YUSUF TEAM

THE PERMANENT COURT OF ARBITRATION

IN THE PROCEEDINGS BETWEEN

ATTON BORO LIMITED

(*Claimant*)

AND

THE REPUBLIC OF MERCURIA

(*Respondent*)

PCA CASE NO. 2016-74

MEMORIAL FOR THE RESPONDENT

Counsel for the Respondent

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABC	Atton Boro & Company
ABG	Atton Boro Group
ABL	Atton Boro Limited
Annex2	Statement Made by the Minister of Health, appended to PO1 as Annex2
Annex3	Report by NHA, appended to PO1 as Annex3
Art.	Article
Award	Award granted by arbitral tribunal in favor of ABL
BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments; Annex1 to PO1
DOB	Denial of Benefits
DOJ	Denial of Justice
ECT	Energy Charter Treaty
Facts	Statement of Uncontested Facts, PO1, PO2, and PO3.
FDC	Fixed-Dose Combinations
FET	Fair and Equitable Treatment
HCM	High Court of Mercuria
HGP	HG-Pharma
ICC	International Chamber of Commerce
ICSID	International Center for the Settlement of Investor-State Disputes
LTA	Long-Term Agreement
MHM	Ministry of Health of Mercuria
NHA	National Health Authority
Notice	Notice of Arbitration by ABL
Patent	Mercurian Patent No 0187204 granted to ABG for Valtervite
PCA	Permanent Court of Arbitration
PO	Procedural Order
Reef	The People's Republic of Reef
Response	Response to Notice by Mercuria
Rules	PCA Arbitration Rules 2012

UC	Umbrella Clause
US	United States
VCLT	Vienna Convention on the Law of Treaties

LIST OF AUTHORITIES

I. TREATIES AND CONVENTIONS

REFERENCE NAME	FULL NAME
Canada-Venezuela BIT	Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, 1998.
Kazakh-US BIT	Kazakhstan-United States BIT December 1, 1994
NYC	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Rules	PCA Arbitration Rules, 2012
US Model BIT 2004	2004 US Model BIT
VCLT	Vienna Convention on the Law of Treaties, 1969

II. CASES

REFERENCE NAME	FULL NAME
Abaclat	Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (August 4, 2011)
Ambiente	Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (February 8, 2013)
Amto	Limited Liability Company Amto v. Ukraine, Arbitration No. 080/2005, Final Award (March 26, 2008)
ATA	ATA Construction, Industrial and Trading company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010)

Bayinder	Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. V. Islamic Republic of Pakistan ICSID Case No. Arb/03/29, Decision on Jurisdiction (November 14, 2005)
Biwater	Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008)
British	British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18/BCB-BZ, Award (December 19, 2014)
Burlington	Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction(June 2, 2010)
Caratube	Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award (June 5, 2012)
CCL	CCL v. Republic of Kazakhstan, SCC Case No. 122/2001, Jurisdictional Award (January 1, 2003)
Chattin	B.E. Chattin (United States) v. United Mexican States, United States – Mexican States Claims Commission, 4 UNRIAA, Award (July 23, 1927),
Chevron	Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I], PCA Case No. AA 277, Partial Award on the Merits (March 30, 2010)
CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005)
Daimler	Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (August 22, 2012)
Deutsche	Deutsche Bank AG v. Democratic Socialist Republic of

	Sri Lanka, ICSID Case No. ARB/09/2, Award (October 31, 2012)
El Paso	El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award (October 31, 2011)
EnCana	EnCana Corporation v. Republic of Ecuador, London Court of International Arbitration, LCIA Case UN3481, Award (February 3, 2006)
Flughafen	Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award (November 18, 2014)
GEA	GEA Group Aktiengesellschaft v. Ukraine, Award (March 31, 2011)
Gemplus	Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (June 16, 2010)
Generation	Generation Ukraine Inc. v. Ukraine, (ICSID case No. ARB/00/9), Award (September 16, 2003)
Genin	Alex Genin, Eastern Credit Limited, Inc. & A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (2001)
Global	Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, (December 1, 2010)
Holiday	Holiday Inns SA and others v. Kingdom of Morocco, ICSID Case No. ARB/72/1, Decision on Jurisdiction (1974)
Jan	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction (June 16, 2006)

LG&E	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006)
Liman Oil	Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of Award (June 22, 2010)
Maffezini	Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (January 25, 2000).
Malaysian	Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007)
MTD1	MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004)
MTD2	MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment (March 21, 2007)
Murphy	Murphy Exploration and Production Company International v. Republic of Ecuador [II], PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016)
Noble Ventures	Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (October 12, 2005)
Nova	Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/11/1, Excerpts of Award (April 30, 2014)
Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (October 5, 2012)

Oostergetel	Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL, Final Award (April 23, 2012)
Oro	El Oro Mining and Railway Co. (Ltd.) (Great Britain) v. United Mexican States, 5 UNRIAA, Decision No. 55 (June 18, 1931)
Pac	Pac Rim Cayman LLC. v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012)
Philip	Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (December 17, 2015)
Phoenix	Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award (April 15, 2009)
RFCC	Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Decision on Jurisdiction (June 16, 2006)
Romak	Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award (November 26, 2009)
RosInvestCo	RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Final Award (September 12, 2010)
Saint-Gobain	Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, (December 30, 2016)
Saipem	Saipem S.p.A v The People's Republic of Bangladesh, ICSID Award, Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007)
Salini	Salini Costruttori S.p.A. and Italstrade S.p.A. v.

	Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001)
Saluka	Saluka v. Czech Republic, UNCITRAL, Partial Award (March 17, 2006)
SG1	Société Générale, in respect of DR Energy Holdings Limited, and Empresa Distribuidora de Electricidad del Este S.A. v Dominican Republic, UNCITRAL, LCIA Case no UN 7927, Award (September 19, 2008)
SG2	Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic, UNCITRAL, Preliminary Objections to Jurisdiction, (September 19, 2008)
Tokios	Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004)
Total	Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010)
Toto	Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (September 11, 2009)
Ulysseas	Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Interim Award (September 28, 2010)
Vivendi	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (November 21, 2000)
White	White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (November 30, 2011)
Yaung	Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award (March 31, 2003)

III. PUBLICATIONS

REFERENCE NAME	FULL NAME
Badia	Albert Badia, *State Responsibility for State Enterprises' Action in Investment Law, Piercing the Veil of State Enterprises in International Arbitration,* 29 INT'L ARB. L. LIB. (2014)
Badini	Aldo A. Badini, *Denial of Benefits – Practical Lessons for States and Investors from the Pac Rim Arbitration,* 3 Y.B. ON INT'L ARB. 293-306 (2013).
BALTAG	CRINA BALTAG, THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR (2012)
Bjorklund	Andrea K. Bjorklund, *Chapter 7: The Use of Investor-State Arbitration as a De Facto Enforcement Mechanism for Arbitral Awards,* IN 37 THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION, (Stavros L. Brekoulakis, Julian D. M. Lew, et al. eds. 2016)
Crawford	James Crawford, *Treaty and Contract in Investment Arbitration,* 24 ARBITRATION INTERNATIONAL, 351-74 (2008)
DOLZER	RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d., 2012),
DOUGLAS	ZACHARY DOUGLAS, JOOST PAUWELYN AND JORGE E. VIÑUALES, THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW BRINGING THEORY INTO PRACTICE (2014)
Gaillard	Emmanuel Gaillard and Yas Banifatemi, *Chapter 8: The Long March Towards a Jurisprudence Constante on the Notion of Investment,* IN BUILDING

	INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (Meg N. Kinnear, Geraldine R. Fischer, et al. eds. 2015)
Jaramillo	Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., *Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting*, IN LIBER AMICORUM BERNARDO CREMADES (Miguel Ángel Fernández-Ballesteros, David Arias eds. 2010)
Lalive	Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, BRIT. Y.B. INT'L L. 1980.
Rubins	Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, IN 19 ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS, STUDIES IN TRANSNATIONAL ECONOMIC LAW, (Stefan Michael Kröll and Norbert Horn eds, 2004)
SALACUSE1	JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT (2013)
SALACUSE2	JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2010)
Sasson	Monique Sasson, *Attribution under the Law of State Responsibility, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, 21 INT'L ARB. L. LIB. (2010)
Shany	Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835-851 (2005)

SORNARAJAH	M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3d. 2010),
WIPO	World Intellectual Property Organization, *How Long Does a Patent Last*, WIPO, available at http://www.wipo.int/patents/en/

STATEMENT OF FACTS

The Parties

1. The Republic of Mercuria is the Respondent ("Mercuria"). The National Health Authority (NHA) is a Mercurian public sector corporation but it operates independently from the government. NHA is fund by private contributions and national taxation. Based on the record, Mercurian officials did not negotiate the LTA.
2. Atton Boro Limited ("ABL" or the "Claimant") is a "mailbox company" of Atton Boro and Company (ABC). ABC is a corporation organized under the laws of the People's Republic of Reef ("Reef"). It is also the primary holding company of ABG. ABC's shares are held by a mix of private entities and individuals of a wide variety of nationalities.
3. **On April 5, 1998**, ABL was incorporated in the Kingdom of Basheera.
4. **On April 15, 1998**, in exchange for shares, ABC assigned to ABL the Mercurian Patent for Valvervite.

Submission To Arbitration

5. **On November 7, 2016**, the Claimant submitted its Notice of Arbitration under the Permanent Court of Arbitration
6. **On November 26, 2016,** Mercuria submitted its Response to the Claimant's Notice of Arbitration.

The Public Health Situation In Mercuria

7. **In 2003**, the NHA's annual report highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals across the country. Greyscale is a severe and pervasive epidemic. Mercuria took aggressive measure to combat this national crisis. The Ministry of Health of Mercuria directed the NHA to invite offers from pharmaceutical companies for long-term strategic supply of FDC greyscale medicines at discounted rates.
8. Mercuria launched a health plan, signed the LTA with ABL, reformed its legal framework, and created awareness of greyscale through workshops. The five-year health plan was launched by NHA and ABL (1999-2004).

9. **Since 2003**, the NHA had been engaged in parallel efforts to promote prevention of greyscale transmitted sexually. The NHA campaign involved awareness workshops in educational institutions and workplaces to encourage people to be tested regularly.
10. **On 19 January 2004**, the Minister for Health of Mercuria lauded the success of the *Mercuria Comprehensive HIV/AIDS Partnership*, a Product Development Partnership between ABL and NHA as a part of this plan.
11. **In May 2004**, the NHA invited ABL to make an offer for supplying its FDC drug, Sanior.
12. **By 2006**, nearly 50% of all adults were getting themselves tested every six months, as compared to just over 17% in 2003.
13. **On December 26, 2006**, in a press conference to discuss the NHA report, the Minister for Health emphasized the need for more rigorous campaigning and research, she stated that "*the government would take every measure it deemed necessary to make ensure that patients of greyscale could avail treatment.*"

The LTA

14. **On 11 January 1998**, Mercuria and Basheera concluded the BIT.
15. **On July 20, 2004**, ABL and NHA concluded the LTA, a commercial supply contract. There is no record of direct participation by Mercurian officials in the negotiation of the LTA. NHA acted as an independent corporation, it acted as a commercial purchaser.
16. Under the LTA, the NHA would purchase Sanior from ABL at a 25% discounted rate by periodically placing purchase orders. The agreement stipulated the minimum guaranteed annual order-value. The LTA stablished a 10 years period of validity. As the number of patients coming into care grew, the order value for Sanior doubled with each quarter in 2007.

Mercuria Responds To The Health Crisis By Renegotiating The Lta

17. Before terminating the LTA, NHA intended to renegotiate with ABL the price for Sanior, stating that it had "*grossly underestimated the number of greyscale cases in Mercuria.*" In early 2008, NHA needed to supply medicines for nearly twice the number of patients. ABL initial discounted offer (10% for the remaining period of the LTA) was not enough any longer to face Mercuria national health crisis. The NHA rejected this offer, and demanded an additional discounted of 40%.

18. **On May 15, 2008**, the Minister for Health and the President of Mercuria met privately with the Director of the NHA to resolve budgetary problems that had arisen in several government healthcare programs.
19. **On June 10, 2008**, NHA terminated the LTA.

The Patent

20. **On April 15, 1998,** the ABG assigned to ABL the Valtervite Patent.

21. **On October 10, 2009**, the President of Mercuria promulgated the Intellectual Property Law (Law No. 8458/09), which introduced a provision allowing for the use of patented inventions without the authorization of the owner.

22. **On 17 April of 2010**, the High Court granted HG-Pharma a license to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria. HG-Pharma does not export Valtervite. ABL has not respond to HG-Pharma request of its bank details to transfer royalties under the non-voluntary license.

The Enforcement Proceeding

23. **On 3 March 2009**, ABL filed the enforcement proceeding of the Award dated 20 January 2009 before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy.

24. The pendency of the enforcement proceeding is a combination of circumstances:

    a. Mercuria is a developing country with an overburdened judiciary struggling to cater to its population of 67 million people. ABL was aware of Mercuria overburdened judiciary struggling.

    b. **On 10 January 2012**, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters.

    c. **In September 2013**, a ruling of the Supreme Court of Mercuria clarified that benches constituted under the Commercial Courts Act had jurisdiction only to

hear original commercial suits and not enforcement proceedings. All enforcement matters were returned to be heard before regular benches of the Court.

25. The pendency of the enforcement proceeding of the Award is not a delay technique responding to a political interest. Mercuria have not sought to set aside the Award before courts at the seat of the tribunal that issued it.

ARGUMENTS

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR ANY CLAIMS OF THE CLAIMANT

A. This Tribunal does not have Jurisdiction to hear Claims Relating to the Award

26. This Tribunal lacks jurisdiction *ratione materiae* because an award is not an "investment" within the meaning of Art. 1(1) of the BIT. Under this treaty, an asset shall be an initial contribution in the pursuing of an enterprise. Here, the award neither is 1) an asset; nor, 2) a part of an original investment or an entire operation because the LTA is a commercial contract.

i. This Award is not "Any Kind of Asset"

27. Under Art. 1(1) of the BIT, an investment is "any kind of asset" including a list of investments. This list does not include an award. In *Caratube,* "any kind of asset" was an investment after a *prima facie* contribution because the stimulation of flow of private capital was one of the purpose of the BIT.[1] The tribunal reasoned that this BIT protected those kind of assets that were the result of the flow of capital.[2] The tribunal based its holding on the Preamble of the BIT:[3]

> "Recognizing that **agreement upon the treatment** to be. [sic] accorded such investment **will stimulate the flow of private capital and the economic development** of the Parties" [emphasis added]

28. Under the Preamble, the primary subject-matter of the BIT was the treatment of *investments* because the BIT was regarded as an "*agreement upon the treatment to be accorded* [to] *(...) investment*[s]."[4] The tribunal concluded that even though "investment"

[1] Caratube, ¶ 351; *See also* Kazakhstan-US BIT.

[2] Caratube, ¶ 349 (referencing the Preamble of the BIT).

[3] Kazakhstan-US BIT.

[4] Caratube, ¶ 350. [Emphasis added]

did not expressly qualify the contribution, its existence was a prerequisite to the investment's protection under the BIT.[5]

29. Here, an investment is also "any kind of asset" under Art. 1(1) of the BIT. Like in *Caratube,* the Preamble of the Mercuria-Basheera BIT establishes that:

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

30. Under the BIT, the treatment of investments is the primary subject-matter because it also establishes that an "agreement on the treatment to be accorded to such investment."[6] This award is not an asset because it is not an initial contribution on the pursuing of an enterprise that allows the flow of private capital to Mercuria under the BIT. From the record, it was also established that the purpose of the ABL was carry on business in South American and African countries.[7] Therefore, the award is not an investment because it failed to satisfy the contribution prerequisite under the Preamble and Art. 1(1) of the BIT.

ii. This Award is not an Investment Because it is neither Part of an Original Investment nor Part of an Entire Operation

31. This award is neither an investment itself nor part of an investment. The tribunal should not extend the BIT's protection to this award based on the potential arguments that it is 1) part of an original investment, or 2) part of an entire operation that qualifies as an investment.

32. In *White*, the tribunal held that an award was part of an original investment because it crystallized contractual rights.[8] In *White*, the tribunal held that an award was not itself an investment; instead, it was part of the original investment—a contract.[9] Since the BIT protected the rights under the contract, the BIT protected those contractual rights arising out of an award.[10]

---

[5] Caratube, ¶ 351.

[6] Caratube, ¶ 350.

[7] Facts, 860:28.

[8] White, ¶ 7.6.9, ¶ 7.6.10:82*; see* Saipem ¶ 127.

[9] White, ¶ 7.6.3; Romak ¶¶ 205, 212; GEA, ¶ 161

[10] White, ¶¶ 7.6.8, 7.6.10.

33. Here, the award is not part of an original investment because the LTA is not an investment. This award had no contractual rights to crystallize. Since the BIT does not protect the rights under the LTA, the BIT also does not protect contractual rights arising out of the award. This award is not protected under the BIT because there are no contractual rights to crystallize.

34. In *ATA*, the tribunal held that the award was protected under the BIT because it was part of an "entire operation."[11] The tribunal reasoned that an entire operation included contracts, constructions, retentions of money, warrants, and awards.[12] Here, the award is not part of an entire operation because the award resolved disputes regarding the LTA. This contract is not an investment because it does not satisfy the prerequisite of initial contribution by an enterprise to qualify as an investment. Therefore, the award is not protected under the BIT because there is no such entire operation that includes an investment.

iii. The Award is not an Investment because the LTA is a Commercial Contract

35. Even if this tribunal decides that the award is protected under the BIT, the award is not part of an investment or an entire operation because the LTA is a commercial contract. A supply contract is a commercial contract because it does not go beyond the basic obligations of this type of contract: payment and delivery.[13] A commercial contract is not an investment under Art. 1(1) of the BIT.

36. In *Nova,* the tribunal declined jurisdiction because the supply contract of coal was not an investment within the meaning of the Canada-Venezuela BIT.[14] The tribunal reasoned that this agreement was not an investment because of its commercial nature. This contract did not go beyond the simple payment after the delivery of the coal. This agreement established

[11] ATA, ¶¶ 114-5. *See also* Bjorklund, ¶ 722, at 101. *See* Holiday, in Lalive, at 123.

[12] ATA, ¶ 114.

[13] Nova, ¶ 113.

[14] *Id*.; *See also* Malaysian ¶¶ 69-72 (referring to Aron Broche's observations made during and following the *travaux préparatoires* about the meaning of the term "investment" and noting, at ¶ 69, "It appears to have been assumed by the Convention's drafters that use of the term 'investment' excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre.").

the right to pay at fixed prices to receive coal in the specific quantities, delivery dates and shipping modalities.[15]

37. Here, the LTA was a supply contract for a blockbuster greyscale-treatment drug, Sanior, with a fixed discounted rate.[16] The LTA was a purely commercial supply arrangement between NHA and ABL because it did not go beyond its basic obligations.[17] ABL had to supply Sanior, and NHA would purchase it at a 25% discounted rate.[18] The LTA established ABL's obligation to perform accordingly to clause 6 of this agreement.[19] In addition, when NHA signed the LTA, it acted as a purchaser. This agreement was neither carried out by Mercuria nor its Minister of Health.[20] Thus, ABL and the previous arbitral tribunal recognized its commercial nature when 1) ABL requested the specific dispute resolution forum provided by the LTA for recourse of disputes and 2) the arbitral tribunal granted damages under the LTA.[21] Therefore, the award is not protected under the BIT because the LTA is a commercial contract.

38. Therefore, this Tribunal does not have jurisdiction *ratione materiae* over the claims regarding the award because 1) the award is not an initial contribution pursuing an enterprise, and 2) the award is not part of an investment or entire operation because the LTA is a commercial contract.

B. The Tribunal Lacks Jurisdiction *Ratione Personae*

39. This Tribunal lacks jurisdiction *ratione personae* because Mercuria is not internationally responsible for acts done by NHA. A State controls a public corporation when the State

[15] Nova, ¶¶ 96-7, 113.

[16] Notice, 110:4. *See* Global, ¶ 57. See also Daimler, ¶¶ 163-4 ("The Tribunal must also bear in mind the important differences between ordinary contracts and treaties. While both are based upon the will of the parties, the latter are concluded between sovereign States.")

[17] Notice, 110:4; Response, 500:16.

[18] Facts, 895:29.

[19] *Id.*

[20] Facts, 1590:50. *See also* Facts, 880-910:29 (The Ministry of Health only directed NHA to seek offers from pharmaceutical companies for the long-term supply of FDC greyscale because NHA recommended it in its 2003 Annual Report).

[21] Response, 500:17; Notice, 110:4.

instructs, directs, supervises the performance of the contracts and their negotiation. Those acts are attributable to the State, and a State should be liable for those acts.[22] Here, 1) the Government of Mercuria did not authorize NHA to terminate the LTA and 2) NHA was not a controlled instrumentality of Mercuria when it negotiated, signed, and terminated the LTA.

40. In *Bayindir*, the tribunal held that it had jurisdiction *ratione personae* because the Government of Pakistan expressly authorized the National Highway Authority (NHA) to terminate a construction contract.[23] NHA was a Pakistani public corporation controlled by the government. The tribunal reasoned that a State act occurs when a person or group of people act on the instructions of, or under the direction or control of, that State in carrying out the conduct.[24] Pakistan was held liable because the NHA's termination of the contract was a State act.

41. Here, the NHA's termination of the LTA was not a State act because it was not authorized by the Government of Mercuria.[25] Although NHA is a public corporation politically controlled by the government, there is no evidence that Mercuria officials participated in the negotiation of the LTA.[26] Therefore, NHA's termination of the LTA was not a State act because NHA acted neither on the instructions of, nor under the direction or control of, the Government of the Mercuria. As a result, this tribunal does not have jurisdiction *ratione personae* because Mercuria is not liable for a non-state act.

42. In *Encana*, the tribunal held that the conduct of Petroecuador, a State-owned and State-controlled instrumentality was attributable to Ecuador. There the tribunal reasoned that 1) Petroecuador was subject to instructions from the President and others, and 2) the Attorney-General had supervised and controlled Petroecuador's performance of the participation contracts and their potential renegotiation. The tribunal concluded that the

[22] Bayindir, ¶ 125; EnCana ¶ 154.

[23] Bayindir, ¶ 125.

[24] Bayindir, ¶ 124. *See also* Badia, at 173.

[25] Notice, 124:4; Facts, 930:30; Response, 500:16-17.

[26] Facts, 1590-5:50.

conduct of Petroecuador in entering into, performing, and renegotiating the participation contracts (or declining to do so) was attributable to Ecuador.[27]

43. Here, NHA is not a State-owned and State-controlled instrumentality because NHA as a public corporation operates independently from the government.[28]. Unlike in *Encana*, here, 1) NHA was not subject to instructions to terminate the LTA from either the Minister of Health or the President of Mercuria, and 2) the Minister of Health did not supervise and control NHA's performance of the contracts or their renegotiation. There is no record of any direct participation of Mercurian officials in the negotiation, performance, and termination of the LTA.[29] Therefore, this tribunal should conclude that NHA's termination of the LTA is not attributable to Mercuria because it was not state act.

C. The Tribunal Lacks Jurisdiction *Ratione Temporis* under Art. 3

44. This Tribunal lacks jurisdiction *ratione temporis* because the award and the LTA are not investments. The timing of alleged violations of the BIT is irrelevant because the LTA is not protected by the treaty. A tribunal has jurisdiction *ratione temporis* when violations occur on valid investments that are made in "the territory of the other Contracting Party on or after the date of its entry into force" under Art. 13 of the BIT.[30] In this case, Mercuria did not violate the BIT after the date of its entry into force because the alleged breaches do not arise from the BIT.

45. In *Philip,* the tribunal held that it had jurisdiction *ratione temporis* because the treaty was in force and protected the claimant's right at the moment of the alleged breach.[31] The tribunal reasoned that the term "investment" treaty must be deemed to be limited to prospective disputes because otherwise, it would be contrary to the dispute resolution clause and the object and purpose of the treaty.[32]

---

[27] EnCana, ¶ 154. *See* Sasson, at 22-3.

[28] Facts, 1590:50.

[29] *Id.*

[30] SG1, § 105. *See also* Jaramillo, at 1240.

[31] Philip, ¶¶ 527-9.

[32] *Id*. ¶ 526

46. Here, after the BIT came into force, the claimant's rights were not violated because the award and the LTA are not investments. Therefore, this Tribunal does not have jurisdiction *ratione temporis* over the claims relating to the award under Art. 13 of the BIT.

II. MERCURIA IS JUSTIFIED IN DENYING BENEFITS OF THE BIT TO ABL UNDER ART. 2

47. A question regarding the exercise of a DOB clause goes to the admissibility and not the jurisdiction of the Tribunal.[33] This Tribunal does not have jurisdiction over claims made by ABL because it is not an investor under the definition of the BIT for reasons explained above. Therefore, this Tribunal may not address questions regarding the DOB clause because it does not have jurisdiction to address the merits of the case.
48. However, in the event this Tribunal finds that it has jurisdiction over this dispute, it should nevertheless find that Mercuria has validly denied the benefits of the BIT to ABL because ABL is merely a 'mailbox company.' Mercuria, as a host state may legitimately exercise the right reserved under the DOB clause as its prerogative of state authority. Further, ABL meets the requirements for Mercuria to deny benefits of the BIT under Art. 2(1) and Art. 2(2).

A. DOB clause denies BIT protections to treaty shopping shell companies like ABL

49. The policy objective of the BIT is to promote and protect investments made by nationals of Mercuria and Basheera in the others' territory. ABL is a company that is owned and controlled by nationals of states other than Basheera and Mercuria. It does not possess any autonomy of its own, neither does it have sufficient connections with Basheera, to demand treaty protections. Therefore, extending BIT protection to ABL is counterproductive to the purpose of the BIT.
50. The DOB clause is inserted in the BIT to "guard [the host state] against what has been described as the establishment of a 'shell company'. . . [whose] sole purpose is to avail [it]self of treaty protections," [34] thus preventing treaty shopping. It is a secondary

[33] Newcombe. citing DOUGLAS 1; *See also* Paulsson 2. (explaining that a question of jurisdiction of a tribunal calls into question the authority of a tribunal to decide on an issue altogether; whereas admissibility of issues before a tribunal is for the tribunal to exercise its authority to determine).

[34] *See* Badini.

requirement, aside from the definition of an investor under Art. 1(2).[35] "A distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, and disruptive treaty shopping that would play havoc with the policy objectives"[36] of the BIT. It is to prevent "investors" like ABL, who have no real connection to the contracting parties to the BIT from seeking treaty protection when their corporate structure is created to facilitate treaty shopping.

51. In *SGS*, the tribunal held that an investment made by a transfer of rights transaction must be a *bona fide* transaction in order to qualify such an investment for BIT protection.[37] The tribunal echoed the limitations from *Vivendi*, which set out the limits to extending BIT protection to investments made by entities that are established in a country only to make use of favorable terms in investment treaties.[38] The purpose evidenced in *Vivendi* is identical to the purpose of DOB clauses in the BIT. The DOB clause in the BIT is inserted to act as a limit—to prevent sham investors like ABL from seeking BIT protection.[39] This is similar to the "effective control" requirement in the 1987 ASEAN Agreement. The tribunal in *Yaoung* noted that the 1987 ASEAN agreement contained an additional element requiring "effective control" "to avoid what has been referred to as 'protection shopping'."[40]

52. This Tribunal should find that Mercuria denies benefits to ABL because ABL's financial and corporate control is not in Basheera. Its contractual obligations under the LTA was not met by ABL, but by ABC—an entity that is registered and head-quartered in Reef[41] whose shares are held by a mix of private entities and public individuals not from Basheera.[42]

B. ABL is not a *bona fide* Investor in Mercuria

[35] *See* SORNARAJAH, at 329-30. (the idea is to prevent companies from engaging in 'round-tripping,' where corporations incorporate companies to merely adopt a nationality of convenience to seek protections from a treaty because of its favorable terms).

[36] Maffezini, ¶ 63.

[37] SG2, ¶ 110.

[38] *See* Vivendi.

[39] *See* BALTAG.

[40] Yaung, ¶52.

[41] Facts, 1509-10:48.

[42] Facts, 1570-2:50.

53. The test for determining whether ABL is an investor does not stop with Art. 1(2), but extends to the test under Art. 2, because an investment treaty is a cumulative document.[43] It should, therefore be read in a manner that is consistent with its structure, where the overall objective of protection of investments is complements the text of the BIT.[44] Art. 2 is a test to determine whether an investor is *bona fide* in that the investor wishes to engage in meaningful economic activity. ABL is not a *bona fide* investor to Mercuria because it has no real links to Basheera to claim BIT protection. Further, ABL satisfies the requirements of Art.2(1) and Art. 2(2). ABL is a legal entity that is owned and controlled by nationals of a third state because its holding company, ABC, is a corporation organized under the laws of Reef.[45]

54. An investor that has no *bona fide* factual links to a contracting State of a treaty should not be allowed to benefit from the treaty. The tribunal in *Saluka* acquiesced that the investor there did not have a "*bona fide* [. . .], real and continuous links" to the Netherlands.[46] The tribunal ultimately allowed Saluka's claim because of the words specific to the treaty. Yet, the tribunal admitted that:

> "a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping."[47]

55. A party is not a *bona fide* investor when the sole purpose of its investment is to gain access to international jurisdiction, and not for engaging in economic activity. In *Phoenix*, the tribunal found that the claimant there "had made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic."[48]

---

[43] *See generally* British.

[44] British, ¶ 280.

[45] Facts, 845-6:28.

[46] Saluka, ¶ 239-40.

[47] Saluka, ¶ 240.

[48] Phoenix, ¶ 142.

56. The tribunal considered that Phoenix was abusing the rights under the treaty, a "*détournement de procedure*"[49], because Phoenix did not have sufficient contacts with the investing State.[50] ABL does not have sufficient contacts with Basheera because, like Phoenix, its purpose was not to engage in meaningful economic activity of its own. ABL wanted to further the business interests of its holding company ABC; to have the ability to bring international litigation to protect the patent rights of ABC, thus engaging in treaty shopping to facilitate ABC's interests in South America and Africa.

C. ABL meets the substantive requirements for the application of Art. 2

57. The DOB clause is a provision where "States reserve the right to deny the benefits of a treaty to a company incorporated in a State but with no economic connection to that State."[51] It adds an additional requirement along with the incorporation test of the BIT because it specifically seeks to deter treaty shopping.[52]

58. The tribunal in *Tokios* notes that "State parties are capable from excluding the scope of the agreement, entities of the other party that are controlled by nationals of third countries or by nationals of the host country."[53] *Tokios* tribunal further held that where such a DOB clause is present, tribunals were required to determine whether the investor had substantial business activities by applying the control test, in addition to the test of nationality of the investor.[54]

59. Art. 2(1) denies benefits to an investor, if the investor is owned or controlled by nationals of a third State and if the investor does not have any substantial activities in the territory of the contracting party whose jurisdiction it claims. Here, ABL is an investor which is owned and controlled by ABG, and in turn, ABC, both of which are corporations whose nationality is not Basheera. Further, because ABL has no real, factual, or substantial

[49] Phoenix, ¶ 143.

[50] Phoenix, ¶ 140-5.

[51] DOLZER, at 48.

[52] *See* BIT, art. 1(2).

[53] Tokios, ¶ 36.

[54] Tokios, ¶ 35.

connections of its own to Basheera, it has no "substantial activities" in Basheera, meeting the second part of Art. 2(1).

i. ABL is owned and controlled by nationals of a third state

60. Art 1(2) and Art 2(1) creates two types of investors, one that is incorporated in a contracting State to the BIT and the other being investors that are controlled by nationals of a third State.[55] Nevertheless, both clauses must be read together in determining the legitimacy of an investor.[56] "Foreign ownership or control is potentially unacceptable [. . .] where it is not accompanied by substantial business activity in the state of incorporation."[57]

61. The ownership of an investor is determined by examining its shareholding, the members of its board and officers, and the center of its control.[58] The tribunal in *CCL* held that the claimant has the burden to provide the necessary information and evidence concerning its ownership and control when doubt has arisen on that matter.[59] Here, ABL has not provided any proof that its ownership and control lies with Basheera. On the contrary, ABL admits that it is owned and controlled directly by ABG, and in turn by ABC, which are both companies with no ties to Basheera.

62. The element of control is the "legal capacity to control."[60] The tribunal in *Ulysseas* ruled that the claimant was not directly held by nationals of a third state, because the parent company of the claimant intervened in the working of the claimant only in the event of a deadlock.[61] Unlike *Ulysseas*, ABL is directly and persuasively controlled by its parent and holding companies. Further, just like in *Ulysseas*, ABL's control persisted since 1998 and up until the date of the Notice.[62]

63. This Tribunal should hold that ABL is a shell company established in Basheera by ABC to facilitate treaty shopping, with no autonomous control over its own business. ABC

---

[55] *See* Amto, ¶ 61 for the explanation of art. 17 of the ECT.

[56] *See* Salini.

[57] Amto, ¶ 61.

[58] Salini, ¶ 32.

[59] CCL, ¶ 82.

[60] Ulysseas, ¶ 167.

[61] Ulysseas, ¶ 169-89.

[62] Ulysseas, ¶ 174

financed ABL's commitments under LTA. ABL is owned, controlled and funded by ABC, which even funded ABL for setting up the manufacturing unit in Mercuria.[63] ABC also funded ABL's performance of the obligations under the LTA.[64]

ii. ABL has no real, factual links to Basheera

64. Giving ABL benefits of the BIT is in contravention to the BIT because ABL is a mailbox company without any real, factual links to Basheera. This Tribunal should lift ABL's corporate veil, allowing Mercuria's DOB because protecting ABL is inconsistent with the objects and purposes of the BIT.

65. Real and factual links of an investor can be determined by the strength of its connections to the State of incorporation. In *Pac Rim*, the tribunal found that the claimant there did not have any principal activities of its own in the State of its nationality; that it was the holding company that was directing all the business activities in El Salvador.[65] On this basis, the tribunal held that the claimant fails the "substantial activities" test because it found that the claimant did not have activities of its own that could be separated from that of its holding company. Pac Rim argued that it was the "intellectual property"[66] of the holding company and should therefore receive BIT protection. The tribunal rejected this argument because Pac Rim was not a traditional holding company, but was "akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities."[67]

66. The characteristics of ABL fit closely with the characteristics of Pac Rim. Like Pac Rim, ABL is not a holding company, but it is held by companies whose nationalities do not make it eligible for treaty protection. Further, ABL is the "intellectual property" of its holding company, in that it is assigned the patent for Valtervite from its parent company. ABL also does not have "activities of its own" in and out of Basheera, like Pac Rim. All of ABL's activities are funded, sourced, and directed by its holding companies.[68]

---

[63] Facts, 1572-3:50.

[64] Facts, 1573:50.

[65] Pac, ¶ 4.71-2.

[66] Pac, ¶ 4.74.

[67] Pac, ¶ 4.75.

[68] Facts, 1572-3:50.

67. The materiality of the business connections of an investor determines the strength of the activities. In *Amto*, the claimant had paid taxes (including income taxes, social insurance obligatory payments, internal VAT, and entrepreneurial activity risk state fee); two full time staff to whom it paid social insurance obligatory payments; a multi-currency bank account with significant transactions in each currency; and a statement from the landlord that it was renting office space. [69] The tribunal there held that this was sufficient to establish connections with Latvia.[70]

68. Unlike in *Amto*, while ABL is said to "fulfill its tax obligations in Basheera," and that it had "rented office space" with some number of staff members, there is no evidence to show that it conducted business activities on its own. ABL's business activities were carried out through the financial strength of ABC, which is not the same as the claimant in Amto.

69. This Tribunal should hold that ABL is a shell company with no independent or substantial business activities in Basheera; and that ABL does not qualify for BIT protection.

iii. The purpose of the BIT is defeated if protection extends to ABL's "investment"

70. The object and purpose of a treaty "may be discerned from its title and preamble."[71] "The object and purpose of the Treaty as a whole is to promote greater economic cooperation between the parties and investment by nationals of one party in the territory of the other."[72] The tribunal in *Saluka* noted that while the protection of investment is an important aim of the treaty, "a necessary element alongside the overall aim of encouraging foreign investment and extend and intensifying the [contracting] parties' economic relations."[73] Here, the parties to the BIT, are Basheera and Mercuria. Extending protection to nationals of a third state like ABL is beyond the scope of protection under the BIT.

71. This Tribunal should, like in *Saluka* consider Art. 2(2) in light of the preamble to the BIT; in that the BIT is an agreement to encourage investments between Mercuria and Basheera.

---

[69] Amto, ¶ 68

[70] Amto, ¶ 69.

[71] Saluka, ¶ 299.

[72] Murphy, ¶ 165.

[73] Saluka, ¶ 300.

Protecting ABL's so called "investments" do not further the diplomatic relationship between Basheera and Mercuria because ABL is not a Basheeran entity.

III. THERE IS NO VIOLATION OF FET BECAUSE CLAIMANT HAS FAILED TO MAKE A *PRIMA FACIE* SHOWING THAT MERCURIA BREACHED ARTICLE 3 OF THE "BIT"

72. Art. 3 of the BIT states that investors are entitled to FET. Under international law, this is understood to "provide a basic and general standard which is detached from the host State's domestic law."[74]

73. The exact content of FET is not always the same nor clear, but it should be construed as meaning a *minimum* standard.[75] [Emphasis added]. Meaning, that when FET is stated in a BIT, the parties can expect not to be treated grossly unfair or arbitrarily. A minimum standard of treatment means that FET violations will include acts of "willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[76] FET does not provide for a heightened or favorable treatment of investors.

74. It is the position of Mercuria, that Claimant is not an investor and therefore is not entitled to the protections the BIT. Regardless, it remains that there is no violation of FET.

A. There is No Breach of the Legitimate Expectations of the Parties

75. Claimant is not an investor and therefore cannot reasonably have any basic expectations on the basis of the BIT. Claimant had a commercial contract and received an arbitral award based on breach of that contract. The arbitral award nor profits from a commercial contract entitles Claimant to investor protections. If mere contracts are allowed to provide mailbox companies with the same rights as foreign investors, then the basic expectations of Mercuria in signing the BIT have been violated and true foreign investors are put at a disadvantage.

76. If Claimant is found to be an investor, then Mercuria cannot be held to subjective expectations. The obligations and expectations of BIT contracting parties derive from the terms of the investment treaty and not from any set of expectations investors may have or

[74] Genin, ¶ 367.

[75] *Id.*

[76] *Id.*

claim to have."[77] The BIT is the primary source of governance for investment claims. Simply because an investor assumes their basic expectations are encompassed in the BIT does not make it a fact. The plain language of the BIT does not state that basic expectations of the investor are protected.

77. If the Tribunal decides that FET encompasses a foreign investor's legitimate and reasonable expectations, then the expectations, as well as their violation, must be examined objectively.[78] Legitimate expectations must be an objective concept, the result of balancing interests and rights that vary according to context.[79]

> "[L]egitimate expectations cannot be solely the subject expectations of the investor, but have to correspond to the objective expectations that can be deduced from the circumstances and with due regard to the rights of the State."[80]

78. A foreign investor cannot reasonably expect the State will freeze its legal system, especially when the State faces emergency situations. "There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis."[81]

79. According to the tribunal in *El Paso*, deciding if a FET violation has occurred must be considered in light of the circumstances of each case. The tribunal stated that legitimate expectations might differ between an economy in transition such as that of Ukraine and a more developed one.[82]

80. The tribunal in *Generation* more explicitly explained the weight of investor's decisions to invest in developing countries. The tribunal explained that basic expectations of investors must include all the circumstances of the host State. The tribunal pointed out that investors often specifically chose developing countries in hopes of making a larger profit than they could in a more stable country, but must also admit that their basic expectations include potential risks.

---

[77] MTD, §§ 66-7.

[78] El Paso, ¶ 356.

[79] *Id*.

[80] El Paso, ¶ 358. *See also*, Saluka.

[81] *Id.* ¶ 374.

[82] *Id.* ¶ 360.

> "The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls."[83]

81. The basic expectations of the investor must include that they were well aware that Mercuria is a developing country with an overburdened court system. Claimant chose to sell its medicine in a State they were well aware of was experiencing problems with contagious diseases, such as greyscale outbreaks. Claimant saw an opportunity to make a profit, but should not be allowed to deny that basic expectations must include basic risks.

82. Additionally, it is not solely the basic expectations of the investor that must be protected, but also those expectations of the State. "[A]n interpretation of the fair and equitable treatment standard in light of the object and purpose of the BIT may not exclusively rely on the interests of foreign investors."[84] Upon signing of the BIT, the State also formed expectations that it would maintain sovereignty and not be prevented from passing legislation to protect its public. This is explicitly evidenced by Art. 12 of the BIT.

83. Each BIT is drafted with consideration of the intent of each party. Not every BIT includes explicit statements about a party's right to take emergency action and each Article must be treated as having the purpose of putting the other party on notice of applicable rights.

> "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."[85]

84. Article 12 put Claimant on notice that Mercuria may take action necessary for its protection of essential security interest in appropriate times. It is the basic expectation of Mercuria that the State is within its right to take action in what they considered an emergency in international relations.

85. Protection of essential security interests may not have a precise definition. However, if it is not within the right of a State to take action when the majority of their working population

[83] Generation, §20.37.

[84] El Paso, ¶ 358.

[85] BIT, art. 12.

is suffering from public health epidemic of a contagious disease outbreak, then it is hard to imagine what is considered an emergency. If the crisis that Mercuria was suffering from does not entitle it to invoke Art. 12, then there is likely no definition that is suitable at all. Denial of Mercuria's right to invoke Art 12, in itself violates the basic expectation of Mercuria of placing Art 12 in the BIT.

86. The Tribunal should decide that if FET includes basic expectations, then Mercuria was within its right to take measures to deal with the public health crisis and that Claimants basic expectations include the potential risks of investing in a developing country.

B. Mercuria's Behavior was Not Discriminatory

87. Art. 3(2) of the BIT provides that:

> "Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."

88. Plain reading of the BIT implies that discriminatory behavior is when one party is treated differently than other materially similar parties without a legitimate reason. Mere difference in treatment does not constitute discrimination. A party that alleges discrimination must be able to show a *prima facie* case of discrimination.

89. Under international investment agreements, the national treatment obligation does not preclude all differential treatment that may happen to affect an investment, but the aim of investment treaties is to protect foreign investors from *de facto* discrimination based on nationality.

90. It remains the sovereign right of a State to govern companies within its territory how it deems necessary, even if it is differently. Art. 3 of the BIT simply gives contracting parties an extra assurance that their investments within the host-state will not be targeted based on nationality.

91. Claimant has not been treated discriminatory because they have not been treated differently than other materially similar parties. Mercuria enacted legislation that dissolved all patent rights, regardless of nationality. There was no specific targeting of Claimant as a Basheeran company. Simply because Claimant was effected by the law does not amount to discrimination.

92. Additionally, in order for there to be discrimination, differential treatment needs to be without a legitimate reason. Here, the treatment of Claimant's patent has not been without reason. The reason behind removal of patent rights was to obtain life-saving medication for public use. Claimant was unreasonably withholding access to lifesaving medicine and maintained a monopoly on the product. Mercuria implemented legislation that would prevent any company from unjustly withholding medicine by exclusive control. Mercuria stands behind its obligation to protect the public and the reasonable measures it took in order to achieve that protection.

93. Other tribunals have dealt with the denial of a license as the basis for a discrimination claim. According to the tribunal in *Genin*, when discrimination is viewed as an aspect of FET, the test of if discrimination has occurred lies in the intention of the government in denying the license.[86] In *Genin*, the tribunal held that Claimants failed to prove that withdrawal of Claimants licenses was in a discriminatory way.[87] This is because the Respondent did not revoke the license with the intention to harm Claimant nor was there any evidence that Claimant was treated in a less favorably way than other companies of similar nature.[88]

94. Here, the State of Mercuria did not revoke Claimant's patent with the intention of harming Claimant nor was Claimant treated in a manner differently than any other patent holder. Mercuria's intention behind revocation of all patents was to allow the NHA to deal with the public health crisis that Claimant was well aware of. Revocation of patents was necessary to produce lifesaving medicines.

95. The tribunal in *Total* also dealt with the issue of discrimination. The Claimant there alleged that they were treated in a discriminatory manner because regulation of the gas sector and pesification of the currency negatively affected mostly foreign investors.

96. The *Total* tribunal found that in order for a Claimant to prove that they have been treated in a discriminatory manner, they must: identify a local subject for comparison, must prove that the claimant-investor in in like circumstances with the identified preferred national comparator, and they must demonstrate that it received less favorable treatment in respect

[86] Genin, ¶ 369.

[87] *Id.*

[88] *Id.*

of its investment as compared to the treatment granted to the specific local investor or the specific class of national comparators.[89]

97. The *Total* tribunal found that even though measures of the general application of gas sector and pesification laws resulted in different treatment being accorded to investors in different sectors, which did result to a type of discrimination, that since the investor could not show a nationally based discrimination, the discrimination claim failed.[90]

98. Here, Mercuria has behaved more fairly than Argentina did in *Total*. Mercuria has passed legislation that revoked *all* patent rights, but only after three years and with proper justification. Mercuria has not enacted a law that only affects one sector, but has passed a law with regards to all sectors.

99. Likewise, Claimant has not alleged, nor can they prove that they have been treated differently based on nationality. Claimant has given no local subject for comparison, cannot prove that there is a preferred national comparator, nor can Claimant demonstrate that it received less favorable treatment in respect of its investment as compared to a local company. Therefore, Claimant fails not only on a general test of discrimination, but also by discrimination tests employed by the tribunals in both *Genin* and *Total*. Claimant has failed to show a *prima facie* showing of discrimination because it does not exist.

C. Mercuria's Behavior was Not Arbitrary

100. Art. 3(2) of the BIT provides that neither contracting party shall impair an investment by unreasonable or discriminatory measures. Arbitrary treatment of an investment means that a State has prevented the use, enjoyment or disposal of an investment solely on the basis of prejudice or preference rather than reason or fact. For a State's actions to be arbitrary, the conduct cannot be governed by law, but be based only on capriciousness.

101. Claimant alleges that they have been treated arbitrarily because its patent protection was removed and a third party was allowed to access it. Although the protection was removed and a third party was allowed to produce the medicine, it was not without reason or fact. Rather, the actions of the State were contemplated extensively and conducted under the governance of a carefully crafted law.

[89] Total, ¶ 212.

[90] Total, ¶ 213.

102. The reason the State allowed a third party access to patented information is that Mercuria needed to aid its population. In 2005, only 10,012 out of the total number of greyscale patients depended on Mercuria to obtain greyscale medicine that was during the time that Claimant contracted the sale of medicine to the NHA.[91] In 2006, that number drastically increased to 100,000. At the prices charged by Claimant, it would cost a third of the entire health budget to provide medicine for greyscale alone. The working population was at risk of falling victim to greyscale if the epidemic was not quickly handled.

103. Mercuria was aware of greyscale prior to granting Claimant's patent, but greyscale was not an epidemic at the time. The number of people that the disease infected dramatically increased, transforming an issue that the State was slowly dealing with to a crisis that required immediate action.

104. The State's behavior was not arbitrary because it was conducted for a specific purpose based on the factual situation of the State. The State's behavior also was not arbitrary because it was conducted in accordance with the law. Mercuria followed proper procedure to pass Law No. 8458/09, which provides that third party applicants are only granted use of a patent if certain requirements are satisfied.

105. In *Genin*, the tribunal considered if the Respondent's decision to revoke Claimants license was arbitrary treatment of the investment. It was relevant that the tribunal found no evidence of discriminatory action.[92] Additionally, the tribunal considered the Respondent's explanation of their decision to revoke the license, that their decision was in the course of exercising its statutory obligations to regulate the relevant sector.[93]

106. Mercuria's decision to revoke patents was in the course of exercising its obligation to deal with the outbreak of a contagious disease. Mercuria was acting to control the public health epidemic by allowing the public access to critical medicines through a third party producer. Mercuria, guided by health information acquired from the NHA, followed legislative process to pass the law that revoked patents and allowed third parties to produce medicines if they met legislative requirements. Passing laws to regulate the public health sector is in the course of exercising its obligation to the health sector and the public.

---

[91] Facts, 1359-61:42-3

[92] Genin, ¶ 370.

[93] *Id*.

107. In *Genin*, the totality of the evidence was essential in the tribunal's decision that the withdrawal of the license was justified. In light of the circumstances, the tribunal stated that in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to, "amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action."

108. In the present case, Mercuria was dealing with a much more severe political and economic situation than Estonia was in *Genin*. The totality of the circumstance called for drastic measures by the State. Estonia was merely dealing with political and economic transition period, whereas Mercuria was dealing with a public health crisis.

109. Mercuria's revocation of patent rights was in response to dealing with greyscale that had become out of control. Mercuria actions were in good faith for the protection of the public.

110. The tribunal should find that Mercuria did not act in an arbitrary manner, but rather acted with a public purpose. Where ample grounds existed for the action taken by the Respondent, Respondent cannot be held to have violated the standard of FET.[94]

D. FET Does Not Mean that Regulations Never Change

111. It would be contrary to a State's purpose to sign a BIT, if that BIT encompassed the inability of the State to enact new legislation. The tribunal in *El Paso* summarized this ideal: "FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements."[95]

i. Plain Reading of the BIT shows that Stability of Legal and Business Environment is Not Intended

112. When considering the context in which the BIT includes the FET standard, its object and purpose, the tribunal should observe the Preamble and the Treaty.[96] Art. 3 of the BIT provides for FET, but nowhere in the BIT is there language, a promise, nor intention that the business and legal framework of Mercuria will remain frozen.

---

[94] *Genin* ¶367.

[95] *El Paso* ¶368.

[96] Vienna Convention and *LG&E §124.*

113. Art. 3(1) of the BIT rather indicates the opposite by conditioning the ability to create favorable conditions for investors subject to the "right to exercise powers conferred by its laws and investment policies." In order for Claimant to assert a right to an immutable legal and business framework, they would have to use outside sources, other BITs and other tribunals decisions, to justify that FET automatically encompasses the right of an investor to unchanged conditions over that of the ability of a State to enact laws.

114. In arbitral cases that have incorporated stability of the business and legal framework into the meaning of FET, there has been some sort of outright indication in the Preamble or the BIT itself that refers states specific promises and explicit language of "stability."[97] Neither in the Preamble nor in Art. 3 of the BIT is there any sort of language.

ii. FET Does Not Encompass Immutability of the Legal and Business Framework

115. If the stability of the legal and business framework were always an essential element of FET, then legislation could never be changed: "the mere enunciation of that proposition shows its irrelevance."[98]

> "Such a standard of behavior, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*."[99]

116. The tribunal in *El Paso* refused an automatic application of FET implying the stability of the legal and business framework because "[e]economic and legal life is by nature evolutionary."[100]

117. The tribunal in *El Paso* acknowledged that legal and business frameworks must change according ever changing circumstances. Mercuria has done exactly what it is supposed to do, enact laws in the interest of its citizens and their needs. It would be illogical that Claimant would demand its investment be free from Mercuria's ability to enact laws. The

[97] CMS, § 274, Occidental, § 183, LG&E, § 124.

[98] El Paso, ¶ 350.

[99] *Id.*

[100] *Id.* ¶ 352.

patent legislation was enacted in order to deal with a public health crisis; Mercuria must maintain their sovereign right to govern.

118. Additionally, purpose of the patent laws deserves consideration. Patent laws are implemented in order encourage innovative ideas that will aid the overall population. Patent protections allow for an investor to maintain its secrecy for a period of time in order to recuperate costs of research and development.

119. The passage of Law No. 8458/09 does not negate the aim of patent laws. Law No. 8458/09 allows for the protection of a patent for at least three years from issuance of the patent. After the three years, a third party applicant is required to apply and must submit to the grounds that the patent has reasonable public requirements, the patent holder has not availed the product to the public at a reasonable cost, or that the patented product is unavailable in the territory.[101]

120. Law No. 8458/09 not only allows time for a patent holder to recuperate costs, but it also holds third party applicants to high standards to obtain patented information. The law prevents large scale companies from maintaining a monopoly on life saving drugs and exploiting developing governments and vulnerable populations.

121. Claimant has more than recuperated the costs of research and development for the patent in dispute. Claimant's parent company charged their normal price for the drug in conducting business with the NHA from 1999-2004. After conducting business for five years, Claimant entered into a contract to provide the greyscale drug as an exclusive provider, adding to their profits. Additionally, Claimant has received and is still receiving a royalty from the profits from the third party that has used the patent.

122. Patents are on average only good for 20 years.[102] It is recognized that a person cannot maintain an exclusive control over an idea or a product forever. Eventually, for the overall welfare, information must be released. This is the principle that Mercuria was forced to implement in order to deal with its public health crisis, release of information in order for the greater good of the public.

[101] Facts, 1390-8:42.

[102] *See*, WIPO.

IV. WHETHER MERCURIA IS LIABLE UNDER ART. 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS

A. Claimant Bears the Burden to Prove That They Were Denied Justice

123. If Claimant suggests that they have been denied access to justice, it is the Claimant that must prove that they have been denied their right. In denial of justice claims, the starting point must encompass the principle that all acts emanating from a State enjoy a presumption of legality and the one that alleges the denial of justice has the burden of proving it.[103] Therefore, when making the decision as to whether there has been a denial of justice, the Tribunal should ensure that the burden of proof is placed on the Claimant with a deference of legality to the State.

B. Claimant Fails to Prove a Fundamental Failure Occurred with Convincing Evidence.

124. Denial of justice is a grave charge under which international law requires proof of exceptional circumstances. A court's conduct can only be deemed unfair or inequitable under international law when there is clear and convincing evidence of egregious violation of due process and/or manifest arbitrariness that resulted in a total failure of the judicial system.

125. A State can only be held for denial of justice if Claimant can prove that the court system fundamentally failed. "Such failure is mainly to be held established in cases of major procedural errors such as lack of due process."[104] Such a failure must be proven to a standard of "convincing evidence."[105]

126. Mercuria cannot be found to have a court system that has fundamentally failed because Claimant rests its claim on the basis that its award has not been enforced in a desirable timeframe. Claimant's accusation is that an unsatisfactory amount of time has passed between the arbitral award and the time of enforcement.

127. Claimant's main contention is the speculation that the State indulges the NHA's frivolous

[103] Flughafen, ¶ 637.

[104] Liman ¶ 279. *See also*, RosInvestCo, ¶ 279.

[105] Chattin ¶¶ 282, 288.

claims. There is no hard evidence that any Mercurian court has refused to hear the claim, only evidence that Mercuria has tried to afford each party the opportunity to be heard.

128. Mercurian courts have scheduled enforcement proceedings but have been forced to reschedule them due to adjournment requests, enforcement issues, and concerns on the part of both parties. The mere passage of time does not constitute as a fundamental failure on the part of courts. Furthermore, Claimant only has circumstantial claims that are of a speculative nature, failing far below the standard of convincing evidence that is of a most convincing nature.

129. In *Liman*, there were allegations of corruption of the government.[106] The tribunal found that although there had been an 18-million-dollar fee proposal and settlement offer by the government, that it was not implausible that there were other explanations for those facts. Therefore, that information alone, Claimant failed to meet the burden of proof of sufficient evidence of their claim.

130. Here, the Tribunal should find also that Claimant has failed to meet the burden of proof because its accusations rely on the speculative assumption that they have waited a long time and have no real evidence that there have been major procedural errors or a lack of due process.

C. Undue Delay as a Denial of Justice

131. When undue delay is the basis of a denial of justice claim, each case must be analyzed on a case by case scenario considering the totality of the circumstances. Denial of justice claims usually regard courts that are corrupt or a for courts that have blatantly denied to address grievances within the law. Here, we have a claim that Claimant has waited too long. A longer than anticipated wait in enforcement of an award cannot be the basis of a denial of justice. Rather, to amount to a denial of justice there must be an egregious delay that amounts to failed court system that has refused a party its rightful day in court. In determining if an undue delay amounts to a denial of justice, then the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake, and the behavior of the courts themselves are factors, among others, that must be considered.[107]

[106] Liman, ¶ 422.

[107] Oostergetel, ¶ 290; *see also* Chevron.

i. Complexity of the Proceedings

132. The nature of the case at hand is extremely complex. First, this is not a simple breach of contract case, but the enforcement of an international arbitral award that will have severe implications on the State, both parties, and internationally when enforcement or refusal of the award is decided. Enforcement itself is complex, as the arbitral award must be ensured to have been awarded with proper procedures. The ability to enforce by the Mercurian Courts is another complex and separate procedure.

133. Adding to the complexity, the party in which the award is being enforced against raises a legitimate, but often controversial exception to the enforcement of arbitral awards. That exception raised is the refusal of enforcement on the basis of contrariness to public policy. The public policy exception is not only a source of contention in Mercuria, but many other countries in the world. Public policy enforcement disputes are very complex, lengthy, and must receive proper consideration as the public is the first responsibility of every government.

134. To further frustrate complexity, a number of legal proceedings affecting arbitral awards occurred. The Parliament of Mercuria passed a law in which special benches were created in order to expedite commercial matters. A year later, a ruling by the Supreme Court of Mercuria changed enforcement procedures, allowing only original commercial suits to be heard by the special court.

ii. Behavior of the Litigants

135. The behavior of the litigants themselves must also be examined. Prior to investing in Mercuria, Claimant understood that Mercuria is a developing country with an overburdened judiciary struggling to cater to its population of 67 million people. The fact that Mercuria is still developing is one of the reasons why Claimant chose it as an investment destination, in order to take advantage of the development process.

136. The Claimant cannot believe that they would receive special treatment by the courts of Mercuria. Claimant does not allege differential treatment than any other claimant within the court system, only that they have been treated slowly. Claimant has done nothing in order to hurry along proceedings, but after initial filings, Claimant has sat back and waited for proceedings. The process of having an arbitral award enforced is not the sole responsibility

of the State, but it is equally in the hands of the party that desires enforcement.

137. Additionally, if delay tactics are being used by a party, it is a factor that the State must consider, not be held responsible for. The NHA may not desire the arbitral award to be enforced, as any losing party is not in favor of having a judgment against them. Yet, it is equal that a party desiring enforcement will have every motivation to hurry along enforcement. However, as the State, it is our responsibility to allow each party to be heard. If the NHA has concerns about enforcement of the award, we must hear and consider them or else a true denial of justice has been served.

iii. Significance of the Interests at Stake

138. The significance of the interests at stake must be considered. The significance of the Claimant is merely that of a monetary nature. Claimant demands payment for a breach of contract claim in the form of an arbitral award. Although it is important to enforce arbitral awards, Claimant has already received monetary compensation from the breach of contract claim in the payment of a percentage of proceeds from a third party seller, as ordered by the Court. However, enforcement of the arbitral award on the part of the State has an extreme degree of significance. There is a public policy dispute that must be examined. If Mercuria enforces an award in opposition to public policy, the public will suffer. If Mercuria forces proceedings without following proper guidelines, there could be precedential and unjust consequences. The significance of the interests at stake is only that of a monetary value for Claimant, but very significant for the State. The State's responsibility is not only to both parties, but to the Mercurian public to ensure that laws and awards are enforced with proper procedure and justice.

iv. Behavior of the Courts

139. The behavior of the courts must also be examined. Mercuria is working to find ways to speed up its overburdened court system. This includes establishing a special court in order to specifically hear commercial claims. It must be understood that steps are being taken by Mercuria in order to implement better court systems and requires time to adjust.

140. Mercuria is a developing country and has many newly signed investment treaties. Enforcement of arbitral awards is not an area in which Mercuria has a great deal of

experience. There must be time to adjust. Mercuria must train judges properly to deal with such complex cases. Foreign investing countries cannot expect arbitral experts overnight.

141. Additionally, the behavior of the Courts has not been that as a denial of justice because they have not outright refused to hear enforcement proceedings. Mercurian Courts have acted to the contrary; they have heard both parties in regards to the award enforcement. Claimant relies upon speculation that the Court has indulged delay tactics by the NHA, but has no accusation or evidence that either party has not been allowed its day in court. The fact that Claimant is unhappy with the Courts decision to hear NHA concerns is not a valid basis for a denial of justice claim.

142. In *Oostergetel* it was found that in consideration of the four factors mentioned above, that the State had not denied justice to the Claimant through an undue delay.[108] The tribunal evidenced this by the fact that although there were discrepancies in the State's proceedings that because the State had reasonable answers as to why there was a delay there was not a denial of justice. Part of the reasonable explanations of the State was that there had been many obstructions on the part of both parties. Also, the length of proceeding was standard for the State in issue, which was a more than two years from the filing of the bankruptcy petition until the adjudication itself. The State also explained that the Claimant had not exhausted local remedies effectively during the proceedings.

143. Likewise here, Mercuria should not be found to have denied justice by an undue delay because they have provided more justifiable and reasonable answers than in the case of *Oostergetle*. Mercuria has explained their circumstances and given answers for any delay in proceedings. The proceedings have not taken substantially longer than other cases of similar sort and do not amount to an egregious delay. There are no allegations of corruption of refusal of Claimant to be heard. Any obstruction on the part of the NHA is merely speculative and the State must afford each party to be heard.

V. ABL'S CLAIMS UNDER THE LTA ARE PURELY CONTRACTUAL CLAIMS

144. Claimant wrongly asserts that the breach of the LTA by NHA is necessarily a treaty claim without offering sufficient cause for such an elevation. Tribunals in investment treaty

[108] *Oostergetle* ¶290.

disputes are required to "clearly distinguish between mere contract violations and treaty violations."[109] A first and primary requirement for a contract claim to fall under a treaty is that the host State must have made undertakings under that contract.[110]

145. The NHA is not a state-owned enterprise. NHA is an independent entity organized by NHA trusts, which are established by legislation.[111] Further, there is no record of direct participation by Mercurian officials in the negotiation of the LTA.[112] This tribunal should hold that ABL is not entitled to bring LTA claims under the BIT because the LTA did not contract with any part of the State of Mercuria.

146. Further, the distinction between a contract claim and a treaty claim can be made by considering the facts surrounding the conclusion, performance, and termination of the contract in question.[113] The LTA was terminated and performed by NHA, an entity independent of the government of Mercuria. The LTA was terminated because of ABL's inability to offer a reasonable discount to NHA. Whether that termination was a breach, has already been determined by a different tribunal, and an Award in favor of ABL has already been issued.

147. A UC claim is specifically a treaty claim. A claimant must show that the claim it seeks to elevate falls under the treaty.[114] Most tribunals are in agreement that a contract claim elevates to a treaty claim when a State exercises its sovereign action to breach the contract.[115]ABL falsely asserts that the LTA was terminated by Mercuria. The LTA was terminated by NHA because NHA and ABL could not reach a number deciding the amount of discount for increased production. This termination was not influenced by the government of Mercuria; it was influenced by the number of cases of greyscale that were discovered in Mercuria. The demand for Sanior increased so much so that it became difficult for the NHA to maintain the agreement at the price agreed to between NHA and ABL. Therefore, this tribunal should find that the termination of the LTA was not due to

[109] Saint-Gobain, ¶ 370.

[110] *See* Toto; *see also* Crawford, 351-74; *see also* Shany, 835-51.

[111] Facts, 1592-3:50.

[112] Facts, 1594-5:50.

[113] Biwater, ¶ 472.

[114] Burlington, ¶ 189

[115] Abaclat, ¶ 318, ¶¶ 498-9; Ambiente, ¶544; Deutsche, ¶¶ 557-9.

any exercise of sovereignty by Mercuria and deny the elevation of the LTA to a treaty claim under the BIT.

PRAYER FOR RELIEF

The Claimant hereby submits that the Tribunal:

i. Find that it has no jurisdiction to adjudicate claims in relation to the Award
ii. Declare that Mercuria rightfully denied the benefits of the BIT to ABL under Art. 2.
iii. Find that Mercuria is entitled to restitution of all the related to these proceedings;
iv. Direct ABL to pay a higher proportion of the costs of the proceedings under Art. 9(3) of the BIT;

In the Alternative, wherein Tribunal does not grant the second request, declare that Mercuria has not violated the substantive and procedural protections of the BIT.

v. Declare that the enactment of Law No. 8458/09 and the grant of a license for the Claimant's invention is not a breach of the FET clause under Art. 3 of the BIT;
vi. Declare that NHA termination of the LTA is not a violation of Art. 3(3) of the BIT;
vii. Find that Mercuria is not liable for the conduct of its judiciary in relation the enforcement proceedings under Art. 3 of the BIT.

On Behalf of Respondent

Yusuf Team