PERMANENT COURT OF ARBITRATION

MEMORIAL FOR RESPONDENT

ON BEHALF OF:	AGAINST:
RESPONDENT	CLAIMANT
REPUBLIC OF MERCURIA 50, ABC AVENUE MERCURIA	ATTON BORO LIMITED, 22 FARAWAY STR BASHEERA

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LIST OF ABBREVIATIONS

§(§)	Paragraph(s)
Arbitration	The present arbitration
Arbitral Tribunal	The present arbitral tribunal
Award	2008 award
Basheera	Kingdom of Basheera
BIT	Bilateral investment treaty
CAFTA	US-Central America Free Trade Agreement
Claimant	Atton Boro Limited
Court	High Court of Mercuria
FDC	Fixed-dose combinations
ICJ	International Court of Justice
ILC Rules	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
IP	Intellectual Property
LTA	Long-Term Agreement

Mercuria-Basheera BIT	Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Mercuria and the Kingdom of Basheera
NHA	Mercuria National Health Authority
No.	Number
Notice	Notice of Arbitration dated November 7, 2016
NYC	New York Convention
p.	Page
pp.	Pages
PCA	Permanent Court of Arbitration
PCA Rules	PCA Arbitration Rules 2012
Reef	People's Republic of Reef
Respondent	Republic of Mercuria
supra	Above
Tribunal	2009 Arbitral Tribunal seated on Reef
TRIPS Agreement	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law

US	The United States of America
VCLT	Vienna Convention on the Law of Treaties
v.	*versus*
Vol.	Volume

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STATEMENT OF FACTS

1. On 11 January 1998, Respondent and Basheera signed the Agreement for the Promotion and Reciprocal Protection of Investments, the Mercuria-Basheera BIT. In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Claimant, to develop activities in the territory of Basheera.

2. On 25 November 2004, Claimant and the NHA entered into the LTA for the supply of Atton Boro's greyscale treatment, named Sanior, which has as its base active ingredient Valtervite. The terms of the LTA set a fixed discount rate of 25% over the regular purchase price of Sanior.

3. In early 2008, the NHA informed Claimant that it would need to renegotiate the price for Sanior, as it had underestimated the number of greyscale cases in its territory. For that, the NHA requested an additional discount of 40% on the price of Sanior, as it considered the only possible manner to contain the health crisis. Unfortunately, the NHA was not able to find in Claimant the necessary cooperative mindset that is characteristic of long-term agreements, as it denied to offer further discounts, and had no other alternative but to terminate the LTA.

4. Claimant was disturbed with idea of losing profits and challenged the termination of the LTA through arbitration. On January 2009, Claimant obtained an Award in its favor that demanded the NHA to pay Claimant USD 40,000,000.00. Later, on 3 March 2009, Claimant initiated enforcement proceedings in the Court. The NHA counterclaimed, requesting the Court to refuse the enforcement of the Award since it is contrary to public policy, according to article V.II.B of the NYC.

5. On 10 October 2009, the President of Respondent enacted a new legislation of Intellectual Property Law (Law No. 8.458/09) that allows for the use of patented inventions without the authorization of the owner on certain circumstances to safeguard the public interest.

6. As consequence of that, in November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the Court seeking a license to manufacture Claimant's patented ingredient, Valtervite. On 1 April 2010, HG-Pharma received the license to manufacture and sell the drug by paying the reasonable amount of 1% royalty of its total revenues to Claimant.

7. In January 2012, the director of the NHA disclosed in an interview that the use of generic drugs reduced costs of purchasing medicines by as much as 80%, resulting in over 1.2 billion USD in savings annually.

8. Respondent's policy in order to safeguard the national health system was a success. Its actions accorded for the public interest and were in accordance with the national and international law. As it will be delimitated below, this Arbitral Tribunal lacks jurisdiction over the present dispute, and Claimant's contentions are not admissible.

ARGUMENTS ON THE JURISDICTIONAL ISSUE

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER ANY CLAIMS IN RELATION TO ENFORCEMENT OF THE AWARD

9. The Arbitral Tribunal has no jurisdiction over the claims related to enforcement of the Award as (A) considering that investment arbitral tribunals have jurisdiction over commercial arbitral awards would create a supervisory power, (B) the Award is not an asset held or invested in the territory of the other contracting party in the sense of article 1(1) of the Mercuria-Basheera BIT; subsidiarily, (C) it is not a right conferred under a contract in the sense of article 1(1)(e) of Mercuria-Basheera BIT; and, (D) it is not a claim to money in the sense of article 1(1)(c) of the Mercuria-Basheera BIT.

I.A. Considering that investment arbitral tribunals have jurisdiction over commercial arbitral awards would create a supervisory power

10. The qualification of an arbitral award as an investment pursuant to a BIT and, thus, as a protected investment would amount an arbitral tribunal assuming a supervisory-supervisory jurisdiction over domestic courts' or arbitral tribunals competences,[1] which includes the enforcement, the annulment and the refusal of commercial arbitral awards in the sense of the NYC.[2]

11. With the possibility of considering awards as investments, investment arbitral tribunals would be given the power to revise awards given by other arbitral tribunals. Also, they would have the power to rule on enforcement proceedings and other matters that should be of the exclusive competence of domestic courts.

[1] Annaker
[2] Idem

12. In this sense, in *Romak SA v. The Republic of Uzbekistan*,[3] the arbitral tribunal considered that the enforcement of a commercial arbitral award is a state court competence and the investment arbitral tribunal should not be a new instance of review regarding enforcement of the arbitral award.

13. Allowing Claimant's proposition that awards are investments would create a policy issue. It would transform investment arbitral tribunals in courts of appeals to parties which are unsatisfied with previous awards they received or the conduction of proceedings in national courts. Creating this supervisory-supervisory jurisdiction is not the aim of BITs, therefore, awards should not be included in the hall of investments, which means that the Arbitral Tribunal has no jurisdiction over the claims relation to the Award.

I.B. The Award is not an investment made by a contracting party in a territory of the other contracting party pursuant to article 1(1) of the Mercuria-Basheera BIT

14. BITs limit their application and scope to investments that were made by a contracting party in the territory of the other contracting party.[4] In this sense, a BIT protection encompasses an investment to the extent that this investment was made in the territory of the other contracting party.[5]

15. Article 1(1) of the Mercuria-Basheera BIT provides that the term investment means any kind of asset held or invested by a contracting party in the territory of the other contracting party. In this sense, to be covered by the Mercuria-Basheera BIT, the Award must have been held or invested by Claimant in Respondent's territory.

16. However, the Award is not an investment made by Claimant in Respondent's territory because: (i) international arbitration is an autonomous legal order not related to any territory; (ii) alternatively, the arbitration was not seated in Respondent's territory.

I.B.i. International arbitrations are in an autonomous legal order not related to any territory

17. The Award should not be deemed an investment pursuant to the meaning of the Mercuria-Basheera BIT as international arbitrations are not connected to a territory, not even to the seat of the arbitration.[6] In this sense, even though an international arbitration takes place in a

[3] Romak SA v The Republic of Uzbekistan §185
[4] Salacuse, p.189.
[5] Salacuse, p.189.
[6] Gaillard.

state's territory, it is not linked to this territory.[7] Consequently, an arbitral award cannot be considered an investment made in a territory of a contracting party.

18. Professor Emmanuel Gaillard considers that international arbitrations are protected by a transnational legal order, that they are autonomous to any national legal system.[8] It does not derive its validity from any national legal system, which includes the seat of the arbitration or the place of enforcement of the award.[9]

19. In other words, a transnational arbitration is an "a-national" arbitration.[10] Which means that international arbitrators administer justice for the prosperity of the international community, they do not play a judicial role on behalf of a given state.[11] In this regard, an arbitral award does not have a territory and it belongs to the arbitral legal order.[12]

20. Judicial support for the transnational approach is found in the *Putrabali* rulings, in which the French Supreme Court affirmed the existence of an arbitral legal order independent of any national legal order, qualifying an arbitral award as an "international judicial decision" enforceable in France despite its prior annulment by the court of the seat of the arbitration.[13]

21. In this present case, the Award should not be deemed as an investment pursuant Mercuria-Basheera BIT. The commercial arbitration, in which the Award arose out is not connected to Respondent's territory, it is part of the transnational legal order. Thus, it does not fulfill the requirement for the protection laid out in article 1(1) of the Mercuria-Basheera BIT.

I.B.ii. Alternatively, the arbitration was not seated in Respondent's territory

22. If this Arbitral Tribunal considers that the Award has a territory, it still cannot be considered an investment under the Mercuria-Basheera BIT.[14]

23. If an award is to have a nationality, the legal force of it is derived particularly from the law of the state where its arbitration was accomplished.[15] Moreover, the arbitrators who rendered the

[7] Idem.
[8] Idem.
[9] Idem.
[10] Gaillard, p. 37
[11] Idem, p. 35
[12] Gaillard, pp. 59; 122.
[13] Putrabali Rulings.
[14] Gaillard p.15.
[15] Idem.

award are assimilated to national judges exercising their functions in a national legal order, which is the law from the seat of the arbitration.[16]

24. In this present case, the Award was issued by an arbitral tribunal seated in Reef.[17] Thus, its legal force derives from Reef and the arbitrators are comparable to judges from Reef. Consequently, if this arbitral tribunal considers that the Award has a territory, its territory is Reef.

25. As article 1(1) of the Mercuria-Basheera BIT provides that investments must be held or invested by a contracting party in the territory of the other contracting party and the Award's territory is Reef, it cannot be considered an investment for the purposes of this Arbitration.

I.C. Subsidiarily, the Award is not a right conferred by law or under contract to undertake commercial or economic activities pursuant to article 1(1)(e) of the Mercuria-Basheera BIT

26. The Award is not an investment made in Respondent's territory within the meaning of article 1(1)(e) of the Mercuria-Basheera BIT, which defines investment as a right conferred by law or under contract to undertake commercial or economic activities.

27. In the case *GEA v. Ukraine*,[18] the tribunal considered that an arbitral award is not an investment. In making this consideration, the tribunal reasoned that considering the application of article 1(1)(e) of Germany-Ukraine BIT, which defines investments as rights to exercise economic activity, an arbitral award could not be regarded as an investment.

28. An arbitral award is a legal instrumental that crystalizes the decision of an arbitral tribunal of a dispute arising out a contract. The tribunal there held that an award that rules upon rights and obligations conferred under an investment contract does not equate with an investment itself.

29. In this present case, the Award arose out of the LTA that is a commercial contract for the supply of Sanior.[19] In this sense, the LTA differs of the technical meaning of investment contract as it governs a supplying transaction, not an international investment.

30. Therefore, as stated in *GEA v. Ukraine*,[20] if an award that derives from an investment does not meet the threshold to be considered an investment, an award that derives from a commercial

[16] Idem.
[17] Statement of Uncontested Facts. §17.
[18] GEA Group Aktiengesellschaft v. Ukraine.
[19] State of Uncontested Facts §9, p.29

agreement by no possible means can be considered as such. Consequently, the Award does not qualify under article 1(1)(e) definition of investment.

I.D. The Award is not a claim to money in the sense of article 1(1)(c) of the Mercuria-Basheera BIT

31. The Award should not be considered a claim to money pursuant article 1(1)(c) of the Mercuria-Basheera BIT, thus it does not qualify as an investment.

32. In *Romak SA v. The Republic of Uzbekistan,*[21] the arbitral tribunal considered that an arbitral award should not be regarded as an investment as it did not amount to a claim to money pursuant the applicable BIT. In such case the applicable BIT was the Swiss-Uzbekistan BIT, which considered claims to money as investments in its article 1(2)(c).

33. The arbitral tribunal, in such case, analyzed whether the mechanical application of the clauses of the BIT, especially of the term "claims to money", would attend to the purpose of the Swiss-Uzbekistan BIT. Finally, it understood that the mechanical application was hazardous.

34. The tribunal held that the mechanical application of clauses would defeat "any limitation to the scope of the concept of investment"[22] and would not be a distinction between investments and commercial transactions. Therefore, a clause should be interpreted considering the whole of the treaty and its aims.

35. The particular meaning of the term "claims to money" is not clear in the Mercuria-Basheera BIT. Thus, one needs to resort to the VCLT to assess the method of interpretation of such term. The VCLT establishes on its article 31(2) that a treaty shall be interpreted considering its preamble and annexes, besides to the text. In this sense, the interpretation of the Mercuria-Basheera BIT should consider, in addition to the text of its article 1(1)(c), its preamble and annexes.

36. In this regard, the preamble of the Mercuria-Basheera BIT recognizes the importance of affording effective means, under national law and international arbitration, of asserting claims and enforcing rights with respect to an investment.[23] Thus, a claim to money is only protected by the Mercuria-Basheera BIT if it arises out of an investment.

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[20] GEA Group Aktiengesellschaft v. Ukraine.
[21] Romak SA v The Republic of Uzbekistan.
[22] Romak SA v The Republic of Uzbekistan §185.
[23] Mercuria-Baheera BIT. p.32.

37. In this sense, when commenting the interpretation of "investment" definition in investment treaties, scholars have proposed caution in the mechanical application of BITs[24] that does not analyze whether a dispute object falls into the BIT's purpose. For that matter, a mechanical application of a BIT term can entitle illegitimate parties to the privileges and protections of the BIT and thus entitle them to claim its benefits.[25]

38. The Award that Claimant alleges is an investment is, in fact, an award that arose out a commercial arbitration related to the LTA. As stated supra on item I.B., the LTA is not an investment for the purposes of the Mercuria-Basheera BIT, but merely a commercial agreement by which the NHA purchased Sanior from Claimant.

39. Furthermore, as demonstrated, mechanical applications of BIT's terms should be avoided. BIT's should be seen in the whole. Consequently, considering that the aim of the Mercuria-Basheera BIT is to protect investments and not commercial transactions, the Award should not be deemed an investment pursuant to article 1(1)(c) of the Mercuria-Basheera BIT and this Arbitral Tribunal has no jurisdiction over the claims relating to it.

ARGUMENTS ON THE ADMISSIBILITY ISSUE

II. RESPONDENT IS ALLOWED TO DENY THE BENEFITS OF THE MERCURIA-BASHEERA BIT TO CLAIMANT

40. Respondent is allowed to deny the benefits of the Mercuria-Basheera BIT to Claimant, as Claimant is a mailbox company. (A) Claimant should be considered a mailbox company as it does not have substantive activities in Basheera. Moreover, Respondent should be able to exercise the right of denying benefits to Claimant as (B) the effects of the denial of benefits clause are retroactive and (C) no previous notification of the intent to deny benefits to Claimant is needed.

[24] Reisman; Iravani. p. 39; Annaker.
[25] Salacuse, p.174.

II.A. Claimant should be considered a mailbox company since it has no substantive activity in Basheera

41. Respondent contends that the benefits of the Mercuria-Basheera BIT should be denied to Claimant. The denial of benefits is allowed under article 2(1) of the Mercuria-Basheera BIT that dictates that benefits can be denied to a legal entity, if two cumulative requirements are met: (i) the owners or controllers of the entity are nationals of a third state and (ii) the legal entity has no substantial business activities in the territory of the contracting party in which it is organized. It will be shown below that Claimant meets both these criteria.

42. It is uncontested that nationals of a third state own Claimant. In April 1998, Claimant was incorporated in Basheera as a wholly owned subsidiary of Atton Boro Group. Atton Boro Group's primary holding, Atton Boro and Company, is a corporation organized under the laws of Reef. Therefore, Claimant is owned by a legal entity of Reef, which is not a Contracting Party of the Mercuria-Basheera BIT.

43. Furthermore, Claimant also does not have substantial business activities in Basheera. Its incorporation in Basheera is only a mean to benefit from the provisions of the Mercuria-Basheera BIT. In fact, no important or essential activities are developed by Claimant in its place of incorporation.

44. In *Alps v. Slovakia*,[26] the arbitral tribunal understood that the burden of proving that substantial business activities exist is on the investor. It was further acknowledged that a company must provide factual and documented descriptions of the business it runs or the products or services it offers, including websites' screenshots, notes of management meetings and decisions, annual reports and balance sheets, a list of customers, vendors, suppliers, lenders or borrowers.

45. With the factual proof, the investor must demonstrate that it has an effective link with the state in which it is incorporated. This means that the investor must run an actual, independent and verifiable activity, produce or sell visible and tangible goods or services, earn profits and eventually "foster economic prosperity" for the states that are party to the treaty.[27]

46. In the present case, Claimant did not meet such threshold. For example, there is no proof that Claimant produces or sells any visible goods in Basheera or that it profits there. That is because Claimant only manages its portfolio of patents registered in South America and

[26] Alps Finance and Trade AG v. The Slovak Republic, p. 31.
[27] Alps Finance and Trade AG v. The Slovak Republic, p.31.

Africa, and provides support for regulatory approval, marketing, and sales as well as legal, accounting and tax services for Atton Boro Group affiliates in South America and Africa.

47. In addition, Claimant produced no evidence that it develops independent activities in Basheera. Claimant failed to do so once it is undisputed that it is controlled by Atton Boro Group, which is capable of influencing all decisions Claimant makes. Furthermore, no documents demonstrating that Claimant fosters economic prosperity in Basheera were presented, as Claimant only has between 2 to 6 employees in Basheera and its activities there do not involve the population of the nation, not fostering economic prosperity.

48. In a nutshell, Claimant has not demonstrated that it has substantial business in Basheera, it did not need to be incorporated in Basheera to manage Atton Boro's Group investments in Africa and South America. Thus, as Claimant is controlled by nationals of a third state and does not have substantial business activities is Basheera, Claimant should be considered a mailbox company.

II.B. The denial of benefits has retroactive effects

49. It is Respondent submission that the denial of benefits clause has retroactive effects. Thus, when a State invokes the denial of benefits clause, it has effects on the entire investment, including the acts that happened before the denial. Case law also supports Respondent's proposition in this regard.

50. In *Rurelec and GAI v. Bolivia*,[28] the Tribunal decided that the denial of benefits clause has retrospective effects. In that case, Bolivia denied benefits to GAI considering the Article XII of the US-Bolivia BIT. Such provision has a similar language to Mercuria-Basheera BIT in relation to the denial of benefits clause.

51. In that case, the tribunal confirmed Bolivia's claims and considered that any US investor claiming under the US-Bolivia BIT, such as GAI, should be aware of the existence of the denial of benefits clause and its potential invocation by host state. Thus, the tribunal considered that when accepting the offer to invest, investors simultaneously accept the risk envisaged by the denial of benefits clause. Hence, the invocation of the denial of benefits clause poses no risk to the legitimate expectations of the investors.

52. Moreover, the tribunal argued that, it is proper that the denial is raised when the benefits are being claimed. In this regard, the tribunal reasoned that the right to deny the benefits of the

[28] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational sof Bolivia.

BIT could be invoked at the time of objections as the purpose of the denial of benefits provision is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits.

53. In *Pac Rim v. El Salvador,*[29] the arbitral tribunal was faced with the question of whether El Salvador could, pursuant to article 10.12.2 of the CAFTA, deny the benefits of the treaty after the dispute had arisen. Article 10.12.2 of CAFTA stipulates that a party may deny benefits to an investor of another party if the enterprise has no substantial business activities in the territory of any party and persons of a non-party own or control the enterprise.

54. The tribunal in *Pac Rim v. El Salvador,*[30] noted that there was no express time limit in CAFTA for a party to deny benefits under article 10.12.2. Therefore, the denial of benefits clause in CAFTA can be invoked retroactively up to the limit for presenting objections to the arbitration.

55. This same reasoning should be applied in the present dispute, as article 2 of the Mercuria-Basheera BIT does not estipulate any time limits or obligation for notification. Thus, Respondent did deny benefits in a timely and proper manner.

56. Therefore, this Arbitral Tribunal shall conclude that the denial of benefits provision has retrospective effects, and, hence, Claimant cannot argue that the denial is only effective for matters that occurred after it was raised.

II.C. No notification is required for Respondent to deny the benefits of the Mercuria-Basheera BIT to Claimant

57. Furthermore, Respondent had no obligation to notify Claimant previously of its intention to raise the denial of benefits clause. Case law also supports Respondent's contention in this regard.

58. In *Rurelec and GAI v. Bolivia,*[31] the arbitral tribunal highlighted that the applicable BIT created some conditions for the denial of benefits to be accepted. None of these conditions mentioned the necessity of a previous notification. Therefore, no notification is needed for a state to deny the benefits of a BIT.

[29] Pac Rim Cayman LLC v. Republic of El Salvador.
[30] Idem.
[31] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia.

59. The same understanding was adopted in *EMELEC v. Ecuador*.[32] The tribunal there considered that the proper stage of the proceedings to announce the denial of benefits is upon responding to the arbitration, requiring no previous notification. The tribunal even reinforced that one must attend to the language of the BIT when analyzing the requirements for the denial of benefits.

60. In such case, for the denial of benefits to be possible, it was necessary for the company to be controlled by nationals of a third country or not to have substantial activities in in the contracting state, never mentioning the necessity of prior notification.

61. This understanding should also be applicable in Respondent's case. The Mercuria-Basheera BIT does not mention in its denial of benefits clause the need for a notification. The only compulsory steps for the denial of benefits relate to the nationality of the legal entity and to the activities it develop, article 2(1) does not even include the word "notification" in its text. Hence, there is no reason to demand a notification.

62. Consequently, the denial of benefits clause produces effects when the benefits are claimed by one of the contracting states and the previous notification should not be considered as a requisite for denying benefits to Claimant.

ARGUMENTS ON THE SUBSTANTIVE ISSUES

III. THE LAW NO. 8458/09 IS IN ACCORDANCE WITH THE PROVISIONS SET BY THE MERCURIA-BASHEERA BIT

63. The enactment of Law No. 8458/09 is in accordance with the provisions set by the Mercuria-Basheera BIT as (A) Law 8458/09 falls under the scope of Respondent's Right to Regulate and (B) it did not breach the fair and equitable treatment standard provided for in article 3.2 of the Mercuria-Basheera BIT.

III.A. Law No. 8458/09 falls under the scope of Respondent's right to regulate

64. The enactment of Law No. 8458/09 falls under the scope of Respondent's right to regulate, and, therefore, is not a violation of the Mercuria-Basheera BIT.

65. A state's right to regulate is derived from the concept of jurisdiction and from the fundamental principle of state sovereignty. In this sense, each state has the freedom to act

[32] Empresa Elétrica del Ecuador, Inc.v. Republic of Ecuador.

within its own territory under the constrains prescribed by international law, without the interference of other states in the exercise of its sovereignty.[33]

66. The right to regulate is understood in international law as a legal power[34] and the protection of legitimate expectations of the investors must be balanced against the legitimate right of the host state to regulate in the public interest.[35]

67. Case law supports that understanding. In the case *Parkerings v Lithuania*, the tribunal held that it is an undeniable right and privilege of each state to exercise its sovereign legislative power, which allows the state to enact, modify or cancel a law at its own discretion. There is nothing objectionable about an amendment brought to the regulatory framework after the time an investor made its investment, except if the agreement contains a stabilization clause. Thus, as long as the change in the regulatory framework is not made unfairly, unreasonably or inequitably, states do have discretion to modify their own regulatory frameworks.[36]

68. Mercuria's public health system was in crisis, which allowed Respondent to modify its national framework in accordance with the public interest. No reasonable investor could expect that Respondent would not reform its legal framework in legitimate exercise of its police powers when faced with a public health crisis; particularly when nothing in the Mercuria-Basheera BIT guarantees investors that the contracting parties' laws and regulations will remain immutable.

69. Therefore, as states are embodied with the right to regulate, the enactment of Law No. 8458/09 is a legitimate act of Respondent.

III.B. The enactment of law No 8.458 does not violate fair and equitable treatment

70. The fair and equitable treatment standard is provided for in article 3(2) of the Mercuria-Basheera BIT, which requires that investments and returns of investors of each contracting party be accorded fair and equitable treatment and enjoy full protection and security in the territory of the other contracting party.

71. Respondent acknowledges that the standard lacks exact boundaries and its requirements of application are still under debate, and, therefore, its proper interpretation depends on the

[33] Giannakopoulos, p. 10.
[34] Giannakopoulos, p. 11.
[35] Mercurio, p. 894.
[36] Parkerings-Compagniet AS v Republic of Lithuania, para 332.

specific wording of the particular treaty.[37] But as a general qualification, it is agreed that the fair and equitable treatment standard embodies reasonableness, consistency, non-discrimination, transparency and due process of law.[38]

72. That general understanding was supported by the arbitral tribunal in *MTD v. Chile*, in which arbitrator Schwebel defined fair and equitable treatment as a broad and widely-accepted standard.[39] The conclusion of the tribunal in that case was that fair and equitable treatment should be understood as an even-handed and just treatment, in a way that fosters promotion of foreign investment.[40]

73. The treatment provided by Respondent in relation to Claimant's investments satisfy those requirements of an even-handed and just treatment. Respondent only enacted Law 8.458/09 in face of the crisis in the public health system that demanded the circumstances to be modified.

74. The arbitral tribunal in *TecMed S.A. v. The United Mexican State* also decided in the same line of reasoning, holding that the fair and equitable treatment should be considered in light of the good faith principle. They also understood that was required to each contracting party to provide treatment that does not affect the basic expectations of international investors, which were taken under consideration to make the investment.[41] In those terms, enacting a Law to guarantee that its people would be afforded treatment to a disease is not a conduct that violates bad faith.

75. Nevertheless, the fair and equitable treatment standard cannot be used as a *carte blanche* for a investor to base their claims. Even though the concept of legitimate expectations has a place within fair and equitable treatment, its thoughtless application by looking only from the investors' perspective results in risking that the true purpose of the standard in BITs gets lost.[42]

76. The Mercuria-Basheera BIT has not in any way established a stabilization clause, preventing Respondent from modifying its legal framework. Moreover, the fair and equitable treatment standard cannot be understood as an equivalent to that stabilization clause.[43] It should be understood as a demand that the state exercises its legal power to create new regulation with

[37] Parkerings-Compagniet AS v Republic of Lithuania, para 332.
[38] Mercurio, pp. 892, 893.
[39] MTD v. Chile. Opinion of Judge Steven Schwebel, para. 23.
[40] Idem, page 34. para. 113.
[41] TecMed v. Mexico. para. 154.
[42] UNCTAD. Fair and Equitable Treatment. p. 29.
[43] D'Aspremont, 2011; Dolzer; Schreuer, 2012.

respect to investors' legitimate expectations.

77. In this sense, it is important to understand which of the investor expectations can be qualified as legitimate and in what circumstances they can reasonably arise.[44] Moreover, there is a balance between the investor's expectations and those of the host state that reflects the social and policy context in which foreign investors find themselves. Thus, considerations on the expectations of the local community and investor conduct are relevant for the correct application of the standard.[45]

78. Case law supports Respondent's proposition in this regard. The tribunal in *Waste Management v. United Mexican States* established the threshold for finding a violation of the fair and equitable treatment standard, which is said to represent the prevailing international position.[46] That threshold states that the fair and equitable treatment is violated by conduct attributable to the state and harmful to the Claimant if that conduct is arbitrary, grossly unfair, unjust or idiosyncratic. Additionally, the conduct must be discriminatory in a sense that exposes the Claimant to sectional treatment or involves the lack of due process leading to an outcome which offends judicial property.[47]

79. Regarding the judicial property, the requirement of the international benchmark is that the national procedure is fair and equitable for both parties and that it respects, above all, the investor's right to present his case and be heard,[48] which also means that the investor has to be treated with transparency by the legal system. The enactment of Law 8.458/09 was made under the due process of national legislations in Respondent's territory and Claimant was never prevented for accessing Respondent's Judiciary, which leads to the conclusion that the judicial property was respected and Claimant does not have grounds to claim a violation of the fair and equitable treatment in this matter.

80. Moreover, the legitimate expectations of investors are not protected *per se*.[49] Case law also supports that the legitimate expectations of investors must be balanced against the host state's legitimate regulatory interests, which in turn must be considered in light of the domestic authorities' powers to regulate matters within their own borders.[50]

[44] UNCTAD. p. 29
[45] Idem.
[46] White v. India. para. 5.2.2.
[47] Waste Management v United Mexican States, para. 98.
[48] D'Aspremont, 2011; Dolzer; Schreuer, 2012.
[49] Grosse Ruse-Khan. p. 24.
[50] SD Myers Inc v Canada, para. 263.

81. The Tribunal in *Saluka v. Czech Republic* emphasized that investors may not reasonably expect that the circumstances prevailing at the time of the investment will remain totally unchanged. In this sense, the qualification of the frustration of the foreign investor as justified and reasonable also depends on the host state's legitimate right to regulate domestic matters in the public interest.[51]

82. Regarding the present case, Claimant argues that the fair and equitable treatment was violated by Respondent by the enactment of Law No. 8458/09. In order to be successful in his submission, Claimant must present evidence demonstrating manifestly unfair or inequitable conduct. This means that the conduct cannot be rationally supported by recourse to a legitimate and otherwise non-discriminatory public policy goal.[52]

83. The enactment of Respondent's legislation falls exactly in the circumstance of a conduct rationally supported by recourse to a legitimate public policy goal, namely the control of the health crises of greyscale. In this sense, Claimant was aware of the circumstances that were surrounding Respondent's public health system and cannot argue that his expectation is legitimate.

84. Furthermore, the equiparation of the fair and equitable treatment with the expectation of Claimant that Respondent would not reform its legal framework is also not reasonable. The grant of the patent does not and cannot create any legitimate expectation that the exclusivity it confers is absolute and will remain without interference from accepted checks and balances inherent in the IP system.[53] That expectation is not absolute even in the TRIPS Agreement, which sets conditions under which the host state is allowed to modify or cancel the grant of a patent.

85. Therefore, the enactment of the Law No. 8458/09 cannot be considered a breach of the fair and equitable treatment standard. Even if it is to be said that Claimant had a legitimate expectation regarding Respondent's regulatory environment, that expectation does not supersede the public interest of combating public health crisis.

[51] Saluka vs. Czech Republic, para. 305.
[52] International Thunderbird Gaming Corporation v Mexico (Award), para 194.
[53] Grosse Ruse-Khan, p. 27.

IV. RESPONDENT ACTED IN CONFORMITY WITH THE TRIP'S AGREEMENT

86. The TRIPS's Agreement does not make Respondent liable for the purposes of the arbitration as (A) Claimant cannot rely on the TRIPS Agreement and (B) alternatively, Law No. 8458/09 is in conformity with the TRIPS Agreement.

IV.A. Claimant cannot rely on the Trips agreement

87. The TRIPS Agreement is a multilateral agreement within the WTO, which creates a framework whereupon the state members can regulate intellectual property in their national legislation, establishing parameters.[54] In this sense, it sets out the minimum standards of protection to be provided by each state member to the treaty.

88. The protection is defined by its main elements, namely the subject-matter to be protected, the rights to be conferred, permissible exceptions to those rights, and the minimum duration of protection.[55]

89. Under IP regulation, only states can bring a dispute over the compliance with IP treaty obligations in front of international tribunals.[56] IP worldwide regulation rarely provides standing for investors to challenge state measures as contrary to investor-state arbitration standards.[57] In this context, Claimant has no stand to bring claims relying on obligations contained in the TRIPS Agreement before a tribunal deciding an investment dispute. Those obligations exist only between member states *inter se*, and for that reason any dispute arising out of the agreement fall within the exclusive domain of the World Trade Organization's Dispute Settlement Body.

90. That understanding is reflected in case law. In *AHS v. Niger*, AHS and MMEA complained about infringements of their IP rights in face of the Bangui Agreement, a regional IP treaty that establishes a system of trademark protection. However, the Tribunal held that AHS and MMEA did not have standing to bring claims relying on the Bangui Agreement, as they had not provided relevant arguments as to why compliance with the Bangui Agreement could be subject to arbitration.[58]

[54] WTO. Overview: the TRIPS Agreement.
[55] Idem.
[56] Idem.
[57] Grosse Ruse-Khan, p. 4.
[58] Grosse Ruse-Khan. p. 22.

91. Those arguments raised by AHS were related to the infringement of its IP rights in form of trademark and trade names registered with OAPI, a regional IP Organization in Francophone Africa to which Niger is member. The new personnel employed by the Nigerian authorities, after seizing AHS' equipment, had continued to operate the airport services using uniforms with IP protected trademarks and trade names registered for the AHS'. The arbitrators found the arguments of the claimants with regard to this use of IP protected content as insufficient to establish a right to the compensation in terms of the Nigerien Investment Code and the investment agreement between Niger and AHS. [59]

92. While the complainants could show that Niger had ratified the Bangui Agreement, they were unable to explain how it is pertinent for this arbitration. In particular, the arbitral tribunal found that AHS and MMEA had not explained how it would be competent to hear arguments regarding the breach of the Bangui Agreement. In the present case, Claimant is trying to use the same line of arguments that were rejected in AHS's case.

93. Claimant argues that Respondent actions amounts to a violation of the TRIPS agreement, which in turn characterize as a violation of the fair and equitable treatment, and consequently a violation of the Mercuria-Basheera BIT. The number of cases where an investor could successfully invoke international IP norms under the fair and equitable treatment standard in front of an investment tribunal to establish a violation of a BIT hence appears rather limited. The majority of cases establish otherwise.

94. In *Grand River Enterprises Six Nations, Ltd., et al v. the United States of America,* the tribunal concluded that the fair and equitable treatment standard does not include other legal protections that may be provided for investors or classes of investors under other sources of law. This raises an important policy argument: if one admits using the standard to establish violation of other international treaties, the fair and equitable treatment would become a mechanism for generally litigating claims based on alleged infractions of domestic and international law.[60]

95. For that reason, the fair and equitable treatment standard does not operate in a manner that allows an investor with IP rights to rely on a legitimate expectation in the host state's compliance with IP regulations.[61]

[59] Idem.
[60] Grand River Enterprises Six Nations, Ltd., et al vs the United States of America, para. 219.
[61] Grosse Ruse-Khan, p. 31.

96. An investor can only expect the host state to comply with international IP rules if these rules are (i) directly applicable as part of the domestic law; (ii) sufficiently concrete to be applied by domestic institutions; and (iii) able to give rise to individual rights of the investor.[62] None of these criteria are met in this case.

97. Therefore, alleged breaches of TRIPS and other WTO legal obligations cannot give rise to a breach of the Mercuria-Basheera BIT under the justification of a violation of the fair and equitable treatment. Therefore, Claimant has no stand to rely on the TRIPS Agreement and Respondent is not liable under TRIPS for the purposes of this Arbitration.

IV.B. Alternatively, Respondent's acts are in conformity with the TRIPS Agreement

98. Even if the Arbitral Tribunal considers that Claimant can rely on the TRIPS Agreement, Respondent's actions are consistent with international covenants and norms governing intellectual property and, particularly, with the TRIPS Agreement.

99. The TRIPS Agreement establishes in article 27(1) that patents are to be made available by State members for any inventions, whether products or services, in a way that patent rights be enjoyable without discrimination as to the place of invention and whether the products are imported or locally produced.[63] Respondent acknowledges that the rights conferred by patent guarantees are exclusive, but there are some conditions that allows the use of patents without authorization of the owner if it is intended to protect another legal good.[64]

100. Those conditions, established in items (a) to (l) of article 31 of the TRIPS Agreement, include the obligation to grant such licenses only if an unsuccessful attempt has been made to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time; to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the license; and to subject the decision to judicial or other independent review by a distinct higher authority.

101. It is also worth mentiong that the requirements of article 31(b) of the TRIPS Agreement may be waived in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.

102. Mercuria was faced with a critical public health crisis. Greyscale is a severe and pervasive epidemic that threatens the well being of thousands of working-age individuals in Mercuria.

[62] Ibid. p. 41.
[63] WTO. Overview: the TRIPS Agreement.
[64] TRIPS Agreement. article 31.

The measures taken by Respondent were necessary to safeguard the health of its people. In light of that, the use of Claimant's patent without its authorization could have been made without any effort to obtain it. Even so, Respondent contacted Claimant about the situation in Mercuria and asked for a further discount in the price for Sanior, which was rejected by Claimant.[65]

103. All of the provisions of TRIPS' article 31 were observed in Respondent's actions to enact Law No. 8458/09 and latter to grant the license to HG-Pharma to manufacture Valtervite. The license was granted until greyscale was no longer a threat to public health in Mercuria, satisfying article 31(c) of the TRIPS Agreement, which sets that the scope and duration of such use shall be limited to the purpose for which it was authorized. The requirements related to the due judicial procedures of articles 31(i) and 31(j) of the TRIPS Agreement were also observed, as HG-Pharma filed an application before the Court under the new provision, seeking the grant of a license to manufacture Valtervite. Moreover, the Court fixed the royalties to be paid to Claimant at 1% of total earnings, satisfying also article 31(h) of the TRIPS Agreement.

104. Therefore, despite the fact that Claimant has no stand to bring a claim based on the TRIPS Agreement, the enactment of Law No. 8458/09 and the grant of the license to HG-Pharma manufacture Valtervite does not violate any provision of the TRIPS Agreement.

V. THE COURT'S CONDUCT IN RELATION TO THE ENFORCEMENT PROCEEDINGS WAS CORRECT

105. The Respondent is not liable for the Court's conduct in relation to the enforcement proceedings because: (A) the belated enforcement proceedings by Respondent's judiciary does not amount to denial of justice; (B) the belated enforcement proceedings by Court do not amount to a violation of the fair and equitable treatment; and (C) the Court's conduct does not qualify as a international wrongful act.

[65] Statement of Uncontested Facts. §15. p. 30.

V.A. The enforcement proceedings by Respondent's judiciary do not amount to denial of justice

106. The conduct of the Court does not amount to denial of justice. Claimant's enforcement proceedings were a standard conduct of Respondent's judiciary, and since it has an overburdened judiciary,[66] it is common for proceedings to last a long amount of time.

107. In *Loewen v. USA,*[67] it was decided that, for denial of justice to be alleged, all available judicial remedies must first be exhausted. The tribunal there understood that the notion of denial of justice coincides with the absolute depletion of all available legal remedies, no matter how uncertain and remote they might have been.

108. Claimant's enforcement proceedings are being heard and analyzed by the Court and a favorable decision might be rendered to it. Therefore, Claimant cannot allege denial of justice since there was no exhaustion of local remedies.

109. Denial of justice is the unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.[68]

110. None of this "denial of justice situations" happened in the present case. Claimant's access to Respondent's courts was never obstructed or delayed and there has not been manifestly unjust judgment. Also, even though Claimant argues that the administration of the judicial process is faulty and a guarantee was denied to it, such arguments shall not prevail.

111. As already stated above, Respondent has an overburdened judiciary, making it usual and understandable for judicial processes to last a very long time in it's territory. The extended duration of the processes does not mean that a guarantee is being denied.

112. In this sense, in *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*[69] it was decided that a denial of justice may only be argued in three circumstances; when a court refuses to entertain a suit; if they subject it to undue delay, or; if they administer justice in a seriously inadequate way. None of these circumstances were configured in the present case.

[66] Response to the Notice of Arbitration, §510, p.17.
[67] Loewen Group, Inc. and Raymond L. Loewen v. United States of America.
[68] Maclachlan, Shore and Weiniger.
[69] Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States.

113. Claimant was aware it was investing in a country with a slow judiciary system. Consequently, it was inside of Claimant's sphere of expectations that some delay might occur in situations where it is necessary to access the judiciary.

114. In *Chevron v. Ecuador*[70], the tribunal argued that the denial of benefits requires the existence of *"a particularly serious shortcoming"* and a conduct that *"shocks, or at least surprises, a sense of judicial propriety".*[71] None of them happened in the present case as Claimant did not have the enforcement proceedings denied to it. Claimant's discontentment comes from the fact that the proceedings are taking more time than it wanted, what does not deprives Claimant of having its award enforced.

115. Respondent's judiciary never employed any delay tactics, it only accepted adjournments which it considered lawful. When observing the timeline of the enforcement proceedings it is not possible to find any disturbing conducts employed by the judiciary, only normal delays.[72]

116. In light of these arguments, this arbitral tribunal shall find that Claimant does not have grounds to allege denial of justice. First, because all judicial remedies available have not been exhausted by Claimant. And, second, because the extended duration of the enforcement proceeding is a reasonable consequence of the known fact that Respondent has as overburdened judiciary system.

V.B. The belated enforcement proceedings by Court do not amount to a violation of fair and equitable treatment

117. The belated enforcement proceedings is not a violation of the fair and equitable treatment, as Atton Boro's claim does not meet the threshold for constituting an internationally wrongful act on the part of a national court.

118. The international benchmark requirement is that the national procedure is fair and equitable for both parties and that it respects, above all, the due process of law.[73] Claimant was permitted to present his case in face of Mercuria's judiciary without any restrictions. Moreover, Claimant must be presumed to have been aware that Mercuria is a country with an overburdened judiciary struggling to cater to its population of 67 million people.[74]

[70] Chevron Corporation v. The Republic of Ecuador. p. 21.
[71] Ibid, p. 22.
[72] Notice of Arbitration, p.7.
[73] D'Aspremont, 2011; Dolzer; Schreuer, 2012.
[74] Response to the Notice of Arbitration. para. 9.

119. In *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia*[75], the ICSID tribunal stated that a violation of a BIT could only be characterized if the procedural irregularity that may have been present amounted to bad faith, a willful disregard of due process of law or an extreme insufficiency of action.

120. In *White v. India*, the tribunal adopted the view that in the context of the enforcement proceedings a delay of nine years was not enough to amount to a breach of the obligation to provide "effective means to assert justice and enforce rights".[76]

121. The understanding of the tribunal was that it was not possible for White to have had the expectation as to the timely enforcement of the Award.[77] It held that White should have known the attitude of the Indian judiciary towards the enforcement of arbitral awards, and should have been aware of India's "seriously overstretched judiciary". The nuances of India's legal system were taken into account and it was decided, in context, that the time taken to process the claims was not excessive. Therefore, the lengthy duration of the enforcement of the Award cannot be considered to constitute an internationally wrongful act on the part of the Court.

122. 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. Claimant was never prevented from accessing Respondent's judicial system and the local remedies have not been exhausted in Claimant's case. Therefore, there was no violation of the fair and equitable treatment by Respondent's actions.[78]

V.C. The Court's conduct does not qualify as an international wrongful act

123. The ILC Rules sets out principles that reflect elementary rules of a state responsibility under international law[79]. In this sense, the ILC Rules seek to formulate basic rules, which create a framework whereupon states can be responsible for wrongful acts of international law[80].

124. According to professor Crawford, there are two elements to be identified in order to define a wrongful act[81]. First, the action or omission must be attributable to a state under international

[75] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estoni.
[76] Joanne Greenaway.
[77] White Industries v. India. para. 10.3.15.
[78] D'Aspremont, 2011; Dolzer; Schreuer, 2012.
[79] Olesson. p.1
[80] UN Commentary. p 1.

law[82] and, second, the action or omission attributable to the state must be a "*breach of an international legal obligation in force for that state at that time*"[83].

125. Even if this Arbitral Tribunal considers that the Court is Respondent's organ pursuant to the definition of article 4 of the ILC Rules and thus, its actions or omissions are attributable to Respondent, the second element is not fulfilled. The Court did not breach an international obligation as its actions or omissions do not amount to denial of justice and do not violate de fair and equitable treatment, as stated in items V.A and V.B. supra. In this sense, there is no wrongful act as the second element is not met.

VI. RESPONDENT DID NOT BREACH ITS OBLIGATIONS UNDER ARTICLE 3(3) OF THE MERCURIA-BASHEERA BIT BY NHA'S TERMINATION OF THE LTA

126. Article 3(3) of the Mercuria-Basheera BIT was not violated by the NHA's termination of the LTA as (A) Respondent is not liable for NHA's actions and (B) the breach of the LTA is not protected by Article 3(3) of the Mercuria-Basheera BIT.

VI.A. Respondent is not liable for NHA's termination of the LTA

127. As already established in section V.C, the ILC Rules sets the conditions under which states can be found responsible for international wrongful acts. However, as the *Tribunal in Kenneth P. Yeager v. The Islamic Republic of Iran* affirmed, "in order to attribute an act to the state, it is necessary to identify with reasonable certainty the actors and their association with the state".[84]

128. The circumstances under which a conduct can be attributed to states are established in articles 4 to 11 of the ILC Rules. article 4 of the ILC Rules states the basic rule attributing to the state the conduct of its organs. In turn, article 5 deals with conduct of entities empowered to exercise the governmental authority of a state. Basically, a conduct can be attributable to a state if it was performed by a state organ or a legal entity exercising governmental authority.

129. NHA does not fall in both categories. The NHA operates independently, it is organized by NHA trusts and there is no record of direct participation by Mercurian officials in the

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[81] Ibid, p. 34.
[82] Idem.
[83] Idem.
[84] Kenneth P. Yeager v. The Islamic Republic of Iran

negotiation of its agreements. Therefore, the NHA cannot be characterized as a state organ pursuant to article 4 of the ILC Rules.

130. Regarding article 5 of the ILC Rules, it also cannot be said that the conduct of NHA is attributable to Respondent. The NHA cannot be qualify as a legal entity empowered to exercise governmental authority. Moreover, NHA's termination of the LTA was not an exercise of Respondent's governmental authority, but an exercise of NHA's commercial contractual capacity.

131. In this regard, Dolzer and Schreuer argue that the conduct that an entity may engage must "*accordingly concern governmental activity and not other private or commercial activity*"[85] to be regarded as state's responsibility under international law.

132. In the same line of reasoning, the arbitral tribunal in *Jan de Nul v. Egypt* identified two fundamental elements for the article 5 of the ILC Rules to be applicable: First, the conduct must be performed by an entity empowered to exercise governmental authority, secondly, the conduct in itself must be an exercise of the governmental authority.

133. In *Almås and Almås v. Poland*, the arbitral tribunal relied on the test provided by *Jan de Nul v. Egypt*'s. The arbitral tribunal had to decide whether the Polish Agricultural Agency termination of a contract was of Poland's responsibility. The arbitral tribunal held that even though the Polish Agricultural Agency was an entity empowered to exercise governmental authority, this entity was exercising contractual, not governmental authority in terminating the contract.

134. Furthermore, the tribunal held that when an entity engages in commercial transactions that are important to the national economy, "this inference will not be drawn" [86] as state's responsibility. In this regard, the conduct to terminate the contract was not an exercise of Poland's governmental authority and the responsibility was not attributable to Poland under article 5 of the ILC Rules.

135. According to Professor Crawford, the use of the ILC Rules in order to confer state's responsibility is applicable only to an entity conduct that reflects governmental authority.[87] The entrance in a commercial relationship and the assignment of a contract is not a governmental act, but an entity's commercial instrumentality, and commercial

[85] Dolzer and Schreuer. Chapter VIII: State Responsibility and Attribution.
[86] *Almås and Almås v. Poland* § 210
[87] Crawford, p.101

instrumentalities acts cannot be regarded as state's responsibility.[88] In this regard, a breach of a commercial contract by an entity cannot be considered a state's responsibility since the entity did not breach an obligation in face of the international law.

136. In this sense, the NHA, with its commercial contractual capacity, entered in the LTA with Claimant for the supply of Sanior. That legal relationship was a commercial instrumentality and its termination was a NHA's act in a commercial activity, with no use of governmental authority, which prevents the attribution of responsibility for Respondent.

VI.B. The breach of the LTA is not protected by Article 3(3) of the Mercuria-Basheera BIT

137. Article 3(3) of the Mercuria-Basheera BIT states that the contracting states shall observe any obligation that they might have entered with regard to investments of investors of the other contracting state. However, that does not mean that the Mercuria-Basheera BIT protects obligations like the ones derived from the LTA.

138. In *SGS v. Pakistan,*[89] the tribunal understood that it would be inconceivable to consider that articles like 3(3) of the Mercuria-Basheera BIT elevate the protection of a contract to international law. The legal consequences of Claimant's interpretation of article 3(3) are far-reaching in scope and extremely burdensome in their potential impact upon a contracting party.

139. First, because Claimant's view of article 3(3) makes articles 3 to 6 of the Mercuria-Basheera BIT, which create rules on the promotion and protection of investments and on the treatment of expropriations, superfluous. There would be no need to demonstrate a violation of substantive treaty standards, such as the fair and equitable treatment, if a simple breach of contract, by itself, would suffice to constitute a treaty violation on the part of a contracting party and to create the international responsibility of the party.[90]

140. Second, because Claimant would be able to nullify any negotiated dispute settlement clause in a contract with Respondent. With the reading of article 3(3) proposed by Claimant, the benefits of the dispute settlement provisions of a contract with a state also a party to a BIT, would flow only to the investor.[91]

[88] Idem.
[89] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan.
[90] Ibid, p.363.
[91] Idem.

141. Investors would always be able to surpass the contractually specified forum. The investor would be free to go to arbitration either under the contract or under the BIT. But the state party to the contract would be effectively precluded from proceeding to the forum specified in the contract unless the investor agreed to do so. Contractual dispute settlement clauses would be useless, and that is not the aim of a BIT. Hence, Claimant's interpretation of article 3(3) cannot be accepted.[92]

142. The breach of state contracts and other obligations to investors cannot be commonly considered a breach of international law. The ICJ, in the *Serbian Loans*[93] case, stated that any contract which is not a contract between states in their capacity as subjects of international law is based on the domestic law of some country. For that, a contract like the LTA is not protected by international law and treaties like the Mercuria-Basheera BIT, as the LTA was signed by two private parties.

143. This was also the understanding in *Noble Ventures v. Romania*,[94] a case involving alleged breaches of an agreement to privatize a Romanian steel enterprise made by Romanian authorities. The tribunal mentioned in this case the well-established rule of general international law, that in normal circumstances a breach of a contract by a state does not give rise to direct international responsibility on the part of the state.

144. Consequently, as the termination of the LTA was the mere consequence of a course of business, Claimant cannot argue that any remedies may be accessed through international law, including the Mercuria-Basheera BIT.

[92] Idem.
[93] French Republic v. Kingdom of the Serbs, Croats and Slovene.
[94] Noble Ventures, Inc. v. Romania.

REQUEST FOR RELIEF

For the above reasons, Respondent respectfully request this Arbitral Tribunal to find that:

(1) The Arbitral Tribunal does not have jurisdiction over any claims in relation to enforcement of the Award;

(2) Respondent is allowed to deny the benefits of the Mercuria-Basheera BIT to Claimant;

(3) The law No. 8458/09 does not violate the Mercuria-Basheera BIT;

(4) The TRIP'S Agreement does not make respondent liable for the purposes of the Arbitration;

(5) Respondent is not liable for the Court's conduct in relation to the enforcement proceedings;

(6) Respondent did not breach its obligations under article 3(3) of the Mercuria-Basheera BIT by terminating the LTA;

(7) Respondent is entitled to restitution by Claimant of all costs related to these proceedings.