TEAM XUE

PERMANENT COURT OF ARBITRATION

ATTON BORO LIMITED
Claimant

v.

REPUBLIC OF MERCURIA
Respondent

MEMORIAL FOR RESPONDENT

Case No. 2016-74

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INDEX OF ABBREVIATIONS

AFAS	ASEAN Framework Agreement on Services
ARA	Answer to Request for Arbitration
Art.	Article
ASEAN	Association of South-East Asian Nations
Award	The arbitral award obtained by Claimant against Respondent on 10 June 2008
BIT	Bilateral Investment Treaty
DOB	Denial of Benefits
Doha Declaration	Declaration on the TRIPS Agreement And Public Health
e. g.	exempli gratia (for example)
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that is)

Infra	Below
IP	Intellectual Property
IPR	Intellectual Property Rights
LTA	Long-Term Agreement
MFN Clause	Most Favoured-Nation Clause
NHA	National Health Authority of Mercuria
p., pp.	page, pages
para., paras.	paragraph, paragraphs
Parties	Claimant and Respondent
PO	Procedural Order
PCA Rules	Permanent Court of Arbitration Rules 2012
SoF	Set of uncontested facts established by this Tribunal in Procedural Order 1

UNCITRAL	United Nation Commission on International Trade Law
USD	United State dollar
Vol.	Volume
v.	Versus

INDEX OF AUTHORITIES

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Baumgartner	Baumgartner Jorun, *Treaty shopping in international investment law*, Oxford 2016	Paras. 29, 85
Boed	Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, Yale Human Rights and Development Journal: Volume 3, Iss. 1, Article 1, 2000	Para. 210
Crawford	Crawford James, *The International Law Commission's Articles on State Responsibility. Introduction, text and commentaries*, Cambridge 2002	Paras. 151, 152, 161, 164
Crook	John R. Crook, *Review on Denial of Justice in International Law by Jan Paulsson,* The American Journal of International Law, Vol. 100, No. 3 (Jul., 2006), pp. 742-746	Para. 134

Dolzer/Schreuer	Dolzer Rudolf, Schreuer Christopher, *Principles of International Investment Law*, Oxford University Press, 2012	Paras. 29, 77
Douglas	Douglas Zachary, *The international law of investment claims*, Cambridge University Press, 2009	Para. 29
Harb	Harb Jean-Pierre, *Definition Of Investments Protected By International Treaties: An On-Going Hot Debate*, International Arbitration Report, August 2011	Paras. 33, 36
Harvard Draft Convention	L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 American Journal on International Law 545, 553 (1961)	Para. 198
Naniwadekar	Naniwadekar Mihir, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?,* Trade, Law and Development, Vol 2, No 1 (2010)	Para. 175
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	Wolters Kulwer, 2009	
Peterson	Peterson Luke, *Singapore judges sees investors as clearing temporal jurisdiction hurdle in fight with Lesotho [...]*, Investment Arbitration Reporter, Aug 17, 2017	Para. 46
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Thorn/Doucleff,	Rachel Thorn and Jennifer Doucleff *Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"'* , in Michael Waibel , Asha Kaushal , et al. (eds), The Backlash against Investment Arbitration, Kluwer Law International 2010	Para 100
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	Investment Agreements II , New York and Geneva, 2012	
Vandevolde	Vandevolde Kenneth, *Bilateral Investment Treaty: History, Policy and Interpretation* Oxford 2010	Para 47

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ATA v. Jordan	*ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan,* ICSID Case No. ARB/08/2 Award, 21 October 2015	**Paras. 46, 54**
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Chevron v. Ecuador	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador,* UNCITRAL PCA Case No.2009-23 Final Award, 31 August 2011	**Para. 32**

CMS v. Argentina	*CMS Gas Transmission Company v. The Republic of Argentina*, *Case No. ARB/01/8* *Award,* *12 May 2005*	**Para. 119, 175, 176**
Duke Energy v. Ecuador / Duke Award	*Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award, 18 August 2008	**Para. 108**
El Paso v. Argentine	*El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011	**Paras. 170, 173, 175**
Gami v. Mexico	*Gami Investments, Inc. v. The Government of the United Mexican States,* *UNCITRAL,* *Final Award,* *15 November 2004*	**Para. 113**
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Hamester v. Ghana	*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ISCID ARB/07/24 Award, 18 June 2010	**Para. 161**
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Almas v. Poland	*Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No 2015-13 Award, 27 June 2016	**Para. 153**

LG&E Award	*LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, *ICSID Case No. ARB/02/1,* *Award,* *25 July 2007*	**Para. 114**
Micula v. Romania / Micula Award / Micula Case	*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania,* *ICSID Case No. ARB/05/20,* *Final Award,* *11 December 2013*	**Paras. 109, 110, 113, 114, 119**
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Mytilineous v. Servia	*Mytilineous Holdings SA v. Serbia and Montenegro,* *Partial Award on Jurisdiction,* *8 September 2006*	**Para. 33**
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Parkerings v. Lithuania	*Parkerings-Compagniet AS v. Republic of Lithuania,* *ICSID Arbitration Case No. ARB/05/8,* *Award,* *11 September 2007*	**Para. 109**
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Romak v. Uzbekistan	*Romak S.A. v. The Republic of Uzbekistan,* *PCA Case No. AA280* *Award,* *26 November 2009*	**Paras. 28, 30, 33, 36**
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Salini v. Jordan	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan,* *ICSID Case No. ARB/02/13* *Award,* *31 January 2006*	**Para. 170**
SGS v. Pakistan	*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* *ICSID Case No. ARB/01/13* *Decision of the Tribunal on Objections to Jurisdiction,* *6 August 2003*	**Paras. 174, 177**
Telenor v. Hungary	*Telenor Mobile Communications A.S. v. The Republic of Hungary,* *ICSID Case No. ARB/04/15,* *Award,* *13 September 2006*	**Paras. 190, 191**
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White Industries v. India / White Industries	*White Industries Australia Limited v. The Republic of India,* *UNCITRAL,* *Final Award,* *30 November 2011*	**Paras. 131, 133, 136, 141**

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ABBREVATION	FULL CITATION	REFERENCE
Doha Declaration	Declaration on the TRIPS agreement and public health, Doha WTO Ministerial 2001: TRIPS WT/MIN(01)/DEC/2 20 November 2001	Para. 126
TRIPS Agreement, TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement establishing the World Trade Organization, 1 January 1995	Para. 195, 196
VCLT	Vienna Convention on Law of Treaties (with annex), No. 18232, Vienna 23 May 1969	Paras. 84, 100

STATEMENT OF FACTS

1. **Atton Boro Limited ("Claimant")** is a subsidiary of Atton Boro Group, located in Basheera.
2. **Republic of Mercuria ("Respondent")** is a state against which Claimant brought its claims.
3. **11 January 1998** - The Republic of Mercuria and The Kingdom of Basheera concluded an Agreement for the Promotion and Reciprocal Protection of Investments **("BIT")**.
4. **May 2004** – NHA wrote an invitation to Claimant to make an offer for supplying its greyscale-treatment drug.
5. **25 November 2004** - CLAIMANT and the National Health Authority **("NHA")** entered into the Long Term Agreement **("LTA")**. Under the contract, CLAIMANT was obliged to deliver its drug – Sanior, to NHA and NHA agreed to periodically purchase at least a minimum amount. The LTA included an arbitration clause for resolving disputes.
6. **2005** – NHA started a distribution of Sanior in Respondent's state.
7. **2006** – Health crisis in Respondent's state related to greyscale started to build up.
8. **10 June 2008** – NHA exercised its contractual right and terminated LTA.
9. **2008** - CLAIMANT invoked arbitration under LTA.
10. **20 January 2009** - The Award in the proceedings under LTA was rendered against the NHA. In the Award the NHA was ordered to pay 40,000,000 USD in damages for the breach of LTA.
11. **3 March 2009** – Claimant filed for enforcement proceedings before the High Court of Respondent.
12. **16 March 2009 – 30 October 2016** – The absence of NHA representatives and several notions made by both parties caused for a delay in the enforcement proceedings. As a result of these actions, the proceedings are still pending.
13. **10 January 2012** – The Parliament of Respondent passed the Commercial Courts Act which created special benches of the High Court. The Act was supposed to lighten the burden of Respondent's judiciary system.
14. **10 October 2009** - The President of Mercuria promulgated Law No. 8458/09, which allowed for use of patented inventions, to protect public health and promote access to medications.

SUMMARY OF ARGUMENT

15. This Tribunal lacks jurisdiction over the claims in relation to Award. This is because Award does not in itself constitute an "investment" in the meaning of BIT In fact, even the "underlying" transaction - LTA - fails to qualify as an investment.
16. Moreover, Claimant is not protected under BIT because this protection has been denied by invocation of denial of benefits clause. This is because RESPONDENT had grounds to exercise denial of benefits, did it properly and such denial had retroactive effect.
17. Respondent did not breach the fair and equitable treatment standard. First, Claimant had no legitimate expectation as to the stability of legal framework. Second, new intellectual property regime is consistent with international law and provides Claimant with international minimum treatment standard. Third, the conduct of judiciary does not amount to a denial of justice.
18. Termination of LTA by Respondent's National Health Authority does not amount to the violation of Article 3(3) BIT. First, NHA's actions cannot be attributed to Respondent. Alternatively, the proper interpretation of Article 3(3) does not allow to cover by its scope LTA which is a purely commercial contract.
19. Actions undertaken by Respondent did not expropriated Claimant's investment. Even if Tribunal finds that expropriation occurred, it was justified by public purpose and appropriately compensated.
20. Alternatively, Respondent cannot be held liable for any breach of BIT as it was acting in execution of BIT Article 12, namely, essential security interest.

ARGUMENT ON JURISDICTION AND ADMISSIBILITY

I. THIS TRIBUNAL HAS NO JURISDICTION OVER THE CLAIMS RELATED TO THE ENFORCEMENT OF THE ARBITRAL AWARD

21. In this arbitration Claimant pursues, among others, the claims relating to Award. The Claimant argues that Respondent is liable for violations of the Mercuria-Basheera BIT, including failure to accord fair and equitable treatment to Claimant and to observe its obligation towards Claimant's investment, because Respondent reportedly failed to ensure the judicial protection by delaying the enforcement of Award.

22. However, this Tribunal lacks jurisdiction over such claims.

23. For purposes of the Tribunal's jurisdiction, the proper law to be applied is the Mercuria-Basheera BIT itself interpreted in the light of general principles of international law. Such an interpretation should take place in accordance with the ordinary meaning of the terms of the treaty in its context and in the light of its object and purpose, as required by a general rule of interpretation from Article 31(1) VCLT, which has been signed by both Mercuria and Basheera.

24. The jurisdiction of this Tribunal is limited to matters falling within the scope of the dispute resolution clause contained in Article 8 BIT. According to this provision, the Tribunal has jurisdiction over "*any dispute between an investor of One Contracting Party and the other Contracting Party arising out of or in relation to the Agreement* [BIT] *or the existence, interpretation, application, breach, termination, or invalidity thereof*". Naturally, for any dispute to arise out of BIT, it must be related to an investment protected under BIT. Otherwise, the jurisdiction of this Tribunal would be dismissed.

25. The claims that Claimant seeks in this arbitration with regard to Award do not constitute such an investment protected under BIT on the following, independent grounds. First, Award does not in itself constitute an "investment" in the meaning of BIT (**A**). Second, a dispute referring to the enforcement of Award is separate and distinct from an "underlying" dispute, that is, LTA. Thus, Award does not constitute an "investment" under the "whole business operation" test (**B**). Third, even if this Tribunal decides to examine the "underlying" transaction - LTA - it still fails to qualify as an investment (**C**).

A. Award does not in itself constitute an "investment" in the meaning of BIT

26. Claimant alleges that he is an "investor" in the territory of Respondent[1] with the "investment" in the form of Award as defined in Article 1 BIT. This allegation is unfounded.

27. Article 1(1) BIT defines an "investment" as "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" which, in particular, may include: "…(c) claims to money, and claims to performance under contract having a financial value".

28. The Respondent does not contest that Award constitutes an "asset" that falls within the exemplary categories of investments listed in Article 1(1) BIT. However, those categories should not be applied mechanically. The mere existence of a "claim to money" held by Claimant does not imply that it constitutes an "investment"[2].

29. It is generally accepted in international arbitration law that the term "investment" does have an objective meaning in itself, independent of the categories enumerated in the relevant provision of the Treaty[3]. Recent tribunals have understood this objective meaning to require the contribution that extends over a certain period of time and that involves some risk.[4] It is only logical that the use of the term "investment" imports the same basic economic attributes of an investment derived from the ordinary meaning of that term[5]. What is more, legal terminology is required to be read with economic terminology of investment,[6] which also contains the elements of transfer of funds, longer term project, the purpose of regular income, business risk, participation of the investor[7].

30. In *Romak v. Uzbekistan*, the claimant initiated investment arbitration after the respondent failed to enforce a commercial arbitral award in favour of the claimant. The Tribunal – before it eventually ruled that there was no "investment" made by the claimant - held that:

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1 Notice of arbitration, p. 3.
2 *Romak S.A. v. The Republic of Uzbekistan,* paras. 197-204.
3 *Saba Fakes v. Turkey*, *GEA Group v. Ukraine*, *Alps Finance v. Slovak Republic, Romak v. Uzbekistan.*
4 Baumgartner, title 5.3.
5 Douglas, p. 165.
6 Douglas, p. 163.
7 Dolzer/Schreuer. p. 60.

> *"if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment."*[8]

31. Additionally, it held that a different approach would extend the arbitral tribunal's jurisdiction to the extraordinary scope. This is because:

> *"the mechanical application of the categories found in Article 1(2) would create, de facto, a new instance of review of State court decisions concerning the enforcement of arbitral awards".*

32. Additionally, in GEA Group v. Ukraine[9] the Tribunal decided that the arbitral award – *in and of itself* – cannot constitute an "investment" for the purposes of the investment treaty. On the contrary, it is just a *"legal instrument, which provides for the disposition of rights and obligations arising out of the [...] Agreement"*[10].

33. The pertinent elements of an "investment" have been defined in the so-called *Salini* test. Thought it has been originally developed in arbitration under the ICSID Convention - to which Mercuria and Basheera are not parties - it was later widely accepted even by non-ICSID tribunals[11]. The necessity to take this inherent meaning into account is therefore irrespective of the application of the ICSID Convention. Additionally, it is commonly agreed that there should not be dual standards of interpretation depending on whether or not the arbitration is conducted under the ICSID Convention[12].

34. According to the test, there are four independent characteristics that an "asset" must have, so as to qualify as an "investment" in accordance with the inherent meaning of that term. Those are:

- a contribution of money or other assets of economic value;

- a certain duration over which the project is implemented (minimum 2-5 years);

- sharing of operational risks;

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8 *Romak S.A. v. The Republic of Uzbekistan,* para. 186

9 ICSID Case No. ARB/08/16.

10 *Saipem v. Bangladesh, Mondev, Chevron*, and *Frontier Petroleum Services*.

11 *Quiborax v. Bolivia*, para. 215.; *Mytilineous Holdings SA v. Serbia and Montenegro*, *Societe Generale v. Dominican Republic*, *Romak SA v. Uzbekistan*

12 Harb

- contribution to the host state's development.

35. As regard the third condition, normal commercial risk is not sufficient: the mere non performance of the contractual obligations by the other contracting party is inherent to any commercial transaction and therefore it does not justify its recognition as an investment[13].
36. The Respondent admits that contracting states can create in bilateral investment treaties their own definition of "an investment". Such a definition could exceed or modify this "ordinary meaning" of the term[14]. However, in such cases, the wording of the treaty must leave no room for doubt that the intention of the contracting states was to accord to the term "investment" an extraordinary and counterintuitive meaning[15]. The wording of BIT is clear, unequivocal and does not permit such interpretation.
37. In the present case, the alleged "investment" in the form of Award fails to meet the requirements stemming from the inherent meaning of this term and the Salini test.
38. First, Award fails to fall within a very wide definition of a "contribution". The Reef tribunal's decision in favor of Claimant – in itself - did not require him to engage any sum of money or any asset that could possibly be considered a contribution.
39. It cannot be reasonably presumed that Claimant when setting up a business in the territory of Respondent did not intend to "invest" in Mercuria by enforcing a potential arbitral award. Similarly, he also must be presumed not to involve such a kind of asset in his business plan as he could not even have foreseen, that Award would ever be passed. Potential verdicts of the commercial arbitration tribunals delivered in connection with the nonperformance of commercial contract is just a very incidental issue of Claimant's business activity. Those verdicts do not constitute the "investments" themselves. The fact, that Reef's tribunal decided in favor of Claimant has been completely outside Claimant's control. Therefore, the assumption that Claimant decided to contribute his assets in reliance to Award is misguided.
40. Second, the Award itself does not involve a contribution that covers a certain, significant duration. It is nothing but a result of a single decision passed by the tribunal seated in Reef

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13 Harb
14 *Romak S.A. (Switzerland) v . The Republic of Uzbekistan*
15 *Romak S.A. (Switzerland) v . The Republic of Uzbekistan*

on 20 January 2009. The Award understood in such a way does not last over a minimum period of time required by the inherent meaning of the term "investment".

41. Third, the Award itself does not entail any kind of economic risk. The only risk that Claimant bears in regard to the enforcement of Award is that the sum of money would not be paid by Respondent. This kind of risk, however, is not the typical transactional risk connected with international investments.

42. The Claimant is a company that was set up to manufacture and sale pharmaceutical products. It occupies with the sales of pharmaceutical products and makes profits from those sales. Its business risk is inseparably connected with the trading and distribution of medicines and other pharmaceutical products. The risk of non-enforcement of commercial tribunal's decisions is not even closely connected with Claimant's potential business activity.

43. Fourth, Award does not contribute to Mercuria's development in any way. On the contrary, if the state rooted in a serious health and financial crisis is obliged to pay such a large amount of money, it may have a negative influence on this state's development. Consequently, such Award rather slows down Respondent's development than contributes to it.

44. Consequently, according to the wording of BIT interpreted in the light of an inherent meaning of the term "investment", the definition on an "investment" is not fulfilled by Claimant's Award. Thus, this Tribunal lacks jurisdiction over claims related to Award.

B. The dispute regarding the enforcement of Award is separate from an "underlying" dispute (LTA)

45. The Claimant presumed that his Award should be considered a part of the entirety of his investments made in the territory of Mercuria, namely, LTA concluded between Claimant and National Health Authority. Those claims appears to be unfounded. This is because the dispute regarding Award is separate from the underlying LTA.

46. A dispute submitted to arbitration is separate and distinct from an underlying transaction if:[16]

- the disputes involve different factual or legal disagreements,

[16] Peterson; *ATA v. Jordan.*

- they have different “real causes”,

- they target or centre on different conduct.

47. This standard has to be met even if within the definition of the investment included in the relevant treaty, it is stated that the change of the form of the investment does not affect its character of an investment. This is because such an exception pertains to "*changes of form* " of the investment, such as a change in the organizational form or in the corporate structure of an investment[17]. It does not encompass arbitral awards rendered in course of commercial disputes[18].

48. Award and LTA fails to meet the discussed standard and cannot be considered a part of the whole business operation - LTA.

49. *First*, the dispute referring to the enforcement of Award can be resolved without needing to resolve the original dispute over the termination of LTA. Award lives its own life and can be separately enforced. Additionally, it would still exist even if the overall investment would come to an end. Award is not inseparable from LTA, as the original Agreement would still exist without the Reef’s tribunal decision in favour of Claimant. Namely, there are two different legal disputes – one related to the failure to enforce Award and the other related to the termination of LTA. Those two disputes are independent and separable.

50. *Second,* not only there are two separable disputes, but also two different factual basis from which those disputes resulted. The dispute over Award resulted from the delay in enforcement proceedings in Respondent’s courts, while the dispute over LTA from the premature termination of a purchase-sale contract.

51. *Third,* LTA and Award refer to two entirely different conducts made by entirely different entities. The first one refers to actions taken by Mercuria’s NHA acting as a party to the supply contract for Sanior, while the second refers to Mercuria’s courts’ failure to enforce the commercial arbitration award.

52. In light of the above, the Award does not meet the standard to be considered a part of the whole business operation. This is not changed by the fact, that BIT provides in the definition of the investment that “*any change in the form of an investment does not affect its*

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17 Vandevolde, p. 132.

18 *GEA v. Ukraine*, Para. 162.

character as an investment".[19] The exception in this clause cannot be applied to Award, as Award is not a „form" of an investment. It is just a commercial award, and so it does not fall within the scope of this exception. As a consequence, this Tribunal lacks jurisdiction over the claims pertaining to Claimant's Award.

C. In any case the "underlying" transaction - LTA - fails to qualify as an investment

53. The Respondent submits that even if the Tribunal decides that Award constitutes a part of a "whole business operation" of Claimant in the territory of Mercuria, it would still be lacking jurisdiction, as the "underlying" transaction - LTA – also does not qualify as an "investment".

54. The "underlying transaction" test is simple - if the whole business operation was to be considered an investment, the underlying transaction must constitute such an investment. This test was adopted by several arbitral tribunals in the recent years[20]. In Saipem v. Bangladesh the tribunal confirmed that an arbitral award itself was not an investment protected under the investment treaties. However, it held that what had to be asserted was claimant's 'entire or overall operation', not just the award in isolation.[21] Similarly, *Romak tribunal* confirmed that:

> *'[i]f the underlying transaction is not an investment within the meaning of BIT, the mere embodiment or crystallisation of rights arising thereunder in an arbitral award cannot transform it into an investment"*[22].

55. For LTA to constitute an investment under BIT, it has to fall within the definition of an investment included in Article 1(1) BIT. Thus it has to satisfy the same prerequisites which were applied to determine whether Award itself constituted an investment.[23] Therefore, it has to:

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19 BIT, Article 1(1), p. 33.
20 *Frontier Petroleum v Czech Republic, CSOB v. Slovakia, ATA v. Jordan.*
21 Decision On Jurisdiction And Recommendation On Provisional Measures, para. 110.
22 Para. 211.
23 Para. 13.

a) involve a contribution of money or other assets of economic value;

b) last over a certain duration;

c) involve operational risks;

d) contribute to the host state's development.

56. It must be also noted that supply agreements and one-off sales agreements are not considered protected investments as they do not require any contribution of assets. As expressed in already quoted Romak v. Uzbekistan: "*there is a difference between a contribution […] and a mere transfer of title over goods in exchange for full payment*"[24]. Additionally, any economic activity involves a certain degree of risk and all contracts – including the ones that do not constitute an investment – carry the risk of non-performance. Such risk, however, is purely commercial. If any asset of financial value would be considered an investment, the definition of that term would be limitless.

57. The LTA does not meet the above standard.

58. *First,* in the present dispute, Claimant's delivery of medicines was nothing more than a sale of goods for the arranged price, similar to those that have been considered in case law not to constitute investments. The transfer of title over goods – in this case, over a grayscale-treatment drug – does not have any differ from any other commercial contract as far as the contribution of assets is concerned. By its very nature, LTA was just a commercial supply arrangement between the NHA and Claimant. It involved a mere supply of Sanior by Claimant and the payment of an arranged price by the NHA. The Republic of Mercuria neither was a party to this agreement nor is obliged under investment treaties to protect purely purchase-sale contract made in her territory by foreign entities. Thus, with regard to LTA, there was no contribution of assets involved, necessary to consider this contract a protected investment.

59. *Second,* in light of all of the circumstances, Respondent admits that LTA fulfils this only one requirement, as it was originally supposed to last for 10 years.

60. *Third,* since Claimant did not make any contribution in Mercuria, the element of risk is indirectly put into question as well. In fact, the only risk Claimant had with regard to LTA was that the other party would terminate it or refuse to pay the amounts due. However, what is required is an economic risk "in the sense of an uncertainty regarding its successful

[24] Para. 222.

outcome".[25] At the moment of signing LTA Claimant was aware that the termination may occur, as such clause was explicitly involved in the text of the agreement. As a reasonable businessman, he also must have been aware that the other contracting party may fail to fulfil its contractual duties. Thus, there was no operational risk involved.

61. *Fourth,* with respect to the supply of grayscale-treatment drug, this can hardly be considered a contribution to Mercuria's development. Indeed, the Sanior bought by NHA under LTA contributed to improvement of the public health of Mercuria's citizens. However, a contract that has been directed towards the "investor's" profits and did not resulted in the eradication of grayscale in Mercuria, but just in its mere alleviation for a short time, cannot be considered as contributing to the state's development.

62. The above confirms, that – contrary to Claimant's submissions – LTA is not an "investment". Therefore, this Tribunal lacks jurisdiction over the dispute.

63. To conclude, both Claimant's Award and LTA fail to qualify as "investments" within the meaning of the Mercuria-Basheera BIT. In turn, this leaves Claimant without the necessary standing to bring arbitral proceedings relating to the enforcement of Award before this Tribunal.

II. CLAIMANT IS DENIED THE BENEFITS OF THE BIT

64. Claimant is not protected under BIT because this protection has been denied by invocation of denial of benefits clause.

65. First, Respondent was entitled to deny benefits under art. 2 of BIT (A).

66. Second, denial of benefits was exercised timely and properly.(B) and the effect of denial of benefits is retroactive (C).

A. Respondent was entitled to deny benefits under Article 2 of BIT.

67. Under Art. 2 of BIT each contracting party reserves a right to deny the advantages of BIT to a legal entity if following provisions are fulfilled:

- entity is controlled or owned by another entity; and
- citizens or nationals of a third state own or control such entity; and

[25] *Patrick Mitchell v. The Democratic Republic of Congo*, para. 27.

- entity has no substantial business activities in the territory of the Contracting Party in which it is organized.

68. Those prerequisites are fulfilled in this case because:

- Claimant is controlled or at least owned by another entity (**a**); and
- Claimant's parent company is a third-state national (a national of Reef) (**b**); and
- Claimant has no substantial business activity on the Basheera's territory (**c**).

69. For these reasons, Claimant's business activity in the territory of the RESPONDENT is not subject to the provisions for the protection of investments included in BIT.

70. **(a)** Claimant is owned or controlled by another entity

71. Claimant is a legal entity owned by another entity.

72. According to BIT, the first prerequisite for the denial of benefits to be successfully raised by the contracting party is establishing that the entity claiming to be an investor in the meaning of BIT is controlled or at least owned by a different entity. Such a situation occurs if entity is a wholly-owned subsidiary, it is ultimately owned and controlled by its parent company.[26]

73. Claimant is a wholly-owned subsidiary of Atton Boro and Company[27]. This whole-ownership ultimately results in Atton Boro and Company having control over Claimant.

74. In light of the above, Claimant is both owned and controlled by another entity. As a result, the first prerequisite for the denial of benefits is satisfied.

75. **(b)** Claimant's parent company is a third-state national

76. As presented above, claimant is controlled and owned by another party. Moreover, this control and ownership are held by a third state national.

77. According to BIT, the second prerequisite in order to exercise the denial of benefits is the ownership or control of a third state national. A third state national means a national of a different state than the parties to BIT. The applicable test for the nationality is the test of the place of incorporation.[28] Under this test, the nationality of a legal entity is determined by the place of its incorporation. This test is used to determine the nationality of investor in Article 1 (2)(b) of BIT, therefore is coherent with BIT's terminology.

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[26] *Guaracachi and Rurelec v. Bolivia*, paras. 125, 370.
[27] SoF, para. 860.
[28] Dolzer/Schreuer, p. 47

78. In the present case, the application of the above test leads to the conclusion that Claimant is owned and controlled by a third state national - that is not a national of Basheera or Mercuria.

79. Claimant's owner - Atton Boro and Company - was incorporated under the laws of Reef.[29] Thus, the owner of Claimant is a national of Reef, which is a third state national.

80. Thus, the second prerequisite for the denial of benefits is satisfied

81. **(c)** Claimant has no substantial business activity on the Basheera's territory.

82. In addition to the above, also the third prerequisite for the denial of benefits is satisfied. This is because Claimant had no substantial business activity in the territory of Basheera, which is its state of incorporation.

83. Under the third prerequisite, the denial may take place if the entity lacks substantial business activity within a territory of Contracting State Party in which it is organized.

84. There is no definition of substantial business activity in the denial of benefits clause. Therefore to determine its meaning, the context, object and purpose of the provision should be taken into account.[30] The objective of DOB clause is to prevent "treaty shopping" and "nationality planning". Thus, the meaning of substantial business activity shall be interpreted in the way that makes DOB clause it practically enforceable, and in the way that really prevents nationality planning.

85. In various investment treaties, different terminology is used to address the standard of activity in the territory of contracting party.[31] For instance, some investment treaties use terms such as "real economic activities", "effective economic activities", "commercial or business activities".[32] Significance (of business activities) is implicated by the use of the word substantial, whereas sole "commercial or business activities" are regarded as less stringent standard.[33]

86. To conduct substantial business activity means to conduct activity of magnitude greater than sole ownership of offices and holding meetings. [34]

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[29] SoF, para. 845.
[30] VCLT, Article 31(1).
[31] Baumgartner, point 8.2.3.2.2.
[32] Ibidem.
[33] Ibidem.
[34] *Guaracachi and Rurelec v. Bolivia*, paras. 217, 370.

87. Also, one of the factor when analyzing substantiality of business activity is entity's involvement within a group (of companies) it belongs to, in the territory of entity's incorporation. When entity is not involved in principal group's activity on that territory, it is a strong disadvantage as to substantial business activity ascertainment.[35]

88. In the case at hand Claimant's activities barely exceeded sole ownership of offices and holding meetings. Throughout all the time when Claimant was Atton Boro Group's "vehicle for carrying on business" in the region[36] it employed only 2 to 6 employees.[37]

89. Claimant failed to prove its involvement in Atton Boro Group principal activities in the territory of Basheera. Claimant only undertook basic activity(rented out an office space, opened a bank account, hired few employees) and had not conducted actual business in the territory of Basheera whereas Atton Boro Group had established presence on Basheera's pharmaceutical market[38] which is an actual(substantial) business activity.

90. In the light of the above, Claimant is a mere mailbox company and its activities in the territory of Basheera are insubstantial.

91. To sum up, Claimant is owned and controlled by another entity, namely Atton Boro and Company, (A), which is a third-state national entity, namely national of Reef (B), and Claimant has no substantial business activities (C)

B. Respondent has properly invoked denial of benefits clause

92. Respondent has denied Claimant the benefits of BIT. This is because:

- Denial of benefits has been exercised properly and timely (**a**)
- In any case, denial of benefits has retrospective effect (**b**)

93. **(a)** Denial of benefits has been exercised timely

94. Denial of benefits has been exercised properly and timely by Respondent

95. Whenever investment treaty includes a denial of benefits clause, state's consent to arbitration is itself conditional and may be denied, provided that certain requirements are fulfilled.[39] After the signature and final ratification of the investment treaty, a potential investor is fully aware of the possibility of such a denial and should undertake substantial

[35] *Pac Rim Cayman v. El Salvador*, para. 4.71.
[36] SoF, para. 860.
[37] PO 2, para. 1510.
[38] SoF, para. 860.
[39] *Guaracachi and Rurelec v. Bolivia*, para. 372.

activities to avoid it.[40] Therefore, whenever an investor did not fulfill provisions necessary to avoid invocation of denial of benefits, the state is entitled to invoke it.

96. In any case, if there are any limitations as to invoking denial of benefits, it shall be determined interpreted with regard to applicable provisions. If there was no express limitation in the investment treaty, tribunals derive it from applicable provisions (procedural rules)[41].Those provisions, permit to raise denial of benefits in counter-memorial.

97. Claimant was aware of the existence of denial of benefits and did not act in a way that would preclude its invoking. Therefore, Claimant should have assumed that denial of benefits may be invoked towards it. Thus, Respondent's consent to arbitration is only conditional. There is nothing in BIT that imposes time limit as to denial of benefits. If any limit exists, it should be derived from applicable rules which are PCA Rules. (that had been invoked in Submission of the Dispute to Arbitration). Article 23 point 2 of PCA Rules provides that "A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defense"[42].To sum up, given the textual interpretation of BIT, provisions of PCA Rules, and functional interpretation of BIT the denial of benefits has been exercised timely.

98. **(b)** Denial of Benefits does have retroactive effect.

99. Invocation of the denial of benefits had a retroactive effect. This is because such an effect is necessary for the application of this measure.

100. The very purpose of denial of benefits clause is to allow state a possibility of withdrawal of the benefits granted under the investment treaty after those benefits are invoked[43] and it is proper to activate denial at the time when benefits are being claimed.[44] In order to secure the possibility of withdrawing the benefits granted under investment treaty to the investor, the effect of the DOB shall be retroactive. If not so - state would never be practically capable of denying the benefits of the investment treaty, this is because practically a question whether state has a right to deny benefits to investor is most likely to arise in

[40] Ibidem
[41] *Ulysseas v. Ecuador,* para. 172; *Pac Rim Cayman v. El Salvador,* para. 4.85
[42] PCA Rules, Article 23 (2)
[43] *Guaracachi and Rurelec v. Bolivia*, para. 376
[44] Ibidem, paras. 378-379

connection with the dispute.[45] Such an interpretation is in line with the Vienna Convention,[46] different conclusion would make the denial of benefits clause void.

101. In the present case, Respondent's invocation of the denial of benefits to Claimant has a retroactive effect. It was impossible for Respondent to examine the legal situation of every foreign investor and deny Claimant the benefits of BIT before the present dispute arose.

102. Thus, Claimant was denied the benefits of BIT. The invocation of denial of benefits made by Respondent had a retroactive effect.

103. To sum up, Claimant was a mere mailbox company, and thus, Respondent has exercised denial of benefits properly and timely This exercising of denial of benefits had a retroactive effect. As a consequence, Claimant may not pursue its claims under BIT, as its actions are not protected under this treaty.

[45] Thorn/Doucleff, p.9
[46] VCLT, Article 31(1)

ARGUMENT ON MERITS

III. RESPONDENT'S ACTIONS DID NOT VIOLATE THE SUBSTANTIAL PROTECTIONS OF BIT

104. Respondent denies all the arguments made by Claimant with regard to the alleged breach of the fair and equitable treatment clause. Claimant received protection adequate to the guidelines and regulations of BIT and international law. Neither the deprivation of intellectual property nor the denial of justice occurred in given circumstances.
105. The fair and equitable treatment standard cannot be considered as breached by the state's conduct that is reasonable and justified. This is the case when the state's actions are reasonably related to rational policies. Claimant in its allegations lacks any reference to Respondent's domestic crisis that required reasonable changes in public policy.
106. As Respondent will demonstrate below there was no breach of Article 3 of BIT, as first, Claimant had no legitimate expectations as to the stability of legal framework.(1) Second, enactment of Law No. 8458/09 was consistent with international law (2). Third, delays in enforcement proceedings falls outside the threshold for denial of justice (3).

A. Claimant had no legitimate expectations as to the stability of the legal framework

107. Respondent did not violated the fair and equitable treatment standard by introducing Law No. 8458/09 as no legitimate expectations of regulatory stability were created by any action or statement made by Respondent.
108. The Tribunal in Duke Energy v. Ecuador defined the standard for legitimate expectation protection:

> *"the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment [Tecmed, ¶ 154; Occidental, ¶ 185; LG&E, ¶ 127]. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the*

investor and the latter must have relied upon them when deciding to invest [SPP v. Egypt, ¶ 82; LG&E, ¶¶ 127-130; Tecmed, ¶ 154].".[47]

109. Basing on several cases[48] Respondent will analyze the requirements that must be met for a legitimate expectation of regulatory stability to be protected and prove that Claimant fulfilled none of them.

a. There must be a specific promise given by specific representation that law will remain unchanged

b. The decision to invest must be relied on that promise

110. At the same time investors must expect that the legislation may change if there is no stabilization clause or other such assurance[49]. In particular changes of law are expected if the state is faced with extraordinary circumstances, such as an epidemic[50].

111. Which leads to a conclusion that it would be unreasonable for Claimant to believe that legal framework will remain unchanged. What is more, neither the preamble nor the articles of BIT mention any warranty as to the stability of legal framework. If Parties intent would be to secure such expectation they would have included it.

every situation must be measured in accordance to its circumstances and reality, especially when it comes to transparency of actions. The extraordinary circumstances faced by Respondent – expanding epidemic of greyscale – required extraordinary measures. It is a reasonable and rather common practice for state to modify its regulation in order to protect its citizens to overcome an existing crisis. Failure of the negotiations with Claimant, who knew that situation in budgeting and healthcare was difficult, and quickly growing number of infected people, coerced a fast decision-making process what prevented Respondent from providing total transparency of its actions. However, even failure in

[47] Duke Energy v. Equador , p. 93, para 340
[48] Parkerings v. Lithuania, Micula Award
[49] Micula Award
[50] SoF , pp. 28, 29

making full disclosure does not constitute unfair and inequitable treatment.[51]

112. Claimant made its investment while being fully aware of Respondent's domestic issues and could expect that a range of different measures might be undertaken. Therefore, Claimant expectation that IPR regime will not change over time was unreasonable and cannot be considered as legitimate expectation protected under FET standard.

a. There was no specific promise given to Claimant

113. The burden of proof in claims based on the frustration of legitimate expectations lies on Claimant.[52] It has to prove that the state made a specific promise that particular laws will remain unchanged and by doing so created the investor's expectation.[53]

114. Specific promise must be valid under domestic law and given by authorized source[54]. It cannot be freely interpreted by investor but expressed clearly. Promise cannot also be given to general public information. It must be a precise statement made by proper authority addressed directly to an investor at the time of investment.[55]

115. Minister for Health's press statement of 19th January 2004 and note written by President on the social media site cannot be considered as a specific promise, as they do not meet any of the aforementioned requirements. Firstly, a press statement that has an unidentified audience does not meet the standard of conditions offered directly to Claimant. It is neither a rule nor a personally addressed commitment. The Ministry did not mention that the IPR regulations would remain unchanged. Secondly, the representation is insufficient to create reasonable legitimate expectation despite the fact, that Ministry of Health is a member of the government, his scope of duty does not reach the intellectual property regulations. He did not participate in any negotiations with Claimant neither did he engaged into any contact with Claimant's representatives. If the President would have made such a statement it might have created the area for discussion whether it constituted a promise, as he was the one later issuing discussed regulation.

[51] Micula Award, p. 146, para. 533
[52] Micula Award, after Gami v. Mexico p. 166, para. 604
[53] Micula Award, p. 166, para. 604
[54] ibidem, p. 182, para. 669
[55] LG&E Award, Micula Award

116. President's social media post is no different. It would be more than unreasonable to view the statement "*Mercuria will do away with red tape and roll out the red carpet for investors.*"[56] as a promise of regulatory stability. Information regarding Greyscale given by Respondent to the public knowledge is also not sufficient to fulfill the threshold of specific promise.
117. There was also no specific representation that could serve as replacement for specific promise in inducing the legitimate expectation. Both BIT and LTA lack stability clause or reference to stability of legal framework in its preamble, Therefore, any argument based on specific representation is deemed to fail.
118. As result, there was no promise given to Claimant as to the stability of IPR regime and especially patent protections.

b. Claimant's investment was not made as a result of reliance on Mercurian politics' statements

119. Claiming that enactment of Law No. 8458/09 infringed legitimate expectation, Claimant did not prove that regulation existing at the time of investment was a crucial factor inducing its decision to invest in Mercuria and that in absence of this regulation Claimant would not made an investment.[57] Reliance on the specific promise is an obligatory factor in constituting legitimate expectation[58] – in given circumstances Claimant failed to meet the threshold of this requirement.
120. When investing in Mercuria, Claimant had already had the patent for Valtervite for more than 6 years[59]. Its decision to invest was based on a rising demand for FDC what created an opportunity for gaining profit. Claimant entered a commercial contract with NHA, which had no connection to any of the aforementioned statements of Mercurian politicians. Those statements could have any meaning for Claimant if it would apply for a patent at the time of making the investment, which was granted on 21 Feb. 1998[60] – long before any investment was made. Being a patent owner do not equal to an FDC pills market exclusivity. Any other

[56] SoF, p. 29
[57] Micula Award, relying on *CMS v. Argentina*, p. 168, para. 610
[58] ibidem, p. 183, para. 672
[59] PO3, p. 49
[60] ibidem

manufacturers could hypothetically synthetize a compound with properties similar to Valtervite and produce its own FDC pills creating vivid market competition for Claimant.

121. The intellectual property regulations and their stability was not a factor in Claimant's investment. Even if none of the press announcements were made Claimant, would have responded affirmatively to NHA's invitation. It was a decision dictated by business calculation, not by any eventual promises of legal framework stability.

c. Alternatively, Respondent did not breach specific promise by enacting Law No. 8458/09

122. Respondent introduced the new IPR regulation in good faith, motivated by crisis in public health sector. Law No. 8458/09 was a necessary step that falls short from what is described as "myopic measures"[61]. New regulation secures access to healthcare to all citizens what falls within Ministry's affirmations and information included in NHA's Annual Report. The same sources that Tribunal might find to be a basis for Claimant's legitimate expectations indicated public health protection as a priority in all states actions. Respondent acted in public interest and the FET obligation does not prevent host States from acting in public interest even if such acts adversely affect investments, specifically when acting in obligation to achieve a specific outcome in public health..[62]

B. Enactment of Law No. 8458/09 was consistent with international law

123. By introducing the Law No. 8458/09 Respondent acted in line with international agreements binding to the Parties of BIT. For state's action to infringe fair and equitable treatment standard it must be considered as providing investor with less than international minimum standard of treatment.

124. In this particular situation the applicable law can be derived from TRIPS agreement. Article 31(b) TRIPS explicitly allows member states to issue licenses without authorization of the right holder

> *Where the law of Member allows other use of the subject matter of the patent without the authorization of the right holder, including use by the*

[61] Statement by the Minister of Health, p. 38
[62] UNCTAD Fair and Equitable Treatment, p. 14

government or third parties authorized by the government, the following provisions shall be respected:

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non- commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable.

125. The epidemic of greyscale fits into the scope of national emergency in a meaning established by Doha Declaration on the TRIPS Agreement and Public Health Article 5(b)(c):

(b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.

(c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

126. Doha Declaration is in general addressed to developing and least-developed Member states, underlining the importance of interpreting the TRIPS in a manner that will allow Members to protect public health and promote access to medications for all.[63] Mercuria is a developing country and Declaration should be fully applied to its actions regarding public health. Despite the fact that greyscale is not a fatal disease it is chronic and incurable with symptoms directly affecting the well being of patients.[64] From 2003 the number of cases

[63] Doha Declaration on the TRIPS and Public Health, Article 4
[64] NHA's annual report, p. 41

was growing rapidly with every year bolstering the demand for effective medicines. The termination of LTA substantially reduced Respondent access to FDI drug and inducted a state of national emergency. Providing the citizens with adequate care required compulsory licensing.

127. The second part of Article 31(b) undoubtedly legitimizes the discussed IP Law. Respondent being in the case of national emergency had no obligation to make efforts in obtaining authorization from Claimant to rightfully enact compulsory licensing. The new IP law requires the court to base its decision on granting the license to the applicant on several factors, inter alia, the efforts made by applicant to obtain a license from the patentee on reasonable terms and conditions and if such efforts have not been successful within a reasonable period. It indicates the authorized licensing as one preferred in usual, non-emergency circumstances.

128. Furthermore, Law No. 8458/09 remains in line with requirement expressed in sub point (h) of Article 31. The remuneration amount should be estimated by the economic value of the authorization. It is an uncontested fact, that Atton Boro Group obtained patents in numerous countries. However, it was not Claimant who filed for the patent or took part in developing the patented compound, as it was incorporated after the Mercurian patent was granted to Atton Boro and Company. HG Pharma does not export the drug manufactured using the license, being no threat to Claimant's business position in other countries. Authorization given by Claimant in these factual circumstances has very low economic value, especially in the light of no financial outlays made by Claimant itself in obtaining the patent. The 1% remuneration[65] ordered by the High Court may be perceived as low but it reflects the calculations required by TRIPS Agreement and royalty rates paid in Mercuria for drugs to treat incurable, non-fatal diseases, which ranged from 0.5% to 3% of revenue.[66] Claimant deprived itself of the royalty by refusing to provide the information need for a payment to be made, requested by HG Pharma.

129. In turn, both the compulsory licensing and the ordered royalties are in full compliance with the international law, providing Claimant with at least international minimum standard of treatment and do not violate Claimant's rights.

[65] SoF, p. 30
[66] PO3, p. 50

C. The delays in enforcement proceedings did not breach the Article 3 of BIT

130. In Claimant's allegations, the conduct of judiciary regarding the enforcement proceedings of the Award breached the Article 3(2) of BIT. As respondent will demonstrate it cannot be hold liable as this conduct does not fulfill any standard for estimating the breach of FET clause in regard to access to justice. Further, Claimant alleges that Respondent failed to provide it with effective means of asserting its rights.[67] Respondent highlights the absence of effective means clause in BIT what makes the claim unjustified and therefore will only address the issue in relation to fair and equitable treatment clause concluded in Article 3(2).

131. The conduct of the judiciary in the form of delays in the proceedings can be found as violating the FET standard only if two factors are met[68]:

a. there was a legitimate expectation of affording right to investor in a fair and reasonable manner

b. the conduct amounts to the denial of justice

a. There was no legitimate expectation of affording right to investor in a fair and reasonable manner

132. Claimant does not refer to the violation of legitimate expectation in its argumentation. Should the Tribunal decide otherwise, the argument would be that Claimant did not receive any unambiguous affirmation from Respondent's authorities targeted at Claimant specifically as to the manner in which the enforcement proceeding will be delivered.[69] Well aware of the fact that Mercuria is a developing country with an overburdened judiciary and the population of over 67 million people Claimant decided to invest in it. Hence, there is no reasonable expectation created by Respondent in relation to the enforcement proceedings issue.

[67] Notice of Arbitration, p. 5
[68] White Industries v. India, paras. 10.3.1, 10.4.1
[69] Newcombe/Paradell, pp. 281-282

b. The conduct does not amount to the denial of justice

133. The tribunal in White Industries Award identified a standard consisted of factors relevant to the determination of whether delays in judicial proceedings amount to the denial of justice, namely[70]: (a) complexity of proceedings

(b) the need for swiftness

(c) the behavior of the litigants involved,

(d) the significance of the interest at stake

(e) the behavior of the courts themselves

134. Denial of justice is a high threshold that should not be viewed as a failure of judicial system in relation to an individual situation but as state's failure to maintain an adequate and appropriate system of justice in general.[71] Denial of justice is constituted by the refusal of access to the courts, undue delay in court proceedings, serious inadequacies in the administration of justice and clearly improper and discreditable court decisions[72] – if any of these is proven the FET standard is violated.

135. Claimant founded its denial of justice argument on the fact that its enforcement proceedings were taking place for seven years and alleged it was an example of undue delay. Similar argument was brought up by White Industries in White Industries v. India case, where enforcement proceedings were pending for more than nine years.

136. The enforcement proceedings themselves are not particularly complex.[73] However, taking into consideration the reform of Respondent's judiciary system affecting the proceedings and taking place in the time of them being in progress increased the level of complexity in accordance to the matter of jurisdiction. In this circumstances it is clear that Mercurian courts had to follow the new legislation aimed to improve and accelerate their operation what caused justified delays in the time of implementation. Having regard to Respondent's obligations under the New York Convention, Mercurian courts did not frustrated

[70] White Industries v. India, p. 100, para. 10.4.10
[71] Crook, pp. 742-746
[72] Newcombe/Paradell, p. 240
[73] White Industries v. India, p. 101, para. 10.4.11

Claimant's right to enforce the Award by handing over to the Commercial Bench of Court and then back to the regular benches of the Court.

137. The delays caused by the reform and the overload of cases in High Court do not raise concerns as to the judicial propriety of the outcome, especially taking into consideration the characteristics of Mercurian judiciary.

138. The issues involved in enforcement proceedings and the reform of system of justice are obviously of the high significance in the field of commercial proceedings and arbitration in Mercuria.

139. The tribunal in White draws the comparison between criminal and commercial matters when it comes to the need for swiftness in resolution emphasizing the need for urgent resolution in criminal cases and the less compelling need for celerity in enforcement proceedings where the award contains also an order for the payment of interest.[74] The distinction given demonstrates that mere delays, as occurred in Respondent's case, are not outrageous and that enforcement proceedings do not require to be swiftly resolved.

140. Claimant's allegations are mostly founded on NHA's behavior before court that – in its view – were aimed at delaying the proceedings. NHA is a public organization dealing with number of issues, especially in the time of epidemic. Its priorities are focused on providing people with appropriate healthcare and access to medications as well as preventing further incidences and, unfortunately, not on a single enforcement proceedings filed by a private counterpart. Respondent does not question the fact that NHA sought several adjournments and extensions, however Claimant sought them as well.[75] Multiple times the delays were caused by litigants. Respondent's judiciary cannot be held responsible for NHA's behavior.

141. Examining the behavior of the courts, the tribunal in White considered as relevant that *India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary*[76]. Respondent's situation is no different - Mercuria is a developing country with a population of 67 million people with a seriously overburdened judiciary[77].

142. The proceedings moved at a not unreasonable pace. The adjournments were mostly caused by the applications filed by litigants and NHA's absences what remains outside Court's

[74] ibidem, p. 102, para. 10.4.13
[75] Exhibit 1, p. 7-11
[76] White Industries v. India, p. 103, para. 10.4.18
[77] Response to the Notice of Arbitration, p. 17

control. The non-discriminatory faculty of commercial proceedings requires Court to act in line with litigants' requests in reasonable manner and granting the extensions does not violate counterpart's rights. Both Claimant and NHA were granted with sought procedural elements. Furthermore, Court recorded that it will hear the case ex-parte if NHA will not appear and answered Claimant's request for strict measures to be taken if the absences will continue, later Court informed NHA that it will not be granted with further extensions[78] what induces the reasonableness of Court's actions. Court did not fail to hear the arguments of the Parties and was fulfilling its obligations.

143. It is an uncontested fact that several times matter was adjourned in result of lengthy arguments in other cases or Judge's absent. Howe, er, this is the consequence of judiciary being overburdened – a situation well known to Claimant. Such mere delays do not aspire to the failure of judicial system in general.

144. In White case the tribunal after analyzing the very similar factual circumstances using aforementioned set of factors came to the conclusion, that

> *duration of the proceedings overall (9 years – added by Respondent) and the delay by the Supreme Court in hearing and determining the jurisdiction appeal, was certainly unsatisfactory in terms of efficient administration of justice,* ***neither has yet reached the stage of constituting a denial of justice*** *[emphasis added by Respondent].*

145. Tribunal in present case should come to no other conclusion after analyzing the factual circumstances and all given factors. Especially considering the differences in Respondent's and Indian judiciary conducts – here the overall duration of proceedings equals to seven years and the case was in progress for all that time, with adjournments periods no longer than 3 months while Indian Supreme Court was unable to commence a hearing panel for almost four years.

146. Hence, the conduct of judiciary cannot be deemed as a denial of justice and violating the fair and equitable standard.

[78] Exhibit 1, p. 11

IV. TERMINATION OF LTA BY THE RESPONDENT'S NATIONAL HEALTH AUTHORITY DOES NOT AMOUNT TO THE VIOLATION OF ARTICLE 3(3) BIT

147. The Claimant alleges that Respondent breached the duty of fair and equitable treatment by terminating LTA. This allegation is unfounded.

148. In this arbitration, Claimant's claims related to the termination of LTA are based on Article 3(3) BIT. This provision is an example of so-called "umbrella clause" and it states that "*each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party*."

149. Contrary to Claimant's submission, termination of LTA by Respondent's NHA does not amount to the violation of Article 3(3) BIT, since NHA is not a state organ. Therefore, its actions cannot be attributed to Respondent and are outside the scope of those arbitration proceedings. Consequently the umbrella clause is not applicable (**A**). *Alternatively*, if the Tribunal decides otherwise, the umbrella clause should be interpreted narrowly and its scope does not cover the contract-based claims (**B**).

A. Responsibility for the conduct of the NHA should not be attributed to Respondent

150. In order to determine that actions of NHA amount to the violation of the treaty, it first has to be decided whether its actions can be attributed to Respondent. The rules of attribution are not contained in investment treaties, but they can only be found in general international law which supplements BITs in this respect[79]. The Respondent invites the Tribunal determine the question of attribution by applying the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (the 'ILC Articles'). While those articles are not binding, they are well-respected and widely regarded as a codification of customary international law[80].

151. The basic rules attributing to the state the conduct of its organs are contained in Chapter 2 ILC (Article 4-11). Importantly, these rules are limitative, which means that a state is not responsible for the conduct of entities in circumstances not covered by this Chapter[81]. In the

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79 *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 69.
80 Ibidem.
81 Crawford, p. 29.

present dispute, NHA's termination of LTA should not be attributed to Respondent, since: first, NHA is not a State organ under Article 4 of the ILC Articles **(A)**. Second, the 'functional test' of Article 5 of the ILC Articles is not fulfilled **(B)**. Third, the attribution is unacceptable under the 'control test' of Article 8 of the ILC Articles **(C)**.

a. NHA is not a State organ under Article 4 of the ILC Articles

152. Under Article 4 ILC Articles, the conduct of any State organ acting as such is attributable to the State. An organ includes any person or entity which has that status in accordance with the internal law of the State to which the actions of the organ would be attributed. According to the legal literature, a state organ is an entity that "*acts in an apparently official capacity or under colour of authority*"[82].

153. Additionally, the Almas[83] tribunal held that there is no attribution "where an entity engages on its own account in commercial transaction, even if these actions are important to the national economy".

154. In the present case, as Claimant assumes NHA's actions may be attributable to Respondent, the examination of the attribution should take into account Respondent's law. According to the latter, NHA is clearly distinguished from state organs. It has been set up by the Central Government, but now operates entirely independently[84]. It performs obligations under contracts with third parties in its own name, autonomously initiates public campaigns[85] and enjoys appreciable autonomy.

155. The directions and instructions NHA receives from the government are of a very general nature: in general terms they refer to tackling critical diseases. The Respondent agrees with Claimant that NHA has been, indeed, set up as a part of a national five-year health plan. However, this circumstance is of no importance when deciding whether or not it is a state organ.

156. Additionally, the fact that universal healthcare for Respondent's citizens is crucial for this state's welfare and economy is irrelevant when examining the issue of attribution. The importance for Respondent of the purchase of necessary medicines from Claimant neither

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82 Crawford, p.35

83 *Almas v. Poland*, PCA Case No 2015-13, 27 June 2016, para. 210.

84 Procedural Order no. 3, p. 50.

85 Statement of uncontested facts, p. 29

automatically mean that NHA is an organ of Respondent, nor can it lead to Respondent's responsibility for NHA's actions.

157. Therefore, NHA is not an organ of Respondent under Article 4 ILC Articles. Therefore, its actions are not attributable to Respondent. As a consequence, NHA's actions cannot constitute a violation of Article 3(3) BIT.

b. NHA's conduct is not attributable to Respondent under the 'functional test' of Article 5 of the ILC Articles

158. Under Article 5 of the ILC Articles, the conduct of an entity which is not a State organ is nonetheless attributable to the State when this entity exercises governmental authority in performing that conduct.

159. In order to attribute an act of an entity to the state for purposes of international responsibility,

> *"the conduct of an entity must accordingly concern governmental activity and no other private or commercial activity in which the party may engage"*[86].

160. Additionally, even if an entity was exercising elements of governmental authority, as described in Article 5 of the ILC Articles, for purposes of attribution, it has to be shown '*that the precise act in question was an exercise of such governmental authority*.'[87]

161. NHA has not exercised such governmental authority. As already mentioned, NHA was a party to the contractual arrangements[88], has its own budget and can sue or be sued in commercial arbitration[89]. At the same time NHA is not empowered to exercise governmental authority, but acts as a normal private operator.

162. Additionally, NHA neither entered into nor terminated LTA in exercise of Respondent's governmental powers. Regardless of the fact, that NHA is to some extent accountable to Respondent's government, as far as LTA is concerned, NHA exercised contractual, not governmental authority. The parties to this Agreement were Claimant and NHA, not

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86 Crawford, p. 52.
87 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, para. 193.
88 Statement of uncontested facts, p. 28.
89 Statement of uncontested facts, p. 30.

Respondent or any of his representatives. The fact, that NHA has been set up to help towards achieving the goals of Respondent's Ministry of Health five-year health plan, does not automatically equate all of its actions to the ones of the state.

163. Therefore, NHA's action are not attributable to Respondent under Article 5 ILC Articles. As a consequence, NHA's actions cannot constitute a violation of Article 3(3) BIT.

c. NHA's conduct is not attributable to Respondent under the 'control test' of Article 8 of the ILC Articles

164. Finally, Article 8 ILC states that the conduct of an entity can be attributable to the State if such entity is in fact acting on the instructions of, or under the direction or control of that State. The instructions, directions or control in the meaning of Article 8 ILC Articles "*must relate to the conduct which is said to have amounted to an internationally wrongful act*"[90].

165. This is not a case here. While NHA is politically accountable to Respondent's government, Respondent's actual control over NHA's conduct is negligible. This is because NHA operates independently[91] and on its own behalf. The entire business operations related to LTA – including invitations to make an offer, negotiations, entering into, performing and, eventually, terminating the Agreement – have been made solely by NHA. The Respondent did not take part or give instructions to NHA in any of those actions. It is clear that the alleged termination has been NHA's own decision: the private meeting between the Director of NHA and Respondent's government officials – on which this issue is said to be discussed - took place *after* NHA first threatened to terminate the Agreement (namely, on 15 May 2008)[92].

166. Additionally, the alleged action of NHA is the termination of LTA. Even though Respondent's government authorities to some extent may influence NHA's actions, there is no evidence that they instructed, directed, or controlled the specific operation of terminating LTA. It has been an autonomous decision of NHA, based on clause 6 of LTA (included in LTA by mutual consent of NHA and Claimant) and on purely contractual grounds.

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90 Crawford, p. 73.
91 Procedural Order no. 3, p. 50.
92 Statement of uncontested facts, p. 30.

167. In the light of the above, it is clear that NHA does not meet any of the criteria under the ILC Articles to attribute its actions to Respondent. Thus, Respondent is not responsible for NHA's termination of LTA. Therefore, NHA's actions do not amount to the violation of Article 3(3) BIT.

B. Alternatively, the umbrella clause should be interpreted narrowly and its scope does not cover the contract-based claims

168. Even if this Tribunal decides that termination of LTA by NHA is attributable to Respondent, there would still be no violation of BIT in this regard.
169. According to Claimant, Respondent violated BIT by failing to observe its obligations under Article 3(3). This assumption is misguided.
170. The majority of recent arbitration tribunals indicated that that only certain kinds of public contracts are covered by umbrella clauses[93]. While a literal interpretation may at a glance suggest a wider rendition, a consideration of a treaty's context, object, and purpose lead to the conclusion, that a more nuanced and narrower interpretation of Article 3(3) should be adopted.
171. As already presented, BIT should be interpreted in accordance with the rules on treaty interpretation provided in VCLT.[94] Therefore BIT shall be interpreted 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.[95] The wide interpretation of umbrella clause does not correspond to object and purpose of BIT.
172. The main aim of umbrella clauses is to prevent the abuse of state powers by the host state to the detriment of a foreign investor. Its purpose is not to protect investors against any potential misfortune. As interpreted functionally, the object of an umbrella clause is to promote the *investment,* not the *investor* at the expense of the host state.
173. Therefore, even if its actions in connection with a commercial contract could be considered State's actions, contracts with the "State as a merchant" are distinct and of a different nature

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93 See: *SGS v. Pakistan, El Paso v. Argentina, Pan American v. Argentina, Joy Mining v. Egypt, Salini v. Jordan*.
94 See: para. 3.
95 VCLT, Article 31.

comparing to those where State acts as a sovereign[96]. As such they cannot be subject to international treaty protection.

174. What is more, according to the principle of effectiveness, no provision of BIT can be rendered meaningless. If an umbrella clause was to be interpreted broadly, the other provisions granting the protection for foreign investors would be meaningless and redundant. There would be no real need to demonstrate a violation of the substantive treaty standards if a simple breach of contract, or of municipal statue or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party.[97]

175. Further, Joy Mining and CMS tribunals suggested a clear distinction should be made between ordinary commercial contractual disputes, where one party happens to be a government entity, and other kinds of governmental interference with contract rights[98]. It is widely accepted that the umbrella clause is relevant only insofar as the state acts in its sovereign capacity[99]. As emphasized in case law:

> *"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."*[100]

176. If any and all contractual violations would give rise to treaty-based liabilities, the protection guaranteed to the investor would exceed the parties' original intentions. Thus, purely commercial aspects of a contract are not be protected by the treaty as long as there is no "significant interference by governments or public agencies with the rights of the investor"[101].

177. In any case, the umbrella clause would have to be considerably more specifically worded before it could reasonably be read in the expansive broad manner[102]. Moreover, the claimant would have to provide clear and convincing evidence that the State Parties indeed

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96 *El Paso*, para. 79; see also Pan American, para. 108.
97 *SGS v. Pakistan*, para. 168.
98 *Joy Mining v. Egypt*, para. 72; *CMS v. Argentine*, para. 299 and further
99 Naniwadekar
100 *El Paso*, para. 82; see also Pan American, para. 110.
101 *CMS v. Argentine*, para. 299.
102 *SGS v. Pakistan*, para. 171.

decided on the State's liability based on the treaty for breaches of contractual obligations. Because he failed to do so, his claims related to this issue were denied.

178. In the present case, the wording of BIT does not allow the assumption that the parties intend to cover all contractual claims by the protection of the treaty, and Claimant failed to prove the opposite.

179. All of Claimant's claims related to the termination of LTA can be described as a purely commercial ones. Since Claimant entered into the agreement with NHA - the independent entity, funded partially by private contributions, Respondent has no duty to observe any obligations related to this agreement. NHA's choice to terminate LTA was a purely commercial decision.

180. Moreover, whether NHA is considered a "State" or not, it was definitely acting as a "merchant". Its main activity involved tackling critical diseases in Mercuria and in the framework of this activity it decided to purchase Sanior from the entity that happen to sell this product. There was no participation by Mercurian officials in the negotiations of LTA that could possibly suggest that NHA was acting as the state. Its decision to terminate LTA was a normal contractual decision made by the purchaser unsatisfied by the other party's performance under the contract. There is no reason for a decision made by the entirely independent and partially privately founded entity under the purchase-sale contract to amount to the violation of investment treaty by the State.

181. To conclude, the proper interpretation of the Article 3(3) BIT is a narrow one. Thus, termination of LTA by NHA cannot lead to Respondent's international responsibility. This is because the actions undertaken by NHA with regard to LTA were purely commercial actions of a "merchant". Therefore, all claims related to the violation of Article 3(3) BIT should be dismissed.

V. WITHOUT PREJUDICE, RESPONDENT DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT

182. In case Tribunal consents to Claimant's allegation that its investment was expropriated Respondent will address this issue and demonstrate that none of its actions amounted to the expropriation and even if Tribunal finds otherwise it was made for public purposes, therefore not breaching BIT.

183. The expropriation of investment is mentioned in BIT Article 6 which in point 2 stipulates:

> *"Investments of investors of one Contracting Party shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures."*[103]

184. Respondent will demonstrate that it did not expropriate Claimant's investment either directly or indirectly (1), even if Tribunal will held Respondent liable for expropriation it was entitled to expropriate Claimant's investment (2), the compensation given to Claimant was appropriate (3). Hence, Respondent cannot be found as violating BIT Article 6.

A. Respondent did not expropriate Claimant's investment either directly or indirectly

185. Direct expropriation occurs when state takes over investor's property what undoubtedly did not take place in present case and is not contested by Claimant. However, the allegation of indirect expropriation can be drawn from Claimant's statements and argumentation.
186. Firstly, BIT Article 6(4) states that no non-discriminatory measures that are designed and applied to protect public health constitute indirect expropriation under Article 6.
187. Law No. 8458/09 was designed to allow broad access to FDC pill for all Mercurian citizens affected by greyscale, protecting the public health. Measure is discriminatory when one investor is treated differently, less favorably than other in the same line of business or broader economic sector mostly in relations to nationality.[104] Respondent's conduct was non-discriminatory as compulsory licensing affected all patent holders and not Claimant only. Every drug manufacturer's patent can become a subject of licensing, also the domestic ones. There is a unified model of estimating the royalty for patent holder and the origin of patent holder is excluded from its factors. What is more Mercuria's law provides the patent holder the possibility to question the validity of the non-voluntary license and the

[103] BIT, p. 35
[104] Schreuer,, p. 192-198

royalty, after being granted, before a two-judge bench of the High Court.[105] Hence, the measure taken by Respondent falls within Article 6(4) and cannot be recognized as expropriation.

188. Secondly, even if the Tribunal will not consent to this argument, Respondent did not expropriated Claimant's investment under Article 6(2).

189. Respondent emphasizes the absence of 'creeping' expropriation, which must consist of few less significant actions attributable to the state, which eroded the investor's rights to its investment to an extent that is infringing of the relevant international standard of protection against expropriation.[106] As argued above, NHA's actions cannot be attributed to Respondent, therefore indirect expropriation can only be examined in relation to enactment of Law No. 8458/09 what is not sufficient to fulfill standard of a 'creeping' expropriation.

190. Measures undertaken by the government constitute indirect expropriation only if the interference with the investor's rights is such as substantially to deprive the investor of the economic value, use or enjoyment of its investment.[107] The introduction of Law No. 8458/09 including compulsory licensing might have decreased the economic value of Claimant's investment but did not deprive it of such value. Claimant was not banned from further production and vending of Sanior. It had all capacity to enter into market competition with HG Pharma by reducing the price or introducing more aggressive marketing policy. Refusing to take steps in order to maintain its market position, Claimant deprived itself from the enjoyment of its investment.

191. Additionally, Claimant failed to make a prima facie case of expropriation and the onus to show what it alleged to constitute expropriation and burden of proof that BIT applies lies on Claimant[108]. Expropriation claim was not mentioned in the Request for Arbitration and Claimant did not provide any information as to the magnitude of its losses. Only the Statement of Uncontested Facts mentions that '*By 2014, Atton Boro had lost nearly two-thirds of its market share to the generic FDC pill'.*[109] Claimant's management has been left in hands of its board with no interference from the government and was not denied the access to its assets.

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[105] PO3, p. 50
[106] Desarollo, v.Costa Rica, para. 77
[107] Telenor v. Hungary, p. 31, para 65
[108] Telenor v. Hungary, p.34, para. 69
[109] SoUF, para 24, p. 30

192. In conclusion, Respondent's actions cannot be recognized as an indirect expropriation of Claimant's investment.

B. In any case, RESPONDENT was entitled to expropriate Claimant's investment and provided it with full and appropriate compensation

193. Respondent in all its actions was motivated by the public purpose and therefore cannot be held liable for expropriation of Claimant's investment. As it will demonstrate, enactment of Law No. 8458/09 amounts to a taken of alien property which is uncompensable and even if Tribunal finds otherwise, the royalty equals to full and appropriate compensation.
194. According to BIT Article 6(2) expropriation is allowed "*for public purposes, or national interest, against immediate full and effective compensation"*. The standard for calculating the compensation was created in BIT Article 6(3) and based on a market value of the investment.
195. Respondent explained the factual circumstances surrounding the case multiple times in previous sections. Both TRIPS Agreement governing the compulsory licensing and BIT should be interpreted in a way where public purposes and national interest include crisis in healthcare system. The epidemic of greyscale and Respondent's obligation towards its citizens to provide them with effective treatment equals to the public purpose. IPR in relation to pharmaceutical patents is far less restrictive than to other inventions. WTO identifies the importance of broad access to medicines and fighting the critical diseases creating more freedom in compulsory licensing of drug's compounds.
196. Greyscale is an incurable disease with symptoms affecting day-to-day life of infected patients. Medicines manufactured using the compulsory license and the patent itself allows minimization of those symptoms and bearable life for patients. What is most important recent studies shown that in up to 80% of patients Valtervite prevents from transmitting greyscale to healthy people and is the key medicine in preventing the spread of sickness.
197. NHA's failure in negotiations with Claimant caused a gap in the stream of effective treatment provided to citizens. This situation led Respondent to an enactment of aforementioned regulation and eventual expropriation. Acting in public purpose excuses Respondent from liability for expropriating Claimant's investment if Tribunal will find such expropriation occurred.

198. Respondent would like to bring up that Claimant was not entitled to any compensation at all because its action falls within the scope of an uncompensated taken of an alien property which results from the action of the competent authority of State in the maintenance of public health that should not be considered wrongful[110]. There are elements declining the action's uncompensability: it cannot be a clear and discriminatory violation of the law of the State concerned or an unreasonable departure from the principles of justice recognized by the principal legal systems of the world and cannot be an abuse of powers specified for the purpose of depriving alien of its property.

199. Compulsory licensing is a legal action available to any State being a Party of TRIPS Agreement and as explained above is non-discriminatory. TRIPS Agreement is recognized as a binding source of law by all its member states and all actions taken in compliance with it should be deemed as consistent with international principles. Furthermore, issuance of Law No. 8458/09 is not an abuse of powers but a reasonable measure undertaken for a protection of public health. Therefore, the rule of uncompensated actions is fully applicable in given case.

200. If Tribunal refuses to accept this argument, the royalty fulfills the requirements mentioned in BIT Article 6(3). This Article creates the standard of calculating the compensation based on a market value of the investment. In this case, the value under dispute should be the one estimated for a patent.

201. Respondent does not question that development of Valtervite required a lot of time and financial expenditures from Atton Boro and Company who obtained the patent in 1998. However, Claimant was only assigned with the patent in exchange for shares after it was incorporated and „*never invested a dime into risky R & D*"[111] how head of Claimant described HG Pharma's usage of license. Claimant was incorporated after Valtervite was developed and patented in several countries. It did not participate in costs connected with invention of the compound and was only involved in sale of Sanior that includes the compound. Claimant only draws the blinds of its mother company hard work. The situation of HG Pharma who was granted with the license and Claimant who had the patent assigned is unambiguous.

[110] Harvard Draft Convention
[111] SoF, p. 31

202. HG Pharma does not export the drug manufactured using the license and therefore do not affect market value of the compound in other countries. Medicine received by other countries in a form of humanitarian aid does not amount to the commercial use of the license and has no effect on market value.
203. What is more Claimant has the right to challenge the royalty ordered by court and did not make use of it. It also refused to obtain a payment from HG Pharma by not providing information needed for a payment to be made, which were requested by HG Pharma.
204. The loss of two thirds of Claimant's market shares was not anyhow expressed in particular amount and also no financial records were available for Court making it impossible to estimate the exact economic value of the patent in Mercurian market.
205. Still, Claimant was not denied the ability of further production of Sanior and selling it in Mercuria, so it was not deprived of all the prospected revenues.
206. Furthermore, royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases ranged from 0.5% to 3% of revenue and are not a subject of any disputes. The one assigned for Claimant fits into this range and is reasonable.
207. In conclusion, Respondent cannot be hold liable under BIT Article 6 as it was acting in the public purpose and the 1% royalty assigned by Court is equivalent to a full and effective compensation in regard to BIT Article 6(3).

VI. ALTERNATIVELY, RESPONDENT PROTECTED ITS ESSENTIAL SECURITY INTEREST

208. Even if Tribunal finds that Respondent breached BIT, it was acting within the scope of essential security interest.
209. Article 12 BIT reads as follows:

> *„Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations. „*

210. Scholars in defining the state of necessity - an element justifying essential security interest defense – deliver the standard where state's interest must be threatened by a serious and

imminent peril [112] For peril to be serious and imminent the threat must be likely to destroy the possibility of realizing essential State interest.[113]

211. Epidemic of greyscale affected not only Respondent but also its entire region creating the emergency in international relations. Respondent's actions taken to secure the protection of public health were conducted in the state of necessity.

212. Therefore, the actions undertaken by Respondent were necessary for the protection of essential security interest in time of international health emergency and are fully justified under Article 12.

[112] Thjoernelund, p. 425
[113] Boed, p. 28

RELIEF REQUESTED

RESPONDENT respectfully requests this Tribunal to find that:

I. This Tribunal has no jurisdiction over the claims related to the enforcement of the Award.

II. Claimant is not protected under BIT, because denial of benefits has been properly exercised.

III. Respondent did not violate the fair and equitable treatment standard.

IV. There was no breach of BIT Article 3(3) as NHA's actions are not attributable to Respondent.

V. Respondent did not expropriated Claimant's investment. Alternatively, Respondent is not liable for expropriation of Claimant's investment due to acting in public purpose and providing Claimant with full and appropriate compensation.

VI. Alternatively, Respondent is not liable for any breach of BIT as it was acting in protection of its essential security interest.

Counsels for RESPONDENT

TEAM XUE

25 September 2017