

FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT

COMPETITION

BOSTON, MASSACHUSETTS

2 TO 5 NOVEMBER 2017

**ARBITRATION PURSUANT TO THE RULES OF
PERMANENT COURT OF ARBITRATION**

PCA Case No. 2016-74

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

LIST OF ABBRIVIATIONSiii

LIST OF AUTHORITIESv

LIST OF LEGAL SOURCESviii

STATEMENT OF FACTS 1

ARGUMENTS1

PART ONE: ARGUMENTS ON JURISDICTION

THE TRIBUNAL MAY NOT EXERCISE ITS JURISDICTION UNDER THE AGREEMENT BETWEEN THE REPUBLIC OF BASHEERA AND THE REPUBLIC OF MERCURIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENT DATED 11 JANUARY 19981

I. THE TRIBUNAL HAS NO JURISDICTION OVER THE CLAIMS SUBMITTED BY ATTON BORO AND THOSE CLAIMS ARE ADMISSIBLE.....1

II. THE RESPONDENT CAN EXERCISE THE RIGHT TO DENY THE BENEFITS OF THE BIT BY VIRTUE OF ARTICLE 2 OF THE MERCURIA-BASHEERA BIT 11

III. THE TRIBUNAL HAS NO JURISDICTION OVER ATTON BORO CLAIMS BASED ON THE UNILATERAL TERMINATION OF THE LONG-TERM AGREEMENT BY THE NATIONAL HEALTH AUTHORITY THROUGH OPERATION OF THE “UMBRELLA” CLAUSE OF THE MERCURIA-BASHEERA BIT17

PART TWO: MERITS

IF THE TRIBUNAL FINDS THAT IT HAS JURISDICTION OVER THE SUBMITTED CLAIMS:

IV. THE RESPONDENT HAS NOT VIOLATED THE FAIR AND EQUITABLE TREATMENT STANDART ENSHRINED TO ARTICLE 3 OF THE MERCURIA-BASHEERA BIT21

A. The Fair and Equitable Treatment Provision of the Mercuria-Basheera BIT Encompasses the Autonomous Standard of Treatment..... 21

B. The Respondent Acted Contrary to Claimant’s Legitimate Expectations..... 22

C. The Respondent Failed to Provide the Claimant with Transparency and Due Process.....27

D. The Respondent Treated Claimant’s Investments in Arbitrary and Discriminatory Manner 28

E. Mercurian Courts’ Actions Amounted to Denial of Justice..... 30

F. The Respondent Acted in Bad Faith.....35

PRAYER FOR RELIEF36

LIST OF ABBREVIATIONS

¶ / ¶¶	Paragraph(s)
ARV treatment	Antiretroviral treatment
Award	The Award obtained under the LTA
BIT	Bilateral Investment Treaty
Claimant	AttonBoro Limited
ECT	Energy Charter Treaty
FDC	Fixed-dose combination
FET	Fair and Equitable Treatment
HIV/AIDS	Human immunodeficiency virus infection and acquired immune deficiency syndrome
Law No.8458/9	Mercurian National Legislation to amend Intellectual Property Law, 1976 (Law No. 232/76)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investments Disputes
IP	Intellectual Property
LTA	Long-Term Agreement
MST	Minimum Standard of Treatment
NHA	National Health Authority
OCED	The Organization for Economic Co-operation and Development
p. / pp	Page / Pages
PCA	Permanent Court of Arbitration
Respondent	Republic of Mercuria
The M-B BIT	Mercuria-Basheera Bilateral Investment Treaty
TRIPS	Agreement The Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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STATEMENT OF FACTS

2. The Respondent is the Republic of Mercuria (“**Mercuria**”) which concluded an Agreement for the Promotion and Reciprocal Protection of Investment (the “**M-B BIT**”) on 11 January 1998.
3. The Claimant to the present dispute is AttonBoro Limited (“**AttonBoro**”), business vehicle controlled by AttonBoro Group. AttonBoro Limited is a wholly owned subsidiary which was incorporated by AttonBoro Group in Basheera. The shares of AttonBoro Limited are currently held by AttonBoro Group affiliates, which are all ultimately controlled by AttonBoro and Company. And finally, AttonBoro and Company is a corporation organized under the laws of the People’s Republic of Reef (“**Reef**”) and acts as the primary holding company for AttonBoro Group.
4. AttonBoro Group created a compound called Valtervite as a medical treatment against greyscale and secured a patent protection for it in Reef in 1997. On 21 February 1998, AttonBoro and Company obtained the patent for Valtervite in Mercuria. It was further assigned to AttonBoro.
5. AttonBoro entered to the Mercurian market, by concluding long-terms agreements for the manufacture and supply of essential medicines at competitive rate with the government and the National Health Authority (the “**NHA**”).
6. In 2003, the NHA’s annual report highlighted that the grayscale incidence was increasing among working-age individuals and that it could spiral into a national crisis unless aggressive measures were taken to combat it.
7. On 19 January 2004, the Minister for Health of Mercuria announced statements concerning the success of Partnership with AttonBoro. And in May 2004 the NHA offered AttonBoro to enter into a Long-Term Agreement (the “**LTA**”). Under the LTA AttonBoro was obliged to supply Mercuria with Sanior (FDC drug) at a 25% discounted rate. By June 2005 AttonBoro set up its manufacturing unit and delivered its first consignment.
8. On December 2006, the Minster for Health called a press conference to discuss the NHA report which announced deteriorating situation with grayscale. The Minister stated that: *“the government would take every measure it deemed necessary to make ensure that patients of grayscale could avail treatment”*.

9. In early 2008, the NHA asked the AttonBoro to change the price due to the increasing number of greyscale disease. Atton Born offered a father discount of 10%, the NHA rejected this discount and required an additional discount for 40\$, otherwise it is going to terminate the agreement. AttonBoro refused to grant a discount.
10. On 20 June 2008 the NHA terminated the LTA referring to unsatisfactory performance by AttonBoro. This act of the NHA led to the invocation of arbitration under the LTA by AttonBoro. On January 2009, a Tribunal in Reef found for AttonBoro passing an Award due to the fact that the NHA had breached the LTA by the prematurely termination of it.
11. AttonBoro filed enforcement proceeding before the High Court of Mercuria. The NHA filed its response to decline the enforcement of the Award citing to the fact that it is contrary to public police. Until the present time the Award is not enforced due to the problems with judiciary system in Mercuria.
12. The President of Mercuria promulgated National Legislation for its Intellectual Property Law (the “**Law No. 8458/09**”), which allowed to use the patented inventions without permission of the owner. The Court of Mercuria granted to a Mercurian company, HG-Pharma, a license on 17 April 2010 to manufacture Valtervite. A fixed royalty to be paid to AttonBoro was 1% of total earnings.
13. On 12 January 2012, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches on commercial matters in order to unload courts. On September 2013, the Supreme Court of Mercuria clarified that the benches on commercial matters had no jurisdiction to hear enforcement proceedings. The enforcement matters of Atton Boro were returned to the regular benches.

PART ONE: ARGUMENTS ON JURISDICTION

THE TRIBUNAL MAY NOT EXERCISE ITS JURISDICTION UNDER THE AGREEMENT BETWEEN THE REPUBLIC OF BASHEERA AND THE REPUBLIC OF MERCURIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENT DATED 11 JANUARY 1998

1. Pursuant to the Rules of Permanent Court of Arbitration (the “PCA Rule”), the PCA tribunal has jurisdiction to hear claims if there is an arbitration agreement where the parties have agreed to submit a dispute to arbitration under the PCA Rules.¹
2. In the case at hand, the Claimant consented to conduct the arbitration disputes under the PCA Rules due to the Agreement between the Republic of Basheera and the Republic of Mercuria for the Promotion and Reciprocal Protection of Investments (the “M-B BIT”). Thus, in accordance with Article 8 (2)(c) of the M-B BIT:

Where the dispute is submitted to international arbitration, the investor may choose to refer the dispute to... the Permanent Court of Arbitration. The arbitration shall be conducted in accordance with the Optional Rules for Arbitrating Disputes and the dispute shall be settled by three arbitrators appointed in accordance with the said Rules.
3. The Claimant submitted a request for arbitration before the PCA tribunal against Mercuria on 7 November 2016.² Pursuant to Article 4 of the PCA Arbitration Rules the Respondent filed its response to the Claimant’s notice of arbitration on 26 November 2016.³ By doing this Mercuria accepted the Claimant’s offer to arbitrate. Consequently, both parties have consented to arbitration under the PCA Rules.

I. THE TRIBUNAL HAS NO JURISDICTION OVER THE CLAIMS SUBMITTED BY ATTON BORO AND THOSE CLAIMS ARE NOT

¹ PCA Rules 17 December 2012.

² FDI Moot Court 2017, Response to the notice of arbitration, p.16, ¶ 1.

³ FDI Moot Court 2017, Response to the notice of arbitration, p.16, ¶ 1.

ADMISSIBLE

4. The Tribunal's jurisdiction under the M-B BIT is limited to the disputes within the framework of the dispute resolution provision provided in Article 8 of the M-B BIT. The consent of the host State recorded in this Article controls the scope of the Tribunal's jurisdiction in several aspects.
5. Therefore, the Respondent insists that this Tribunal has no jurisdiction over the submitted claims due to the following reasons. A dispute must be legal in nature and arise out of or in relation to an «investment», *i.e.* jurisdiction *ratione materiae* (A). The Respondent will demonstrate its position on the enumerated arguments respectively.

A. The Requirement of *Ratione Materiae* Jurisdiction Is Not Satisfied

6. The Respondent contends that this Tribunal has no *ratione materie* jurisdiction over Atton Boro's claims in relation to the LTA and the Award since: (1) the Award is analytically distinct from the LTA; (2) the Award - in and of itself - can not constitute an «investment»; (3) even if the Award is a crystallization of AttonBoro's rights under the LTA, the LTA does not fall within the meaning of "investment" under the M-B BIT; (4) the LTA does not satisfy the criteria under the *Salini* test.

1. The Award is analytically distinct from the LTA

7. It is generally accepted that an arbitral award can only constitute an investment if – and only if - the underlying transaction is an investment.⁴ The Respondent submits that the Award which was rendered to the Claimant in 2009, does not apply to the LTA and therefore it must be considered separately.
8. The Respondent argues that the present dispute is similar to the dispute considered by the tribunal in *GEA Group Aktiengesellschaft v Ukraine*.⁵ A subsidiary of GEA had entered into an agreement with Oriana, a Ukrainian state-owned entity, for the supply

⁴*Saipem v Bangladesh*.

⁵*GEA Group Aktiengesellschaft v Ukraine*.

of naphtha fuel. In order to settle disputes, the parties signed a settlement agreement and subsequently a repayment agreement. Both of these agreements contained arbitration clauses. Upon non-payment, GEA commenced arbitration against Oriana under the settlement agreements and successfully obtained an award in its favor. However, the Ukrainian courts refused to enforce this award. Subsequently, GEA initiated ICSID proceedings, alleging expropriation of its investment made in the form of the arbitral award.

9. The *GEA* tribunal established the fact that the award rules upon rights and obligations arising out of an investment does not equate the award with the investment *itself*.⁶

10. Moreover, in the tribunal's view:

[T]he arbitral award and the underlying investment remain —analytically distinct and the 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.⁷

11. The Respondent emphasizes that the present dispute has similar circumstances as the cases considered above. To be more precise, the Claimant initiated the arbitration in order to find that a unilateral termination of the LTA on behalf of the NHA is a breach of the agreement. Atton Boro initiated arbitration proceedings and obtained the Award in its favor. The enforcement proceeding in the territory of Mercuria is still on, however the Claimant initiated the settlement of a dispute in PCA tribunal in relation to the Award.

12. The Respondent submits that since there is no contribution of the Award and it is analytically distinct from the “investment” therefore, this Tribunal has no jurisdiction over the claim in relation to the Award.

2. An Award - in and of itself - can not constitute an ”investment”

13. The tribunal in *GEA Group Aktiengesellschaft v Ukraine* held that:

⁶*GEA Group Aktiengesellschaft v Ukraine*, ¶162.

⁷*GEA Group Aktiengesellschaft v Ukraine*, ¶162.

[T]he arbitral award – *in and of itself* – whether tested against the criteria of Article 1 of the BIT – cannot constitute an “investment”.⁸

14. Closely analyzed, an arbitral award is a legal instrument, which provides for the disposition of rights and obligations arising out of the settlement agreement and repayment agreement.⁹

15. Moreover, the tribunal in *GEA Group Aktiengesellschaft v Ukraine* case further held that the award *itself* could never constitute investment under the BIT or Article 25(1), even if, *arguendo*, it arose out of an investment, i.e., if it arose out of the Fuel Agreement, or if the Settlement Agreements constituted investment.¹⁰

16. Moreover, tribunals conduct an analysis along similar lines before reaching the conclusion that awards – *in and of themselves* – cannot constitute investment.¹¹

17. In the case at hand, the Award is a legal instrument which does not constitute an investment - *in and of itself*. Therefore, the Tribunal has no jurisdiction over the claims in relation to the Award.

3. Even if the Award is a crystallization of AttonBoro’s rights, the LTA does not fall within the meaning of “investment” under Mercuria-Basheera BIT

18. Article 1(1) of the M-B BIT contains the following definition of the notion of “investment”:

The 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 and, in particular, though not exclusively, includes:

(e) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for,

⁸*GEA Group Aktiengesellschaft v Ukraine*, ¶161.

⁹*GEA Group Aktiengesellschaft v Ukraine*, ¶161.

¹⁰*GEA Group Aktiengesellschaft v Ukraine*, ¶162.

¹¹Do arbitral awards constitute an „investment“? Varun Mansinghka& Sanjana Srikumar.Indian journal of arbitration law, p.19.

cultivate, extract or exploit natural resources.¹²

19. The Respondent submits that, as required by the Vienna Convention of the Law of Treaties, the investment definition and the treaty should be interpreted in light of its objective and the purpose of the investment dispute system, as set out in the M-B BIT preamble.¹³ While applying such interpretation the purpose of a State's relinquishment of freedom of action in a BIT, namely the fostering of international cooperation for economic development, should be considered.¹⁴

20. The Respondent argues that the LTA does not confer any rights upon the Claimant to exercise economic activities. The LTA was a purely commercial supply arrangement under which Atton Boro simply undertook to deliver a certain amount of goods to the NHA in exchange for certain amount of payment.

21. The Respondent argues that the present case is similar to *Nova Scotia v. Venezuela*,¹⁵ where contractual rights under a coal supply contract were held to be insufficient to constitute investment.

22. Therefore, the Respondent insists that the Claimant's actions directed on the fulfillment of obligations under the LTA does not constitute an "investment" under the M-B BIT.

4. The LTA does not satisfy the criteria under the *Salini* test

23. The *Salini* test was developed in order to determine whether an "investment" had been made for the purposes of the ICSID Convention.¹⁶ The present case is not subject to the ICSID Convention and, consequently, the *Salini* test should not be considered. However, the arbitral tribunals often consider the *Salini* test in order to define an investment since it contributes to a more close consideration of the definition of

¹²Article 1 of the Mercuria-Basheera BIT, p.32, para.995.

¹³ VCLT, 23 May 1969, Article 31.

¹⁴Petrobart, p.10.

¹⁵*Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*.

¹⁶ The Definition of Investment under the ICSID Convention: A Defense of *Salini*. Alex Grabowsk. Chicago Journal of International Law. Volume 15. Number 1, p.290.

«investment» itself.¹⁷

24. An investment should comply with the following requirements in order to satisfy the *Salini* test: (i) a substantial commitment to the host State economy, (ii) a certain duration, (iii) an element of risk, and (iv) significance to the host State's development. The Respondent insists that all these characteristics are not present in the case at hand.

i. Atton Boro did not make a substantial commitment to the economy of Mercuria

25. While adjudging whether a contribution constitutes a substantial commitment, tribunals have made several important conclusions. Firstly, the commitment should not be assessed only in financial terms, but also in terms of know-how, equipment, personnel and services.¹⁸ Secondly, in *Joy Mining v Egypt* the tribunal noted that the term “substantial” refers *inter alia* to the relationship between the actual contribution to the project and an expected value of an entire project.¹⁹
26. In the case at hand, the key purpose of the LTA was the implementation of the state policy for long-term strategic supply of FDC greyscale medicines. However, pursuing commercial purposes AttonBoro rented out an office space, opened a bank account, hired only two employees and commenced business.²⁰ Moreover, Atton Boro was not the only one who could satisfy the demands of the NHA since the offer was made to the Claimant only after evaluation of competing proposals.²¹
27. Similarly, there is no ground to consider that Atton Boro have special equipment,

¹⁷ The Definition of Investment under the ICSID Convention: A Defense of Salini. Alex Grabowsk. Chicago Journal of International Law. Volume 15. Number 1, p.290.

¹⁸ *RFCC v. Morocco Consortium R.F.C.C. v. Kingdom of Morocco*, ¶61.

¹⁹ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ¶57.

²⁰ FDI Moot Court 2017, Statement of Uncontested Facts, p.28, ¶4.

²¹ FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶9.

personnel, technology to make a substantial commitment to the economy of Mercuria. A compound called Valtervite was synthesized by Atton Boro Group in 1997. Therefore, the Claimant did not use special technology, know-how in Mercuria to develop such an essential treatment.

28. Hence, the Respondent insists that the LTA's commitment is not sufficient for the satisfaction of the 2^{ed} requirement of the *Salini* test.

ii. Atton Boro's investment has no a sufficient duration

29. Commitment to an investment must be evidenced by a certain length of time. It is generally accepted that the required duration must be of at least two years.²² For instance, the *Salini* tribunal clarified that:

[T]he transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years [...].²³

30. Likewise, the *Malaysian Historical Salvors* tribunal found that the contract giving rise to the alleged investment fulfilled the minimum length of time of two to five years since it took almost four years to complete it.²⁴
31. Professor Schreuer points out that a contract is considered to be investment if “*long term relationship*” between the parties exists or, at least, expected to exist.²⁵
32. In the case at hand Atton Boro signed the LTA in October 2004 and this agreement should have been valid for a period of 10 years.²⁶ However, only in 2007 in order to satisfy the demand of treatment and to achieve commercial purposes Atton Boro

²² MEALEY'S International Arbitration Report Vol. 26, №8 August 2011 Jean-Pierre Harb, p.9.

²³ *SaliniCostruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ¶54.

²⁴ *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ¶110.

²⁵ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2009), p. 140.

²⁶ FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶10.

purchased land and machinery.²⁷ In 2008 the LTA was terminated. Therefore, the LTA lasted one year.

33. Thus, the Respondent insists that the LTA's duration is not sufficient for the satisfaction of the 2^{ed} requirement of the *Salinitest*.

iii. Atton Boro's investment does not satisfy the requirement of the assumption of risk requirement

34. Tribunals have acknowledged the risk of changes in production costs,²⁸ of a work stoppage,²⁹ posting guarantee money.³⁰ These investment risks must be higher than normal commercial risks.³¹ Moreover, the supposed investment must be at "risk",³² more particularly economic risk, in that the outcome of the investment must be uncertain. Otherwise, no protected "investment" has taken place.³³

35. In the case at hand, AttonBoro did not experience high commercial risks when signed the LTA with the NHA. Clause 5 of the LTA stipulated the minimum guaranteed annual order-value.³⁴ Therefore, the Claimant had a stable income regardless of number of patients and orders.

36. Thus, there is no risk signing the LTA and it does not fall under the 3rd criterion of *Salini* test.

iv. Atton Boro did not make any contribution to the economic

²⁷FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶14.

²⁸*BayindirInsaatTurizmTicaretVe Sanayi A.S. v. Islamic Republic of Pakistan*, ¶136.

²⁹*Saipem S.p.A. v The Peoples Republic of Bangladesh*, ¶109.

³⁰*Saipem S.p.A. v The Peoples Republic of Bangladesh*, ¶109.

³¹*MHS v. Malaysia Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ¶ 112.

³² Jean-Pierre Harb, Definition Of Investments Protected By International Treaties: An On-Going Hot Debate, Mealey's International Arbitration Report, Vol.26, #8, August 2011, p.11.

³³*Patrick Mitchell v. Democratic Republic of the Congo*, ¶27.

³⁴FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶10.

development of Mercuria

37. Even though neither the relevant treaties, nor the practice of investment arbitration have so far elaborated a precise definition of a contribution to the development of a host State, it can be discerned from the obiter dictum of investment tribunals' decisions. In general, the presence of a contribution is recognized, if a transaction in question has introduced visible benefits to the economy of a host State.³⁵
38. Typically, the contribution is found in cases of construction projects, such as construction of a highway,³⁶ building of hotels,³⁷ construction of motorway,³⁸ building of a hospital,³⁹ and other similar operations. It is also acknowledged in non-constructional projects when transaction's benefits for public interest are obvious.⁴⁰ Such cases for instance concern a contribution of capital,⁴¹ mining works.⁴²
39. At the same time investment tribunals decline jurisdiction in case of ordinary commercial transactions that fail to benefit public interest of the host state. For instance, in 1999 the ICSID Secretary-General refused even to register the claim arising out of a supply contract arguing that this was an ordinary commercial transaction manifestly beyond the scope of the term "investment."⁴³
40. In *Patrick Mitchell v. DRC* annulment proceedings, the ad hoc Committee refused to

³⁵Salini v. Morocco, ¶52; *Fedax v. Venezuela*; *Bayindir v. Pakistan*; *Joy Mining v. Egypt*.

³⁶*Salini v. Morocco*.

³⁷*Holiday Inns v. Morocco*.

³⁸*Bayindir v. Pakistan*

³⁹*Gabon v. Société Serete*.

⁴⁰C.Schreuer, *The ICSID Convention: A Commentary*, 1st ed. (Cambridge: Cambridge University Press, 2009), p. 124.

⁴¹*Alcoa v. Jamaica*.

⁴²*Alcoa v. Jamaica*.

⁴³I.F.I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 *ICSID Rev.—FILJ* 299 (1999), 308.

recognize as investment the contribution made in form of establishment of the legal consulting firm due to the lack of benefits to the economy of the host state or transfer of know-how.⁴⁴

41. The LTA specified that this agreement should have been valid for a period of 10 years from 2005.⁴⁵ However, the LTA lasted only 3 years and for that moment the amount of diseases did not decrease. Moreover, the number of patients came into care grew.⁴⁶ Likewise, the spread of the disease within working-age people could lead to the national and economic crises. Thus, three years after the first supply, the Claimant had not performed significant amount of work in order to prevent such a consequence.
42. Therefore, the Respondent argues that the LTA's contribution to the economic development of Mercuria is insufficient for the satisfaction of the 4^{ed} requirement of the *Salini* test.
43. According to the arguments presented herewith, the LTA failed to contribute to the development of the host state since the Claimant's operations were not beneficial for the host state's public interest.
44. Consequently, all the characteristics of the investment required by the *Salini* test are not present in the case. Therefore, the LTA does not fall under the definition of "investment".
45. Hence, the LTA does not constitute an investment in the territory of Mercuria. Similarly, the present Tribunal has no jurisdiction over claims in relation to the Award.

⁴⁴*Patrick Mitchell v. DRC*, ¶ 39.

⁴⁵FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶¶10.

⁴⁶FDI Moot Court 2017, Statement of Uncontested Facts, p.29, ¶15.

**II. THE RESPONDENT CAN EXERCISE THE RIGHT OF DENIAL TO
BENEFITS ESTABLISHED IN ARTICLE 2 OF THE MERCURIA-
BASHEERA BIT**

46. There is no express time-limit in the M-B BIT when exactly a Contracting Party can deny of benefits under Article 2 of the M-B BIT which provides that:

Each Contracting Party reserves the right to deny the advantages of this Agreement to:

- (1) a legal entity, if citizens or nationals of a third state own or control such entity and
- (2) if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized.⁴⁷

47. Article 2 of the M-B BIT constitutes a reservation by each Contracting Party of a right to deny the advantages but does not constitute a denial of the benefits in itself.⁴⁸

48. In determining whether the exercise of the denial right under Article 2 of the M-B BIT has retrospective or prospective effects, the Respondent points out that article 17(1) of the Energy Charter Treaty have the same provision.

49. The decision in *Plama v. Bulgaria* referred to the purpose of the ECT as stated in Article 2, *i.e.* to promote long-term cooperation in the energy field.⁴⁹ As a result, an investor cannot plan its “long-term” investment if the exercise of the denial of benefits right has retrospective effect:

In the Tribunal’s view, therefore, the object and purpose of the ECT suggest that the right’s exercise should not have retrospective effect.⁵⁰

Finally, this tribunal found that denial of investment protection benefits under Article 17(1) could only be prospective.⁵¹

⁴⁷ Article 17, the ECT.

⁴⁸ *Pac Rim Cayman LLC v. Republic of El Salvador*, ¶4.83.

⁴⁹ ECT.

⁵⁰ *Plama Consortium Limited*, ¶ 162.

50. Article 2 of the M-B BIT sets forth two cumulative conditions for a Contracting Party to exercise its right to deny the benefits of promotion and protection of investments. Only (A) legal entities controlled or owned by citizens or nationals of a third state and that (B) have no substantial business activity in the Contracting Party where they are organized may be denied the benefit.
51. If one of the requisites provided by Article 2 of the M-B BIT is not met, the denial of the benefits clause is inapplicable.⁵²The tribunal in the *Yukos* Cases pointed out that:

[I]t is apparent from the wording of Article 17(1) that two additional cumulative substantive conditions must be met before the “denial-of-benefits” clause can be exercised in respect of any particular entity.⁵³

52. The Respondent insists that Article 2 of the M-B BIT can be invoked in this case since the conditions for its application do exist.

A. Atton Boro Is Owned And Controlled By Nationals Of A Third State

53. Article 31 of the VCLT stipulates that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁵⁴

54. The tribunal in *Plama v. Bulgaria* stated that a "third state" means being a non-Contracting State under the BIT.⁵⁵The same position was expressed in case *Amto v. Ukraine*, where the tribunal concluded that ‘third state’ :

[...] is used in Article 1(7) in contradistinction to ‘Contracting Party’, which suggests that a third state is any state that is not a Contracting Party to the ECT.⁵⁶

⁵¹*Plama Consortium Limited v. Republic of Bulgaria*, ¶ 31.

⁵² *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, ¶460.

⁵³ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, ¶460.

⁵⁴ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969.

⁵⁵*Plama Consortium Limited v. Republic of Bulgaria*, ¶170.

55. The tribunal in *Plama v. Bulgaria* interpreted the phrase “if citizens or nationals of a third state own or control” as following: the word "or" signifies that ownership and control are alternatives. In other words, only one needs to be met for the first requirement to be satisfied.⁵⁷
56. In the tribunal’s view in *Plama v. Bulgaria*:
- [C]ontrol includes control in fact, including an ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body.⁵⁸
57. In *Guardian Fidiciary Trust v Macedonia* the tribunal defined the notion of ‘ownership’ as a legal right or the capacity to exercise control.⁵⁹
58. In order to clarify the notion of control contained in international investment agreements, arbitral tribunals have discussed whether it should be understood as legal or effective control.⁶⁰
59. In establishing the meaning of ‘control’ for the purpose of Article 17, ECT tribunals looked behind the first layer of ownership or control,⁶¹ and discarded minority beneficiaries or ownership in assessing control.⁶²
60. The case at hand is similar to *Generation Ukraine v. Ukraine*⁶³ casewhere the claimant was a company registered in the US which had established a subsidiary in Ukraine. Ukraine invoked Article 1(2) of the US-Ukraine BIT to deny the claimant the

⁵⁶ *Limited Liability Company Amto v. Ukraine*, ¶62.

⁵⁷ *Plama Consortium Limited v. Republic of Bulgaria*, ¶170.

⁵⁸ *Plama Consortium Limited v. Republic of Bulgaria*, ¶170.

⁵⁹ *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia*, ¶91.

⁶⁰ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ¶ 62.

⁶¹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, ¶536.

⁶² *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, ¶536.

⁶³ *Generation Ukraine Inc. v. Ukraine*.

advantages of the BIT because the claimant had no substantial business in the US and was in fact controlled by Canadians. Article 1(2) provides the same provision as the Article 2 of the M-B BIT.

61. In relation to the question of “third country control”, the Respondent considers the Republic of Reef as the third country and relies upon the following facts: AttonBoroLimited is a wholly owned subsidiary which was incorporated by AttonBoro Group in Basheera.⁶⁴The shares of AttonBoro Limited are currently held by AttonBoro Group affiliates, which are all ultimately controlled by AttonBoro and Company.⁶⁵Finally, AttonBoro and Company is a corporation organized under the laws of the People’s Republic of Reef and acts as the primary holding company for AttonBoro Group, a leading drug discovery and development enterprise.⁶⁶
62. Moreover, AttonBoro and Company funded AttonBoro to set up its manufacturing unit in Mercuria, as well as to perform the agreements in entered into with the NHA.⁶⁷
63. In *Saluka Investments BV v Czech Republic*⁶⁸ the respondent also objected to the tribunal’s jurisdiction on the grounds that the claimant was a shell company incorporated in the Netherlands without any substantial business activities there and owned or controlled by investors of a third state (Japan). The tribunal strictly referred to the terms of the invoked investment treaty, holding that the denying party can invoke the clause of denial of benefits.
64. Thus, AttonBoro is a company set up un Basheera by investors of a third state – the Republic of Reef which is controlled by AttonBoro Group.

⁶⁴ FDI Moot Court 2017, Statement of uncontested facts, p. 28, ¶4.

⁶⁵ FDI Moot Court 2017, Procedural order No 2, p. 48, ¶3.

⁶⁶ FDI Moot Court 2017, Statement of uncontested facts, p. 28, ¶2.

⁶⁷ FDI Moot Court 2017, Procedural order No 2, p. 48, ¶2

⁶⁸*Saluka Investments BV v Czech Republic*.

B. Atton Boro Has No Substantial Business Activity In The Territory Of Basheera

65. Though the “substantial business activities” element frequently constitutes the benchmark for the denial of benefits clauses, this term is neither defined in the treaties nor addressed in their explanatory notes.⁶⁹

66. In *AMTO v. Ukraine*, the tribunal discussed the meaning of the term ‘substantial’ and reached the conclusion that:

[...] in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question.⁷⁰

67. The tribunal in *Amto v. Ukraine* put forward, it is not the size of the business that counts, but the existence of the business activities.⁷¹ As explained by some scholars:

[C]ontracting 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).⁷²

68. The M-B BIT does not provide for a list of criteria for determining whether legal entities have substantial business activity. However, tribunals should seek to determine this question based on the facts of each case, taking into consideration the nature and duration of their activities, whether or not they pay taxes and make profit or have permanent employees.⁷³

⁶⁹*Pan American Energy LLC, et al. v. Argentine Republic*.

⁷⁰ *Limited Liability Company Amto v. Ukraine*, ¶ 69.

⁷¹ *Amto v. Ukraine*, ¶ 85.

⁷² Jagusch, Stephen; Sinclair, Anthony; *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, p. 20.

⁷³ Jagusch, Stephen; Sinclair, Anthony; *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, p. 20.

69. For instance, the tribunal in *AMTO v. Ukraine* held that claimant had substantial business activities in Latvia, based on the activities conducted there, which involved permanent staff.⁷⁴ In addition, the tribunal in *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar* established that claimant had substantial business activity which involved the “effective management” of Yaung Chi Oo Trading PTE Ltd.⁷⁵
70. From 1998 to 2016, AttonBoro Limited has had between 2 and 6 permanent employees, *i.e.* manager, accountant, commercial lawyer, patent attorney working in Basheera managing its portfolio of patents registered in South America and Africa. Moreover, this staff provided support for regulatory approval, marketing, and sales as well as legal, accounting and tax services for AttonBoro Group affiliates in South America and Africa.⁷⁶ AttonBoro was incorporated in the territory of Basheera, however the long-term agreements and commercial contract were concluded in Mercuria.⁷⁷
71. Similarly, there is no ground to consider existence of manufacturing, effectual management or substantial commitment in the territory of Basheera. Firstly, Atton Boro and Company funded Atton Boro to set up its manufacturing unit in Mercuria.⁷⁸ Secondly, the Mercurian Patent for Valtervite was assigned to the Claimant in exchange for shares.⁷⁹
72. Hence, activities of Atton Boro in the Republic of Basheera do not constitute a substantial business activity.
73. The Respondent submits that both requirements, namely Atton Boro is not owned or controlled by nationals of a «third state» and has a substantial activity in the territory of the Republic of Mercuria, were not satisfied. Thus, Mercuria can exercise the right to denial of benefits established in Article 2 of the M-B BIT.

⁷⁴*Limited Liability Company Amtov. Ukraine*, ¶ 69.

⁷⁵*Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, ¶ 52.

⁷⁶ FDI Moot Court 2017, Procedural order No 2, p. 48, ¶ 15.

⁷⁷ FDI Moot Court 2017, Statement of Uncontested Facts, p.28, ¶ 5.

⁷⁸ FDI Moot Court 2017, Procedural order No 3, p.50, ¶ 1570.

⁷⁹ FDI Moot Court 2017, Procedural order No 3, p.50, ¶ 1570.

III. THE TRIBUNAL HAS NO JURISDICTION OVER ATTON BORO CLAIMS BASED ON THE UNILATERAL TERMINATION OF THE LONG-TERM AGREEMENT BY THE NATIONAL HEALTH AUTHORITY THROUGH OPERATION OF THE “UMBRELLA” CLAUSE OF THE MERCURIA-BASHEERA BIT

74. The Respondent submits that this Tribunal should not exercise jurisdiction over Atton Boro’s claims in relation to the LTA since only claims related to foreign investments fall under the protection of the M-B BIT.

75. The Respondent emphasizes that the “umbrella clause” contained in Article 3(3) if the M-B BIT does not cover Atton Boro’s contractual claims. In order to cover such claims, an umbrella clause should be construed narrowly in accordance with the intentions of the Contracting Parties.

76. Pursuant to Article 3(3) of the M-B BIT:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

77. The effect of Article 3(3) of the M-B BIT is limited. The ordinary meaning, object and purpose of the umbrella clause supports a narrow interpretation of its scope (A). Moreover, history of umbrella clauses requires a restrictive interpretation of umbrella clauses (B). Finally, policy concerns require a restrictive interpretation of umbrella clauses (C).

A. The Ordinary Meaning, Object And Purpose Of the Umbrella Clause Supports a Narrow Interpretation Of Its Scope

78. It is generally accepted that umbrella clause should be interpreted in accordance with Article 31 of the VCLT. In according to the Article 31 of the Vienna Convention:

A treaty shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in lights of its object and purpose".

When considering the text, object and purpose of Article 3(3) of the M-B

BIT, it should be concluded that the Tribunal does not have jurisdiction over Claimant's contract claims.

79. The *SGS v. Pakistan* tribunal held that the text of the Switzerland-Pakistan BIT used the word “commitments,” not “contractual commitments.”⁸⁰ Accordingly, the text was interpreted restrictively, to mean that purely contract claims would not come within the jurisdiction of the BIT tribunal.⁸¹ Likewise, the text of the M-B BIT uses the phrase “any obligation” not “any contractual obligation”. Therefore, the Respondent asks this Tribunal to interpret the umbrella clause of the M-B BIT in the similar restrictive manner.
80. In accordance with the text of the umbrella clause, the State must not use its sovereign power to fail to fulfill the obligations it has imposed on investment. This restriction of sovereign power. However, the restriction of state sovereignty must have a certain need, therefore, the contracting parties can not believe that they have agreed to greater restrictions on their authority than is necessary.
81. The object and purpose of the M-B BIT, reflected in its Preamble, is to encourage investment.⁸² Purpose must not be interpreted more expansively than the Contracting Parties intended. BITs were not intended as insurance policies against a State's ordinary breaches of contract, and thus they cannot convert mere contract claims into international law claims. Rather, such clauses only prevent a State from breaching contractual rights through sovereign acts, whether through legislation, executive decree, judicial or administrative decision, regulation or otherwise. A State's failure to perform a contract per se does not necessarily give rise to liability under an umbrella clause.
82. The effective meaning of the umbrella clause is retained by a narrow reading. The clause is relevant in the implementation of the investment treaty in the domestic legal order, or in the case the host State fails to participate in international proceedings to which it has agreed earlier.⁸³ In this case, the provisions of the umbrella clause extend to obligations that the investor has undertaken in accordance with the M-B BIT.

⁸⁰ Switzerland-Pakistan BIT.

⁸¹ *SGS v. Pakistan*, ¶ 166.

⁸² The M-B BIT, Preamble, ¶ 975.

⁸³ Lamm, p.7.

B. History Of Umbrella Clauses Requires a Restrictive Interpretation Of Umbrella Clauses

83. Article 32 of the Vienna Convention allows for supplementary means of interpretation when text and purpose leave the meaning ambiguous. Resourse may be had to the preparatory works of the treaty and the circumstances of its conclusion.⁸⁴
84. State practice in the period prior to the great wave of BITs in the 1980's and 1990's demonstrates that States did not intend to agree to international arbitration with a private party for "any obligation it may have entered into with regard to investments."⁸⁵
85. It would be improper for this Tribunal to rely on interpretations of umbrella clauses in draft conventions like the 1959 Abs-Shawcross Draft Convention of Investments Abroad and the OECD Draft Conventions. These draft conventions played a role in the development of the modern umbrella clause,⁸⁶ and the umbrella clauses contained therein have been interpreted broadly.⁸⁷

C.Policy Concerns Require a Restrictive Interpretation Of Umbrella Clauses

86. The Respondent emphasizes that unfavorable legal consequences will flow from an unnecessarily broad interpretation of the umbrella clause. The possible negative consequences of a broad interpretation were canvassed extensively by *SGS v Pakistan* in determining that an umbrella clause should be interpreted restrictively.

⁸⁴ Vienna Convention, Article 32.

⁸⁵ Gaffney and Loftis, p.18.

⁸⁶ Fatouros, p.88, n.80; OECD Draft Convention, Article 2, ¶1(b)

⁸⁷ *Id.*

87. Firstly, *SGS v Pakistan* considered the possibility that a broad view of the umbrella clause could lead to a flood of contractual lawsuits before treaty tribunals. That tribunal stated that such a broad interpretation of the umbrella clause “would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments.”⁸⁸ *El Paso* and *Pan American* agreed with this reasoning.⁸⁹ As discussed above, it is unreasonable to presume that it was the intention of the Contracting Parties to bring non-treaty claims within the jurisdiction of the treaty tribunal.
88. Secondly, the M-B BIT includes substantive treaty standards and guarantees. These include national treatment, most-favored-nation treatment, fair and equitable treatment, and full protection and security. These substantive standards would be superfluous if any simple breach of a contract between parties sufficed to bring a claim under the BIT.⁹⁰ This was endorsed by *El Paso* and *Pan American*, which both held that if an umbrella clause were given a wide meaning, it would render the whole treaty “useless.”⁹¹
89. Finally, this interpretation would allow an investor to nullify any freely negotiated dispute settlement clause in an investor agreement. Thus, the provisions of the umbrella clause should be narrowly construed to avoid the abuse of the provisions of the umbrella clause on the part of the investor and to preserve the sovereign power over the state.

⁸⁸ *SGS v. Pakistan*, ¶¶ 166, 168.

⁸⁹ Dolzer and Schreuer, p.159.

⁹⁰ *SGS v. Pakistan*, ¶ 168

⁹¹ *El Paso*, ¶ 73; *Pan American*, ¶ 105.

PART TWO: ARGUMENTS ON MERITS

IF THE TRIBUNAL FINDS THAT IT HAS JURISDICTION OVER THE SUBMITTED CLAIMS:

IV. THE CLAIMANT WAS ACCORDED FAIR AND EQUITABLE TREATMENT

90. The Respondent submits that Atton Borro's investments in Mercuria were accorded fair and equitable treatment (the "FET") and, thus, there was no violation of the M-B BIT.

91. Article 3(2) of the M-B BIT provides that:

Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment.

92. The Tribunal should interpret this clause in accordance with Article 31 of the VCLT where it is stated that:

[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

93. Therefore, the Respondent contends that: (A) the FET standard should be interpreted as referring to the minimum standard of treatment as it found in the customary international law; (B) Claimant's legitimate expectations were not violated; (C) the Claimant was provided with transparency and due process; (D) Mercurian Courts' actions did not amount to the denial of justice; (E) the Respondent did not treat Claimant's investments arbitrarily and discriminatory; (F) the Respondent acted in good faith.

94. Therefore, the FET standard were not breached by the Respondent.

A. The FET Standard Should Be Interpreted as Referring to the Minimum Standard of Treatment as It Found In Customary International Law

95. While Article 3(2) of the M-B BIT does not specify whether the FET standard is broader or stricter than the international standard, a lot of tribunals have found that the

autonomous the FET standard is not materially different from the MST in the customary international law.⁹²

96. Moreover, OECD reported in 1984 that:

According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated.⁹³

97. In *Neer* case, the tribunal held that the treatment of aliens, in order to constitute a breach of the FET standard:

Should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.⁹⁴

98. The present Tribunal should give meaning of the FET clause contained in the M-B BIT as protecting only gross and offensive conduct, as required by the customary international law. Whatever the Tribunal's interpretation of the FET standard, the Respondent accorded Claimant's investment the fair and equitable treatment.

B. Claimant's Legitimate Expectations Were Not Violated

99. Only legitimate or reasonable expectations, which an investor relied upon in making an investment could be protected by the FET standard.⁹⁵ In determining whether expectations were reasonable, the Tribunal must consider all circumstances: the host state's political, socioeconomic, cultural, and historical conditions and the facts

⁹² *Deutsche Bank v Sri Lanka*, ¶ 419; *CMS v Argentine*, ¶ 284; *Saluka v Czech Republic*, ¶ 291; *Azurix v. Argentine*, ¶ 361; *Ocidental I v Ecuador*, ¶ 190; *El Paso v Argentine*, ¶ 336.

⁹³ OECD 1984, p. 12.

⁹⁴ *Neer case*, ¶ 556.

⁹⁵ *Deutsche Bank v Sri Lanka*, ¶ 420; *Saluka v Czech Republic*, ¶ 302; *Biwater v Tanzania*, ¶ 602.

surrounding the investment.⁹⁶

100. Therefore, Respondent asserts that (1) Claimant's legitimate expectations were formed at the time when investments were made; (2) Claimant's expectations are not legitimate and reasonable; (3) the Respondent provided stability to Claimant's investments.

1. Claimant's legitimate expectations were formed at the time when investments were made

101. Prof. Schreuer analyzing the *Techmed* case stated that investor's legitimate expectations are formed at the time of making an investment.⁹⁷

102. Moreover, in the *LG&E* case, the tribunal stated that:

...[T]he investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment.⁹⁸

103. Hence, the Respondent submits that Claimant's legitimate expectations were formed only after concluding the LTA, *i.e.* after May 2004. Therefore, all expectations formed before the concluding of the LTA should not be taken into account by the tribunal.

104. Even if the present Tribunal considers that the legitimate expectations were formed at the time of making the decision to invest, the Respondent insists that the Claimant decided to make an investment only after the invitation to enter into the LTA, *i.e.* in May 2004. The same position was expressed in the case *BG Group Plc v. Republic of Argentina*.⁹⁹ There is no ground to consider that the Claimant would make an investment in the territory of Mercuria if no invitation was made by the NHA since from 1998 no investments were made by Atton Boro.

⁹⁶*Duke v Ecuador*, ¶ 340.

⁹⁷*Schreuer and Kriebaum* p.2.

⁹⁸*LG&E v Argentina*, ¶ 130.

⁹⁹*BG Group v Argentina*,. ¶ 298.

105. Thus, the Respondent points out that Claimant's legitimate expectations were formed not earlier than in May 2004.

2. Claimant's expectations are not legitimate and reasonable

106. The Respondent submits that the Claimant's legitimate expectations were not reasonable. According to the NHA's annual report in 2003:

...[S]ituation i.e. increasing incidence of greyscale among working-age individuals across the country, could spiral into a national crisis within a decade unless aggressive measures were taken to combat it.¹⁰⁰

107. Enacting of the Law No. 8458/09 and granting the license to HG-Pharma were aimed to stop increasing amount of incidents of the greyscale and to prevent national crisis.

108. Therefore, the Claimant expectations of stability were not legitimate and reasonable, since from 2003 Atton Boro had indications that the law would change in case the greyscale would become a national problem.¹⁰¹ Hence, the Claimant should have expected that in the case of emergency, Mercuria will take any measures to prevent national crisis and its consequences.

109. The tribunal in *Saluka* stated that only expectations that "rise to the level of legitimacy and reasonableness in light of the circumstances" are protected under the FET standard.¹⁰²

110. Mercuria did not create legitimate expectations asserted by the Claimant. Legitimate expectations may arise only if a host state guarantee something, for instance, in form of representation.¹⁰³ However, such representations should be made specifically to this

¹⁰⁰ FDI Moot Court 2017, Statement of Uncontested Facts ¶ 6.

¹⁰¹ *Duke v Ecuador*, ¶ 350.

¹⁰² *Saluka v Czech Republic*, ¶ 394.

¹⁰³ *LG&E v Argentine*, ¶ 133.

investor.¹⁰⁴ In the case at hand, there were no representations made by Mercuria to the Claimant.

111. The Claimant's argument that the LTA is a form of representation should be ignored by the Tribunal. Firstly, it was concluded between the Claimant and the NHA which does not represent the Republic of Mercuria and which acted on its own behalf. Secondly, the LTA is a purely commercial contract and could not be assessed by the Tribunal as representation.

112. Hence, there were no any specific representations made by the Respondent to the Claimant and all legitimate expectations submitted by the Claimant should not be considered by the Tribunal.

3.The Respondent provided stability to Claimant's investments

113. Stability, consistency and predictability of the legal framework of the host State are usually expected by a foreign investor.¹⁰⁵ Therefore, the FET can be described as an essential link between investments and legal stability.¹⁰⁶

114. However, stability does not guarantee that a legal environment of a host State would not be altered in any extent.¹⁰⁷

115. The requirement of stability presumes that a legal environment will not be changed continuously and endlessly.¹⁰⁸

116. Moreover, the tribunal in the *Saluka* case stated that:

¹⁰⁴*Continental v Argentine*, ¶ 8.

¹⁰⁵*LG&E v Argentine*, ¶ 124; *Ocidental I v Ecuador*, ¶¶ 183, 19.

¹⁰⁶Dolzer, p.23.

¹⁰⁷*Continental v Argentine*, ¶ 258; *Enron v Argentine*, ¶ 261.

¹⁰⁸*PSEG v Turkey*, ¶ 254.

no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.¹⁰⁹

117. It was also noted that by assessing whether claimant's expectations were violated:

[T]he host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration.¹¹⁰

118. In the *Parkerings* case the tribunal came to the similar conclusion:

[A]ny businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.¹¹¹

119. The license which was granted to HG-Pharma is permanent, and has a time limit, *i.e.* “until greyscale was no longer a threat to public health in Mercuria”¹¹². Moreover, this license does not prevent Atton Boro from selling Sanior and the Claimant has an opportunity to reduce the cost of its production and decrease the price of it.

120. The enacting of the Law No. 8458/09 does not interfere with requirements of stability as well. It does not change the Patent law of Mercuria dramatically and only introduces the availability of the compulsory license with strict requirements. Moreover, this law does not prevent the patent owner from the selling the patented product.

121. Furthermore, by enacting the Law No. 8458/09, Mercuria fulfilled its international obligation under Article 1 of the TRIPS Agreement to give an effect to the provisions of this Agreement. By this act Mercuria introduced the right to granting compulsory

¹⁰⁹ *Saluka v Czech Republic*, ¶ 305.

¹¹⁰ *Saluka v Czech Republic*, ¶ 305.

¹¹¹ *Parkerings v Lithuania* ¶ 332.

¹¹² FDI Moot Court 2017, Statement of Uncontested Facts , ¶ 21.

license, established in Article 31 of the TRIPS Agreement.

122. Moreover, Mercuria is not a least developed country. Therefore, changes in law are regular.
123. Therefore, the legal and business framework in Mercuria has been stable, consistent and predictable. Hence, the Respondent did not violate requirement of stability under the FET standard.

C. The Claimant Was Provided with Transparency and Due Process

124. There is no violation of the FET standard if the actions of the authority are complied with the law.¹¹³ In enacting the Law No. 8458/09 Mercuria has followed TRIPS provisions that stipulate the opportunity to grant a non-voluntary license. Moreover, the Law No. 8458/09 is not personified and covers not only Valtervite patents. Therefore, it was impossible to consult with all investors who can be affected by this law.
125. As to the granting the license to HG-Pharma, the Respondent also fulfilled its obligations to provide transparency as required by the FET standard under the M-B BIT.
126. Firstly, Atton Boro was impleaded as a party before the High Court of Mercuria when the compulsory license was granted to HG-Pharma to manufacture Sanior.¹¹⁴ Moreover, Mercurian law provides opportunity to question the validity of the compulsory license.¹¹⁵
127. Hence, the Respondent provided transparency and due process to the Claimant when

¹¹³*Lauder v Czech Republic*, ¶ 297.

¹¹⁴ FDI Moot Court 2017, Procedural Order No 3, p.50.

¹¹⁵ FDI Moot Court 2017, Procedural Order No 3, p.50.

the license to HG-Pharma was granted and when the Law No. 8458/09 was enacted.

D. The Respondent Did Not Treat Claimant's Investments Arbitrarily and Discriminatory

128. The term arbitrariness was defined in the *ELSI* case as:

a wilful [sic] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.¹¹⁶

129. Arbitral practice have cited Black's Law Dictionary definition of arbitrary:

depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact.¹¹⁷

130. None of Respondent's actions fit to these interpretations of arbitrariness. In the *LG&E* case arbitrary measures were described as those taken "without engaging in a rational decision-making process."¹¹⁸ Non-granting the licence to HG-Pharma and enacting of the Law No. 8458/09 falls within the definition provided in *LG&E* case. Namely, according to the NHA annual report 2006,

...[T]he estimated maximum number of cases has increased drastically from 216,900 persons in 2003, to 578,390 persons in 2006 and it would cost 1 billion USD or 500% of the greyscale program budget, to provide drugs for a single year of 1365 FDC just to the poorest 100,000.¹¹⁹

¹¹⁶*ELSI case*, ¶ 128.

¹¹⁷*CMS v Argentine*, ¶ 291; *Lauder v Czech Republic*, ¶221; *Ocidental I v Ecuador*, ¶ 162.

¹¹⁸*LG&E v Argentine*, ¶ 158.

¹¹⁹ FDI Moot Court 2017, p.43.

131. Furthermore, granting the license to HG-Pharma saves 1.2 billions USD annually.¹²⁰ Thus, by enacting the law No. 8458/09 and granting the license to HG-Pharma, Mercuria acted rationally, *i.e.* there is a rational relationship between the objective and the measure which is used for implementation.

132. The UNCTAD FET stated that:

Establishing some rational relationship to the alleged objective of a measure should be sufficient for a measure to be considered non-arbitrary.¹²¹

133. Moreover, in the *Enron* case the tribunal stated that:

The measures adopted...were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis.¹²²

134. In the present case, the Respondent enacted the Law No. 8458/09 to prevent a national crisis, since annual report concerned the increasing amount of grayscale incidents and potential consequences of it which was published officially. Therefore, it was available for all investors including the Claimant.¹²³ There were no any possible measures that could be taken by Mercuria to prevent the crisis. Likewise, the only alternative way to solve this problem was to increase the greyscale program budget, although in its turn it could lead to increasing the taxes and to another possible crisis.

135. Hence, Respondent's actions were not founded on prejudice or preference and were engaged in a rational decision- making process. Consequently, the Respondent acted

¹²⁰ FDI Moot Court 2017, p.43.

¹²¹ UNCTAD FET, p. 78.

¹²² *Enron v Argentine*, ¶ 281.

¹²³ FDI Moot Court 2017, Statement of Uncontested Facts , ¶15.

not arbitrary.

136. To prove discrimination, the Claimant has to show capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors.¹²⁴ In the case at hand, neither the enactment of the law No. 8458/09 non-granting the license to HG-Pharma discriminated against Claimant's investments since the Law was not personified. Likewise, there was no precedent of granting a non-voluntary license except HG-Pharma. Therefore, comparing different conducts of court to other investors is impossible.
137. Hence, all actions taken by Mercurian Courts were reasonable and non-discriminatory. Therefore, Claimant's investments were treated in accordance with the FET Standard.

E. There Was No Denial of Justice on Behalf of The Mercurian Courts

138. The Respondent does not dispute that the courts are "part of the State", i.e., an organ of the State in the meaning of Article 4 of the ILC Articles¹²⁵:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State

An organ includes any person or entity which has that status in accordance with the internal law of the State¹²⁶.

139. Mercuria insists that there was no violation of the Article 3 of the M-B BIT and New York Convention since (1) the delay in justice was fully justified; (2) even if the delay was undue, it is not considered as the denial of justice; (3) the New York Convention was not violated.

1. The delay in justice was fully justified

¹²⁴ *Sempra v Argentina*, ¶ 319; *Enron v Argentine*, ¶ 282.

¹²⁵ *Saipem v Bangladesh*, ¶ 190.

¹²⁶ Article 4, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.

140. There are no criteria for determining the frameworks of the proceedings. It depends on the facts of the case and requires a case-by-case analysis.¹²⁷ Assessing the delay is to be based on the time frame between the date of the filing of the complaint and the moment the judgment becomes final.¹²⁸
141. The present case is similar to the *El Oro Mining and Railway Company v. United Mexican States* where the delay in proceeding for nine years was recognized as “undue delay” since there was no any sign or word that the claim was being dealt¹²⁹. However, in the case at hand, under the timeline of the proceeding the Claimant was informed about any actions taken by Court.
142. In the *Interhandel* case despite the delay for ten years in the provision of remedy the court did not hold that there had been any “undueness”.¹³⁰
143. In order to establish the ‘undueness’¹³¹, the Respondent points out that the facts of the case should be considered by the Tribunal.
144. As for the Mercuria Court, all the delays were necessary for the Court and participants of the judicial to make submissions, to file the response to it.
145. Moreover, some part of the delay was caused by the legislative changes in Mercuria concerning the judicial system.¹³² That were necessary for unloading the courts. It is known that Mercuria is developing country with not completely formed judicial system and population of 67 million people. Doubtless that it leads to the full congestion of Courts.
146. Hence, such measures cannot be determined as unreasonable for delay.

2. Even if the delay was undue, it is not considered as the denial of justice

¹²⁷ Amerasinghe, p. 210-12.

¹²⁸ *Golder v. U.K.*, ¶ 47 (iv).

¹²⁹ *El Oro v UMS*. ¶ 9.

¹³⁰ *Switzerland v USA*. 6, 26-9.

¹³¹ Demikrol, p.70.

¹³² FDI Moot Court 2017, Statement of Uncontested Facts .

147. Mercuria is the party to the New York Convention, so it may guarantee that it will:

[R]ecognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.¹³³

148. Denial of justice means improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.¹³⁴

149. The tribunal in *White v India* held that there was ‘undue delay’, but it did not amount to a denial of justice, even despite of nine years delay.¹³⁵

150. The Respondent points out that there was no final decision of a court not to enforce the award. Hence, as it was held by the *White* tribunal the lack of final decision may not be considered as the denial of justice.

151. Moreover, there are some various factors which help to identify whether a delay of justice amount to a denial of justice, that were disclosed in *White v India case*.¹³⁶

152. The first criteria is a ‘‘Significance of Issue’’. In the case at hand, it is evidently that the problem concerning the treatment for greyscale patients is doubtless important due to the increasing number of sick people in Mercuria that could lead to the national crisis.

Next factor is a ‘‘Need of a swift resolution’’. Considering this question it is necessary to divide criminal proceeding and purely commercial matters. The Respondent affirms that criminal proceedings need the swift resolution for observance of human rights. It does not mean that commercial matters do not have to be resolved, it only indicates to the lack of necessity of the swift resolution of the dispute¹³⁷.

¹³³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Article 3.

¹³⁴ Weiler, p.672.

¹³⁵ *White v. India*, ¶ 11.4.19.

¹³⁶ *White v India*.

¹³⁷ *White v India* ¶ 10.4.14.

153. Following requirement is “Behaviour of the courts ”. It is relevant to emphasize that Mercuria is developing country with overstretched judicial system and popularity more 68 million.
154. In *El oro Mining v UK*¹³⁸ case the court stated that: the amount of work incumbent on the Court and the multitude of law suits with which they are confronted, may explain, but not excuse, the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion cannot be other than the judicial machinery is defective.” In present case the Respondent argues that the delay was due to the changes in law regarding judicial system. These changes were very important for unloading the courts.
155. Therefore, in the light of the above factors, it is possible to conclude that, though the length of the process was more than 8 years, this delay did not reach the stage of constituting the denial of justice. This statement was confirmed by the *White v Australia* tribunal¹³⁹.
156. Thus, since there are no evidences of the denial of justice by the Mercurian Courts, THE Respondent affirms that there was no violation of Article 3 of the M-B BIT.

3. New York Convention was not violated

157. According to the New York Convention, the Respondent as the part of it must provide enforcement of arbitral awards with uniform standard¹⁴⁰.

The New York Convention contains the provisions concerning fair opportunity to be heard, including: (1) inability to present one’s case and (2) improper notice of an arbitrator’s appointment or arbitration proceeding¹⁴¹.

158. The second term of this provision was fully satisfied. Noting that fact that this provision consists only whether a party received notice and ability to present a case. It is important to note, however, that the provision only considers whether a party

¹³⁸ *El Oro v UMS*.

¹³⁹ *White v India* ¶ 10.4.23.

¹⁴⁰ Choi, p. 175.

¹⁴¹ New York Convention, supra note 24, art. V(1)(b).

received notice and was able to present its case rather than the law of the procedural due process¹⁴².

159. Under the arbitral practice and doctrine there are few terms of the “inability of presentation the case”. The first one appears when the opposite party is not present either by choice or by the lack of notice. In *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.* the opposite party refused to appear due to their own interpretation of merits¹⁴³. Not allowing to present evidence in the process is the second circumstance. The third term of violation is arising if the arbitration panel did not allow the party opposing enforcement an opportunity to object to the arbitration panel’s procedural rulings¹⁴⁴.
160. There were not such situations in our case, so it appears that there was not violation of the fair opportunity to be heard. New York Convention contains other defenses like: validity of the arbitration agreement (even if the underlying contract is invalid), the matters under the arbitration agreement should be only covered by the arbitral award and the arbitral award must be binding before the enforcement and the arbitration panel should be composed according to the arbitration agreement, the panel should use the proper procedure during the arbitration proceedings and last, the arbitration panel should be composed according to the arbitration agreement, and the panel should use the proper procedure during the arbitration proceedings.
161. Consequently, there is nothing according procedure of enforcement namely the length of process.
162. According to the facts that were presented above it is possible to conclude that there was not violation of the New York Convention.

E. The Respondent acted in good faith

163. The *Sempra* case states that good faith is “a guiding beacon... to the obligation” which lies “at the heart of the concept of fair and equitable treatment”¹⁴⁵. Moreover, in the

¹⁴². Strounnikov, pp.465, 489.

¹⁴³*Biotronik v. Medford*, ¶¶ 133, 140.

¹⁴⁴ *ISE v. Bidas*, ¶¶ 172, 180.

¹⁴⁵*Sempra v Argentina*, ¶¶ 297-298.

Eureka case, the good faith was described as a duty to act reasonable and not arbitrary for reasons of domestic politics.¹⁴⁶ Therefore, as none of the FET requirements were breached by the Respondent, there is no possibility to prove that Mercuria acted in bad faith.

164. Another view was taken in the *Loewen* case, where the tribunal stated that neither bad faith nor malicious intention are essential elements of unfair and inequitable treatment.¹⁴⁷

165. Hence by assessing these two different approaches to the good faith principle, the Respondent submits that he acted in good faith, and the FET Standard was not violated.

Due to the fact that all the acts of Mercuria were aimed to avoid national crisis and to protect its citizens from death. Moreover, the Law No. 8458/09 was enacted in order to make Sanior affordable to all patients. Furthermore, Mercuria granted the license to HG-Pharma to provide population with accessible treatment as soon as possible.

¹⁴⁶*Eureka v. Poland*, ¶ 233.

¹⁴⁷*Loewen v USA*, ¶ 132.

PRAYER FOR RELIEF

The Respondent respectfully requests this Tribunal to find that:

- (1) The Tribunal has no jurisdiction over this claim in relation to the Award;
- (2) Article 2 of the M-B BIT can be invoked in this dispute;
- (3) The Respondent has not violated the fair and equitable treatment standard by granting license and the enactment of Law No. 8458/09;
- (4) The Respondent is not liable under Article 3 of the M-B BIT for the conduct of its judiciary in relation to the enforcement proceedings;
- (5) By termination of the Long-Term Agreement the Respondent has not violated Article 3(3) of the M-B BIT.