] The action of the respondent which is justified by public policy reason and in no case has been motivated by arbitrary political reason is far from being contrary to good faith. In line with this, the respondent submits that it does not represent violation.

42. Further, it is known that not all regulations are expropriation and require the payment of compensation to those who suffer damages because such a firm commitment to the status quo would render public governance impossible, and completely frustrate the essential

[23]. FDI Case 2017, para 950
[24]. *Eureko B.V. v. Republic of Poland*, Partial Award, Aug. 19, 2005, para 233

public goals.[25] In *Philip Morris v. Uruguay*, the tribunal found that a bona fide non-discriminatory regulation for purpose of protecting public interest is valid exercise of police power and does not constitute an expropriation.[26] No change in hos state's legal system violates legitimate expectation when it remains within the boundaries of normal adjustments customary in host state and accepted in other states; because such changes are predictable for a prudent investor at the time of the investment.[27] Respondent submits that no state can be suspected of taking regulation for public policy as a valid exercise of police power.

43. Accordingly, Mercuria's authorization of the compulsory license is justified with public health need and does not constitute indirect expropriation. Thus any argument of that tries to justify indirect expropriation having its fulcrum on the authorization of compulsory license does not hold water due to Article 6(4) of the BIT.

II. THE RESPONDENT, AT ALL TIMES, COMPLIED WITH ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO THE CLAIMANT.

A. Interpretation of FET standard:

44. There are many ways of incorporating FET clause in BITs. The most frequently cited options are: no express reference to FET, hortatory approach, unqualified obligation to accord FET, FET obligation linked to international law, FET obligation linked to the minimum standard of treatment of aliens under customary international law and FET

[25].Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Volume 26 in the series Studies in International Law, Hart Publishing, 2009, at 294; Rudolf Dozler and Christoph Schreuer, *Principles of International Investment Law*, 105, (2008)
[26]. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, July 8, 2016, para 307
[27]. Dozler and Schreuer, *Principles of International Investment Law*, *supra* note 25, at 105

obligation with additional substantive content such as denial of justice.[28] Basheera-Mercuria BIT adopted unqualified FET standard.[29] The respondent submits that this tribunal should follow a plain text approach in interpreting the standard. This approach is consistent with accepted rules of interpretation in international law.[30] In *Lauder v. Czech Republic*, the UNCITRAL tribunal held that in the context of BITs, the FET standard is subjective and depends heavily on the factual context.[31] Each tribunal interprets substantive contents of FET provision from the investment treaty applicable in that specific case.[32]

45. In *Pope & Talbot,* the tribunal indicated that the meaning of FET is not frozen in time and evolves as the economic relations between the states increase.[33] The respondent holds that having adopted unqualified FET without referring to any standard, parties in the case at hand should be understood to have reserved place for flexibility to determine the standard based on facts of each case. Thus, interpreting the agreement in line of any standard, other than plain text approach, diverts the intended purpose of parties.

46. Accordingly, this tribunal should adopt ordinary meaning of the terms fair and equitable pursuant to Article 31 of Vienna Convention on Law of Treaties (VCLT) to assess the violation of the standard in case at hand. The respondent does not overlook the fact that these terms are inherently subjective and lack precision[34] and to overcome the challenge, we submit that the tribunal follows main concepts that have emerged from tribunals' jurisprudence as relevant when assessing FET in specific case.

47. Writings that revised decisions of tribunals addressing FET standard indicate that five main concepts are relevant in assessing violation or otherwise of the standard; which are:

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[28]. UNCTAD, *International Investment Agreements: Key Issues Volume I*, 2004, at 217; Ronald Klager, *'Fair and Equitable Treatment' in International Investment Law*, 9-22, (2011); UNCTAD, *Series on Issues in International Investment Agreements II, Fair and Equitable Treatment*, XIV-XV, (2012)

[29]. Article 3(2) of the BIT reads provides for FET as standard of protection without referring to any standard upon which it is to be assessed. Thus, it is unqualified standard and it has to be interpreted independently.

[30]. UNCTAD, *Key Issues Volume I, supra* note 28, at 213

[31]. Ronald S. Lauder v. Czech Republic, UNCITRAL, 2001, para 292

[32]. UNCTAD *Fair and Equitable Treatment, supra* note 28, at XV

[33]. Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, 31 May, 2002, paras 58-65

[34]. UNCTAD, *Key Issues Volume I, supra* note 28, at 213

prohibition of manifest arbitrariness in decision-making, prohibition of the denial of justice and disregard of the fundamental principles of due process, prohibition of targeted discrimination on manifestly wrongful grounds, prohibition of abusive treatment of investors, and protection of the legitimate expectations of investors arising from a government's specific representations balancing with host state's regulation right in the public interest.[35] NAFTA tribunals have also provided for greater guidance on how to assess FET violation in specific case and they require certain degree of arbitrariness for violation.[36] The relevant cases in this regard are; *Waste Management Inc. v. Mexico*; *GAM Investments Inc. v. Mexico* and *Methanex Corp. v. United States*. The respondent submits that the meaning of FET in our case should be assessed against these standards to determine violation; and argues that none of Mercuria actions appear to be an unjustified action directed arbitrarily against the claimant and justify them as follows.

B. Mercuria has not violated relevant provisions of TRIPS Agreement and has not taken arbitrary measure

48. The interpretation Article 31 of TRIPS Agreement governing compulsory license has been clarified by Doha Ministerial Declaration. Paragraph 4 of the Declaration affirms that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health, and that it should be interpreted accordingly[37] and paragraph 5 gives Members a right to grant compulsory license and determine, for itself, grounds upon which it is to be granted. Paragraph 5 (c) of the Doha Declaration gives Members a right to determine what constitutes a national emergency or circumstances of extreme urgency for purpose of compulsory license and expressly recognizes that public health crisis is one of grounds for authorizing compulsory license.

49. It is clear from the facts of the case that the outbreak of greyscale in Mercuria represents a typical public health crisis. The 2003 Annual Report of the NHA indicted the increasing

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[35]. UNCTAD *Fair and Equitable Treatment*, *supra* note 28, at, at XV-XVI; Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, International Law and Politics, Vol. 43, 43, 54-89 (2010)
[36]. UNCTAD, *Investor-State Dispute Settlement And Impact On Investment Rulemaking*, 2007, at 43
[37]. Carlos M. Correa, *Implementation of Doha declaration on the TRIPS Agreement and Public Health*, World Health Organization's Health Economics and Drugs EDM Series No. 12, (2012)

incidence of greyscale among working-age individuals across the country to be the imminent public health concern with a possibility that it could spiral into a national crisis unless aggressive measures were taken to combat it.[38] The report also disclosed that the then treatment available for the public fell far short of global standards of greyscale treatment, which have reached a stage of Fixed Combination Dose (FCD).[39] Despite some movements by Ministry of Health and NHA to give response to the situation, the 2006 Annual Report of the NHA did not appear to the satisfaction of Ministry of Health because Ministry of Health found that the incidence and prevalence of greyscale emerging from the data was found to far exceed the liberal estimates projected by the NHA.[40] The Ministry emphasized that discovering a solution covering the full extent of the crisis requires more rigorous measures.[41]

50. The compulsory license is issued in line with these facts. Mercuria, when issuing the new law authorizing compulsory license, exercised its power under the declaration and clarified its own grounds for implementation of the Declaration. Thus, it is legitimate exercise of police power and does not violate TRIPS provisions when it is interpreted according to clarification of the Doha Declaration and; it represents good faith action. This way, the legitimate exercise of police force according to the law should not be declared violation of FET standard.

51. Further, if the tribunal finds the compulsory license not justified by compliance with TRIPS Agreement, the respondent submits that, in analyzing whether the issuance of compulsory license violates FET, this tribunal should make an independent analysis of the facts of the case and determine whether it was necessary to issue compulsory license under the same circumstance. In line with this, the respondent argues that the circumstances of the case are reasonably justified to require grant of compulsory license.

> *In a situation involving discrepancies in the issuance of compulsory licenses only of foreign medicines, national policies would have to be*

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[38]. FDI Case 2017, para 875
[39]. FDI Case 2017, para 875
[40]. FDI Case 2017, para, 910
[41]. FDI Case 2017, para, 910

justified according to reasonable and objective criteria. This should be the case if there was a health emergency and no national company was producing a specific or analogous medical treatment. In such circumstance, compulsory licenses of foreign medicines in favour of national (and foreign) producers would be reasonable.[42]

52. Respondent sticks to an argument that the authorization of compulsory license in Mercuria is not blameworthy to the extent of violating FET standard in the situation. Atton Boro was the only producer in Mercuria of Senior (valtervite), a medicine to control the transmission of greyscale epidemic. The expansion of greyscale in Mercuria is at a serious stage and at the current price of the price of the medicine it is beyond the capacity of Mercuria People to avail themselves of treatment. Accordingly, facing such challenge, Mercuria took a reasonable measure that is far from being arbitrary.

C. Alternatively, Mercuria's action is justified by necessity.

53. In any case, if the tribunal finds the respondent responsible under the BIT for the compulsory license, the respondent submits that Mercuria's action should be justified for necessity under Article 25 of the 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The respondent is not negligent of the fact that these Articles are non-binding in nature, but argues that they offer this tribunal a useful guidance to what the norms of customary international law provide on international responsibility of states for wrongful acts. In this regard the tribunal in *Noble ventures, Inc*. recognized that "*while those Draft Articles are not binding, they are widely regarded as a codification of customary international law.*"[43]

54. Article 25 regulates the circumstances in which a state may rely on a state of necessity in order to preclude the wrongfulness of an act which would otherwise be internationally wrongful. The first paragraph authorizes invocation of necessity on the grounds that the act in the question is the only way for the state to safeguard an essential interest against a grave and imminent peril, and only if such invocation does not seriously impair an

[42]. Valentina Vadi, *Public Health in International Investment Law and Arbitration*, 83, (2013)
[43]. Noble Ventures, Inc. v. Romania, Award, para 69

essential interest of the state or States to which the obligation is owed, or of the international community as a whole. The respondent argues that the situation in a case at hand passes the analysis under the two requirements of first paragraph and justifies as follows.

55. Atton Boro is a patent holder of the sanior, medicine for greyscale. The NHA planned to get the medicine by creating contractual relation with Atton Boro has entered a supply contract with Atton Boro to procure senior at 25% discount rate and avail treatment for greyscale patients.[44] A subsequent event indicates that at this discount rate, it will be beyond the capacity of the government to offer treatment to ever increasing poor patients who totally depend on public health scheme for treatment and requires five times the budget available for greyscale.[45] This requires revising current price and Atton Boro is not willing to offer supply at 40% discount determined necessary by the government. With this, no other option is available for the government than authorizing compulsory license for production of generic drugs to stand against the crisis of greyscale and it fulfills 'the only option' requirement of paragraph 1 of Article 25.

56. The second requirement of the first paragraph of Article 25 is that the measure does not seriously impair an essential interest of those towards which the obligation exists, or of the international community as a whole. In our case, the compulsory license is granted only for a period of the prevalence of greyscale as a threat to the public health of Mercuria. Atton Boro's license will resume after that. Accordingly, the interruption that does not last forever and justified by reasonable ground should not be declared a measure that seriously impairs an essential interest of Atton Boro and with this, it fulfills the second requirement of first paragraph of Article 25.

57. The second paragraph of Article 25 put two requirements, both of which are not present in our case, to deny justification under necessity of an action that is otherwise wrongful. The first requirement is a situation in which the international obligation in question

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[44]. FDI Case 2017, para,
[45]. FDI Case 2017, para, 1360-1365

excludes the possibility of invoking necessity (Article 25 (2) (a)). To see this in our case, the Basheera-Mercuria BIT, which is the sources of obligation between the parties, nowhere in its Articles provides such waiver of right regarding claim of necessity. Thus the first element is fulfilled. The second requirement of the second paragraph denies necessity as a defense the State has contributed to the situation of necessity. This is to avoid the state that has intentionally contributed to the occurrence of the event that brings necessity to picture. The outbreak of greyscale can in no way be attributed Mercuria. Mercuria did nothing that result in occurrence of the disease. With this, the second element of second paragraph, the fourth and last requirement under Article 25, is fulfilled.

58. Having presented its claim of compliance with the requirements of Article 25 of ILC' Articles, the respondent requests this tribunal, on occasion it does not find compliance with TRIPS Agreement, to analyze the compulsory license in line with this article and justify it for necessity.

D. Claimant's expectation that the patent law will never be changed is illegitimate and unreasonable under the facts of the case and in the absence of Mercuria's specific commitment for the claimant.

59. The respondent stresses that an expectation that a state never changes its internal policy for reasonable ground cannot be justified expectation to rely on it in claiming legitimate expectation. It is only absurd to think that the state never changes its internal policy on presence of justified public needs and no concept of the rule of law founded on reasonableness could bring about such result.[46] Tribunals have given awards supporting this position.

60. In *El Paso v. Argentina*, the tribunal declared that "*it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such*

[46]. Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, *supra* note 35, 53-54, (2010)

a freeze."[47] In *Saluka v. Czech Republic*, the tribunal stated that the host state's legitimate right subsequently, i.e., after the investment, in the public interest must be taken into consideration when contrasting investor's legitimate expectation and host state's right to regulate.[48]

61. The *EDF v. Rumania* tribunal made it clear that the examination of legitimate expectation should be made in a way that pays due regard to the host state's power to regulate its economic life in the public interest.[49] The tribunal further expressed that:

> *Except where specific promises or representation are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*[50]

62. Mercuria made no specific commitment for the claimant regarding the persistence of its laws. When a public interest ground that requires it to change the regulatory legal environment occured, Mercuria made it clear that "*the government would take every measure it deemed necessary to make sure that patients of greyscale could avail treatment.*"[51]

63. Further, the IP right that the claimant obtained being patent right, claimant should have noted the commonly known fact that patent regime is subject to exception of compulsory license on justified grounds. Since both Basheera and Mercuria are parties to WTO TRIPS Agreement and Paris Convention[52], the claimant should have expected possibility of issuance of such license by the respondent upon prevalence of required ground. This is

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[47]. *El Paso v. Argentina*, *supra* note 14, Para. 372
[48]. Saluka Partial Award, paras 304-308.
[49]. EDF (SERVICES) LIMITED *v. Rumania*, ICSID CASE NO. ARB/05/13, AWARD, October 8, 2009, Para. 219
[50]. *Id*, Para. 217
[51]. FDI FDI Case 2017 2017, para 910
[52]. FDI FDI Case 2017 2017, Para 1500

because both Paris Convention and TRIPS Agreement, under Articles 5 (A) (2) and 31 respectively, recognize issuance of compulsory license as an exception to patent right.

64. Accordingly, it will be unreasonable for the claimant to argue that Mercuria created legitimate expectation by giving the patent right. The argument that tries to attribute creation of legitimate expectation to Mercuria, depending on the grant of patent right, stands only to be a hollow argument in the facts of the case at hand, where the applicable laws recognize compulsory license as exception to patent right and where there is no specific representation on the part of the state not to change its regulatory framework. Thus, the claimant has nothing to depend on in claiming that the respondent abridged its legitimate expectation.

65. In addition, the host state, as regards its legislative power, will have the right to pursue its interests in the light of the new circumstances.[53] The subsequent reversing of a position with negative effects upon the investor will be consistent with FET if it is made in response to serious exceptional reasons that compels the state to reverse its previous decision and to require the investor to re-adapt its business.[54] Therefore, FET does not totally oust the legislative power of host state.

66. The respondent cannot overstate the necessity of authorizing compulsory license when the state is facing a chronic disease attacking it nation[55] and Atton Boro, the patent holder, is working for expansion of its business.[56] HG-Pharma's license is given temporarily and works only until grayscale is won and Atton Boro's business will recover when generic drug are cleared from the market. Requiring Mercuria to wait for Atton Boro until it finishes its expansion project and become capable of handling ever increasing order for veltervite clearly results in the attack of many citizens with greyscale. It is, thus, illegitimate to accuse Mercuria under these circumstances.

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[53]. Rudolf Dozler, *Fair and Equitable Treatment: Today's Contours*, Santa Clara Journal of International Law, Volume 12 Issue 1, 21, (2014)
[54]. *Id*, at 21
[55]. FDI Case, para 875
[56]. FDI Case, 915

E. Amendment of patent law and grant of compulsory license do not violate administrative Due Process.

67. As to the compulsory license, the respondent argues that the grant of the license fulfills a threshold of administrative due process requirement recognized so far. The concept of administrative due process lacks clear meaning and there is no accepted theory that helps to determine attributes that make an administrative decision-making process legitimate and non-arbitrary in international investment law.[57] Despite this, tribunals have handled the issue and decisions of such tribunals can offer a guide to understanding it.

68. The *Thunderbird* tribunal adopted a very modest premise of administrative denial of justice and mentioned that "the administrative due process requirement is lower than that of a judicial process."[58] The tribunal also required a 'manifest arbitrariness or unfairness' in assessing whether administrative due process had been violated. The tribunal in *Waste Management II* also addressed the issue of administrative due process and required 'complete lack of transparency and candour in an administrative process.'[59] The general analysis of arbitral tribunals discloses that they "continued to indicate that the administrative due process test is not very demanding."[60]

69. The compulsory license granted to HG-Pharma was not done arbitrarily and without notice. The government made its intention clear that it will take any necessary measure to secure treatment for patients of greyscale epidemic.[61] Before the license is given, Mercuria made a new law that sends a clear message to all patent holders that the government may authorize compulsory license and clarified grounds upon which it will be done. The law was published in The Government Gazette of Mercuria on October 10, 2009[62] and the compulsory license on the patent was granted on 17 April 2010.[63] The

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[57]. Santiago Montt, *State Liability in Investment Treaty Arbitration*, *supra* note 25, at 349
[58]. *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA Tribunal Arbitral Award, January 26, 2006 , para 200
[59]. *Waste Management II*, Para 197
[60]. Santiago Montt, *State Liability in Investment Treaty Arbitration*, *supra* note 25, at 349
[61]. FDI Case 2017, para 910
[62]. FDI Case 2017, at 44-45
[63]. FDI Case 2017, 950

license was not to the surprise of the claimant, as the law was made open to public five months and a week before the compulsory license was granted. Further, Atton Boro was impleaded as a party before Mercuria High Court in the proceeding for grant of the compulsory license.[64] Thus, Mercuria has not violated administrative requirement to advance notice as element of FET standard.

70. As to the new law, we argue that legislation and regulation cannot be produced under a proceeding similar to judicial type. In this regard, "countries follow different traditions" and in the United States itself, where "the Administrative Procedural Act establishes, as a general rule, the relatively undemanding system of 'notice and comment', the law does not require full hearings in every kind of circumstance."[65] Accordingly, the matter should be understood to be issue of domestic law of a country and rights established under its constitution; and any argument that claims violation of FET Mercuria did not undertake full hearing for the investor before adopting new law lacks a reasonable ground.

F. The proceeding before the Mercuria High Court neither amounts to denial of justice nor lacks due process requirements.

71. The tribunal in *Vivende v. Argentine Republic* explained what constitutes both denial of procedural justice and denial of substantive justice and declared that:

> *...any claim against the [host state] could arise only if Claimants were denied access to the courts ... to pursue their remedy ... or if the claimant is treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to investors under the BIT.*[66]

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[64]. FDI Case 2017, para 1575
[65]. Santiago Montt, *State Liability in Investment Treaty Arbitration*, *supra* note 25, at 349-350
[66]. *Companie Générale des Eaux (Vivendi) (France) v. Argentine Republic,* ICSID case No ARB/97/3 (Award) (November 21, 2000).

72. In these words, the tribunal made it clear that denial of justice exists: if the investor is denied access to court of host state, when there is unfair treatment against the investor and when the final judgement of the court bears defect of substantive unfairness or denies the investor rights guaranteed under the concerned BIT. In majority of cases, denial of justice in relation to FET standard has been approached in an intermediary sense, between narrow and broad sense, in which it is employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions; many of such cases analyzing the concept of arbitrariness.[67]

73. The case before Mercuria High court is too far from bearing defects of both procedural and substantive denial of justice. Procedural due process requires fulfillment of right to be heard, a right to obtain pleadings of counter-party and getting opportunity to defend it. Atton Boro has not been denied access to court and the court is entertaining the case Atton Boro initiated. Procedurally, there is no case where Atton Boro is treated unjustly. The court has accepted and heard its pleadings.[68] Pleadings of the NHA have been served on Atton Boro[69]; and when the NHA failed to do so, the court has ordered it to serve its submissions on Atton Boro.[70] Atton Boro's request to transfer the case to the newly constituted bench was heard and granted.[71] There is no unfair treatment to Atton Boro in terms of procedural elements.

74. Regarding substantive elements, the respondent argues that Mercuria could not be condemned of violating substantive due process in the absence of any final judgment that violates claimant's established rights under applicable laws. Regarding substantive denial of justice, the *Jan de Nul v. Egypt* tribunal referred to an assessment of whether the national courts' decision resulted in a clearly improper and discreditable judgment.[72] This

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[67]. OECD, *Fair and Equitable Treatment Standard in International Investment Law,* OECD Working Papers on International Investment 2004/03, 29, (2004)
[68]. FDI FDI Case 2017 2017, para 200
[69]. FDI FDI Case 2017 2017, para 220
[70]. FDI FDI Case 2017 2017, para 235
[71]. FDI FDI Case 2017 2017, para 255 and 260
[72]. *Jan de Nul v. Egypt, Jan de Nul N.V. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, November 6, 2008, para 196 and following

clearly indicates requirement of presence of final judgement. The ideal circumstance in which denial of justice operates is the existence of a final judgment of the host state that is grossly and inordinately unjust and this is a high standard for the foreign investor to satisfy.[73] "Unless a final court pronounces on the matters, the attribution of responsibility to the state would not be theoretically acceptable."[74]

75. The respondent hereby submits that once the procedure is started under domestic courts of host state, the notion of substantive denial of justice will be relevant only when the concerned party has gone through all available recourses, including appeal to final court in hierarchy, and the resulted decision stands to be egregiously unreasonable by clearly violating substantive rights available for the party under the laws. Accordingly, a proceeding before Mercuria High Court, which is only pending before the court that entertained it in its first instance jurisdiction an which does not involve final judgement, is too far from triggering claim of denial of justice against Mercuria. Therefore, denial of justice claim bears no merit in a case at hand.

76. Further the claim of denial of justice on ground of delay of proceedings is inadmissible in this case. The facts of the case do not show any circumstance where the court made any adjournment without reason and to intentionally delay the proceeding. The respondent offers this tribunal to assess the case taking in to account the findings of *Jan de Nul v. Egypt* in which the tribunal find ten years of proceeding to be a duration of proceedings not amounting to denial of justice; it only acknowledged that ten years to obtain a first instance judgment is a long period of time.[75] The tribunal also made it clear that there can be a situation wherein duration of proceeding may certainly appear to be unsatisfactory in terms of efficient administration of justice, but still does not rise to the level of denial of justice.[76] The respondent argues the proceeding before Mercuria High court does not have element that violates FET when the facts are contrasted with the findings of *Jan de Nul v. Egypt* tribunal.

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[73]. M. Sornarajah, *The international law on Investment*, Cambridge University Press, 357, (2010)
[74]. *Id*, at 358
[75]. Jan de Nul v. Egypt, *supra* not 72, para 204
[76]. *Id*, para 204

G. The Claimant was not subjected to any discrimination.

77. The respondent alleges that there is no circumstance that the claimant can present to claim the violation of FET on ground of discrimination. In order to make out a claim for discrimination, the Claimant must show that two separate investors were similarly situated and that the two investors were treated differently. No event in the dealing between the claimant and the respondent can be validly raised to indicate that the case at hand bears facts supporting presence of discrimination against the claimant.

III. THE RESPONDENT CAN DENY THE CLAIMANT BIT BENEFITS UNDER ARTICLE 2 OF THE BIT

78. The Respondent submits that, if the Tribunal finds that the Claimant qualifies as an investor under Art. 1(2) of the BIT as a legal entity, we submit for this tribunal that; according to Art.2 (1) of the BIT, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized; in basheera, the host state have a right to deny a benefit.

79. In our case, the shares of Atton- Boro Limited are currently held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company which is incorporated and located at republic of reef.it is owned and ultimately controlled by national of third state national of republic of reef which is not contracting party to this bilateral investment treaty.

80. In case between *Plama vs. Republic of Bulgaria*[77] the tribunal decided that as the claimant was controlled by a national of a contracting state, and not by a national of a third state, as required by Article 17(1) of the ECT the state cannot deny

[77] Plama Consortium Limited v. The Republic of Bulgaria, ICSID Case No. ARB/03/24

benefit, but if it is controlled by national of third state a state can deny benefit.[78] Thus since the claimant Atton Boro limited is ultimately controlled by the atton-borro and company, with is a national of third state, republic of reef, the respondent can deny benefit.

81. Moreover, engaging in substantial business activity is also one of the grounds stated under the agreement to deny benefit of the BIT under its art.2 (1). The fact of the case reveals that, atton-borro does not make significant economic contribution in kingdom of basheera. Since Atton Boro limited is an affiliate of Atton Boro &companies found in republic of reef; it have only assigned patent and cannot control the transaction of the group without approval of Atton Boro & company found at reef.

82. Atton Boro Limited has had between 2 and 6 permanent employees who are working in basheera managing its portfolio of patent from 1998 to 2016. [79] Foreign direct investment is a flow people, capital technology to host state and it must have to contribute to the development of host state economy.so if a certain alleged investment does not ally with above stated elements it does not amount as a substantial business activity.

83. In case *of Malaysian Historical Salvors v. Malaysia*, in which Arbitrator Hwang concluded that, substantial bussinees activity swings in favor of requiring a significant contribution to be made to the host State's economy.[80] The tribunal explained that a marine salvage contract had a much smaller development impact than a public infrastructure or banking infrastructure project.[81]

84. Here Atton Boro does not make any flow of technology, capital and people in basheera, they just only open a mail box company to facilitate their investment located at reef.they only employ 2 people to administer the alleged investment in basheera. This show that Atton Boro group neither make any substantial business activity which amount as an

[78] *Id.*

[79] FDI case, page 47
[80]. *Malaysian Historical Salvors v. Malaysia* (n. 160) para. 123
[81] . *Id*, para. 144.

investment not create a job opportunities expected from investment which is pillar to development of host state economy. So, there is no substantial business activity made by Atton Boro group in Basheera.

85. Thus, the respondent submit that, the claimant does not make any substantial business activity in Basheera and controlled by national of third state, republic of reef, so Mercuria have a right to deny benefit of the agreement due to those reasonable justifications.

IV. THE TERMINATION OF THE LONG TERM AGREEMENT BY NATIONAL HEALTH AUTHORITY DOES NOT BRING STATE RESPONSIBILITY ON MERCURIA.

86. When it comes to assessment of whether the respondent should be held liable for the termination of LTA, the submits that this tribunal analyses it in line with the fact that a simple breach of commercial contract in the hand of a state cannot result in its responsibility under investment treaties. The findings of tribunals in *Waste Management*[82] and *Impregilo*[83] indicate that a simple breach of contract by a state does not trigger a claim for violation of FET standard unless it is an outright repudiation of the contract under the shadow of sovereign prerogative. In the words of *Impregilo* tribunal "*the threshold to establish that a breach of the contracts constitutes a breach of the treaty is a high one*."[84]

87. Further, in *Noble ventures*, the tribunal recognized it to be a well-established norm of international law that a breach of a contract by the state does not give rise to direct international responsibility on the part of the state in normal circumstances and such responsibility only arises when it involves and obviously arbitrary or tortious element. It is generally accepted that not every breach of contract on the part of a State automatically

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[82]. *Waste Management*, final award, para 115
[83]. *Impregilo S.P.A. v. Islamic Republic Of Pakistan*, ICSID CASE No. ARB/03/3, Decision on jurisdiction, September 11, 2007, paras 266-270
[84]. Impregolo, *supra* note 83, para 267

entails a breach of an applicable International Investment Agreement (IIA) or a violation of international law."[85]

88. The respondent also argues that the termination cannot activate claim for expropriation on prat of the claimant. "Not every failure of the government to perform a contract amounts to an expropriation even if the violation leads to loss of rights under the contract."[86] It is respondent's position that a simple breach of contract in the hand of sate is not an expropriation if the state has not acted in its official governmental capacity.

89. Respondent submits that the cases of *Jalaba Railroad Case*[87] of 1948 before American Mexican Claims Commission, *Construction RFCC v. Morocco*[88] and *Seimens v. Argentina*[89] are useful for this tribunal to consider in assessing the LTA termination as expropriation because tribunals in these cases similarly held that mere breaches of contracts and defects in its performance would not amount to an expropriation. Accordingly, a state party to a contract breaches BIT only when its behavior goes beyond what ordinary contracting party would do. The *Bureau Veritas* tribunal also recently reaffirmed this position, declaring that establishing a breach of an international obligation arising out of the treaty requires "something more than mere breach of contract.[90] This may be, for example, if the State unreasonably changed its law governing contract in a way that substantially affects the investment or refuse agreed dispute resolution forum.

90. The LTA is a purely commercial supply contract between claimant and NHA and the respondent stresses that its termination by NHA does not result in Mercuria's liability of violating Basheera-Mercuria BIT. It should be understood to be too far from fulfilling the high threshold for this purpose. Mercuria should not be held liable in this case given that

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[85]. UNCTAD Series on issues in international investment agreements, State Contracts, UNCTAD/ITE/2004/11, 2004 at 10; Dozler and Schreuer, *Principles of International Investment Law*, *supra* note 25, at 117

[86]. Dozler and Schreuer, *Principles of International Investment Law*, *supra* note 25, at 117

[87]. American-Mexican Claims Commission, *Jalapa Railroad and Power Co.*, 8 Whiteman Digest of International Law (1976) 908-909.

[88]. *Construction RFCC v. Morocco v. Royaume de Maroc*, ICSID Case ARB/006, Award, 22 December 2003, Paras 60-62, 65-69, 85-89

[89]. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007, Para 248

[90]. Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, Oct. 9, 2012, para. 246

the termination of the supply agreement does not involve an unjustified action of state brought about by the use of sovereign prerogative. There is no record of direct participation by Mercurian officials in the negotiation of the LTA.[91] Thus Mercuria has not done anything that makes it liable under investment/international law.

91. The tribunal may consider umbrella clause relevant in assessing whether Mercuria should be held liable. In such case, the respondent submits that the umbrella clause should not be understood to capture all contractual relations between an investor and host state. In its analysis of the scope of umbrella clause in a recent case of *Control S.A. v. Costa Rica*, the tribunal mentioned that "*it is important to specify that not any contractual breach by the State signatory to an Investment Treaty that contains an umbrella clause can be alleged as a direct violation of the Treaty.*[92] While making the analysis, this tribunal also agreed with the *El Paso v. Argentina* tribunal that: "a*n umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims*."[93]

92. The respondent argues that umbrella clause should not be broadly understood to put an end to a difference between domestic and international law. It should not bring a minor breach of contract for which domestic remedy is available before international tribunal. As Schreuer well noted, "*it cannot be the function of an umbrella clause to turn every minor disagreement on a detail of contract performance into an issue for which international arbitration is available.*"[94] Accordingly, the respondent submits that this tribunal should adopt restrictive interpretation of umbrella clause in case it finds the clause relevant I to assess liability in our case.

93. Alternatively, the LTA's subsistence is subject claimant's performance. If the tribunal holds Mercuria liable for the termination of LTA, despite our argument in above option,

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[91]. FDI Case 2017, para 1595
[92]. Supervisión y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4, para 282
[93]. *Id*, para 282; *El Paso v. Argentina*, *supra* note 14,, para 82
[94]. Schreuer, *Travelling BIT Routes: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, The Journal of World Investment and Trade, Vol. 5 No. 2, 255, (2004)

we submit that the termination is only the forthright action of NHA's under clause 6 of the agreement. Under this clause, parties to LTA, Atton Boro and NHA, agreed that the agreement binds the parties for ten years subject to Atton Boro's satisfactory performance.[95] The NHA has informed Atton Boro that the termination is because

PRAYERS FOR RELIEF

94. In light of the issues raised, arguments advanced and authorities cited, the respondent humbly prays that this tribal hold the line of arguments presented and declare the following.

- The tribunal lacks jurisdiction to entertain and decide the case initiated by the claimant;
- In a case this tribunal rules that it has jurisdiction, to declare the case initiated by Atton Boro, the claimant in this proceeding, and dismiss the case in its whole part.
- To decide rule that the whole costs of the proceeding be covered by the claimant.
- And finally to give ruling that it finds necessary taking in to account the facts of the case and the proceedings of this case.

Respectfully submitted by the Respondent, The republic of Mercuria

[95]. FDI Case, para 895; It is provided in this paragraph that Clause 6, titled "Validity of the Agreement" read *"This Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance."*