THE PERMANENT COURT OF ARBITRATION

ATTON BORO LIMITED

(CLAIMANT)

V.

REPUBLIC MERCURIA

(RESPONDENT)

MEMORIAL ON BEHALF OF THE RESPONDENT

2ND SEPTEMBER 2017

Claimant:

Atton Boro Limited,

22 Fairway Str.

Basheera

Respondent:

Republic Mercuria,

Trade Law Bureau (JLT),

Department of Foreign Affairs and International Trade Mercuria

50, ABC Avenue

Stoica 03035

Mercuria.

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TABLE OF ABBREVIATIONS

Art. / Arts. Article/	Article(s)
BIT	Bilateral Investment Treaty
EAG	Expanded Affiliated Group
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
IBID	Ibidem
ICSID	International Centre for Settlement of Disputes
ILC	International Law Commission
IRS	United States Internal Revenue Service
LTA	Long Term Agreement between Atton Boro and NHA
LTD	Limited
NHA	National Health Authority of Mercuria
PCA	Permanent Court of Arbitration
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nation Commission on International Trade Law
UNCTAD	United Nations Convention on Trade and Development
WTO	World Trade Organization
v.	Versus
VLCT	Vienna Convention on the Law of Treaties
vol.	Volume

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STATEMENT OF FACTS

1. On 11 January 1998, the Republic of Mercuria ("Mercuria") and the Kingdom of Basheera ("Basheera") concluded an Agreement for the Promotion and Reciprocal Protection of Investments (the "BIT").4 The BIT was one of several international agreements concluded by Basheera, a trend that was attributed to the government's new outward-looking economic policy.
2. Atton Boro and Company is a corporation organized under the laws of the People's Republic of Reef ("Reef") and acts as the primary holding company for Atton Boro Group, a leading drug discovery and development enterprise with over a hundred years of operational experience to its credit. While Atton Boro Group's operations span fields as diverse as neuroscience, endocrinology, oncology, and animal health, its most pioneering efforts have been in the arena of critical epidemic diseases that threaten populations in the developing world – AIDS, cancer, tuberculosis, malaria and greyscale.
3. After years of intensive pre-clinical study, clinical trials and regulatory clearances, Atton Boro Group synthesized a compound called Valtervite, which it claimed would radically improve treatment for greyscale patients. After first securing patent protection for Valtervite in Reef in 1997, Atton Boro and Company went on to obtain patents in 50 jurisdictions, including Mercuria (Mercurian Patent No. 0187204, granted on 21 February 1998).
4. In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited ("Atton Boro"), as a vehicle for carrying on business in South American and African countries. For this purpose, a number of patents were assigned to Atton Boro, including the Mercurian patent for Valtervite. Atton Boro Group had an established presence in Basheera's pharmaceutical market. Atton Boro rented out an

office space, opened a bank account, hired a manager and an accountant, and commenced business.

5. Atton Boro and Company shares are held by a mix of private entities and private individuals of a wide variety of nationalities. Its directors come from several different countries, including Basheera and Mercuria. Atton Boro and Company funded Atton Boro Ltd to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA from 1998 onwards. Atton Boro complies with its tax obligations in Basheera. The Mercurian Patent for Valtervite was assigned to Claimant in exchange for shares on 15 April 1998.
6. Atton Boro's principal dealings involved long-term public-private collaborations with States and State agencies for the manufacture and supply of essential medicines at competitive rates. It entered the Mercurian market by concluding several such agreements with its government and with Mercuria's newly set up National Health Authority (the "NHA"). Atton Boro set up a robust manufacturing base in Mercuria, and eventually expanded into other verticals in the pharmaceutical sector in Mercuria.
7. In 2003, the NHA's annual report to the Ministry of Health of Mercuria highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals across the country, and cautioned that the situation could spiral into a national crisis within a decade unless aggressive measures were taken to combat it. The report observed that the treatment currently available in Mercuria was only effective if the infection was detected at very early stages, and even then, it required taking 5 to 7 pills every day. This fell far short of global standards of treatment for greyscale, since

many parts of the world had moved to the novel fixed dose combinations ("FDC") contained in a single pill.

8. Acting on the recommendations in the report, the Ministry of Health directed the NHA to estimate the requirement in Mercuria and invited offers from pharmaceutical companies for long-term strategic supply of FDC greyscale medicines at discounted rates.
9. In a press statement issued 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 Atton Boro and NHA as a part of its five-year health plan (1999-2004). The following day, the President of Mercuria shared this statement on the micro-blogging platform Twitter with the words "Mercuria will do away with red tape and roll out the red carpet for investors."
10. In May 2004, the NHA wrote an invitation to Atton Boro to make an offer for supplying its FDC drug, which it marketed under the brand name of Sanior. Following a protracted negotiation process and evaluation of competing offers, the NHA and Atton Boro entered into a Long-Term Agreement ("LTA").
11. Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders. Clause 5 of the LTA stipulated the minimum guaranteed annual order-value. Clause 6, titled "Validity of the Agreement" read "This Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance."
12. Atton Boro set up its manufacturing unit for Sanior in Mercuria and delivered its first consignment by June 2005. The NHA began distribution across Mercuria. By the end of 2006 about a third of all greyscale patients were being treated using Sanior.

13. Since 2003, the NHA had been engaged in parallel efforts to promote prevention of sexually transmitted diseases like greyscale. The NHA campaign involved actively conducting awareness workshops in educational institutions and workplaces to encourage people to be tested regularly.
14. The NHA annual report 2006 estimated that nearly 50% of all adults were getting themselves tested every six months, as compared to just over 17% in 2003.
15. On 26 December 2006, the Minister for Health called a press conference to discuss the NHA report. She termed the success of the NHA workshops as a "triumph with a sting in the tail", and expressed concern that the incidence and prevalence of greyscale emerging from the data far exceeded even liberal estimates projected by the NHA. Emphasizing the need for more rigorous campaigning and research to unearth the full extent of the crisis, she stated that "the government would take every measure it deemed necessary to make ensure that patients of greyscale could avail treatment."
16. As the number of patients coming into care grew, the order value for Sanior doubled with each quarter in 2007. Atton Boro purchased land and machinery to bolster its production setup. In early 2008, the NHA informed Atton Boro that it would need to renegotiate the price for Sanior, stating that it had "grossly underestimated the number of greyscale cases in Mercuria" and needed to supply medicines for nearly twice the number of patients. Atton Boro wrote back reassuring the NHA that it had built capacity to meet the rising demand, and offered a further discount of 10% for the remaining period of the LTA. The NHA rejected this offer, and demanded an additional discount of 40%, stating that it would be compelled to terminate the agreement if its terms were not met.

17. On 15 May 2008, the Minister for Health and the President of Mercuria met privately with the Director of the NHA. Newspapers carried reports that the agenda for the meeting was to resolve budgetary problems that had arisen in several government healthcare programs. The reports alluded to a reliable source close to the Director.
18. On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed an award (the "Award") in favour of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.
19. On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy.
20. NHA operates independently, but it is politically accountable to the government of the state. It is funded by national taxation, and some private contributions. It is organized by NHA trusts, which are established by the National Health Authorities Act, and in effect they constitute public sector corporations. There is no record of direct participation by Mercurian officials in the negotiation of the LTA. The LTA award enforcement proceedings remain pending.
21. 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. In September 2013, a ruling by 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. 20. On 10 October

2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09)7, which introduced a provision allowing for the use of patented inventions without the authorization of the owner.

22. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court under the new provision, seeking grant of a licence to manufacture Valtervite. The Court heard the matter through a fast-tracked process and granted HG-Pharma a licence on 17 April of 2010 to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atton Boro at 1% of total earnings.
23. Atton Boro was impleaded as a party before the High Court of Mercuria in the matter of the non-voluntary licence granted to HG Pharma to manufacture Sanior. Prior to Law 8458/09 Mercurian statutes did not expressly provide for the issue of compulsory licenses. Mercuria's law provides the patent holder the possibility to question the validity of the non-voluntary license and the royalty, after being granted, before a two-judge bench of the High Court.
24. HG-Pharma is a joint-venture between the State of Mercuria and a private pharmaceutical corporation, with each owning a 50% stake in the company. HG-Pharma wrote to Atton Boro requesting its bank details to transfer royalties under the non-voluntary licence. Atton Boro, intending to protest the license, chose not to respond.
25. Atton Boro Group CFO Daoud Lean was quoted by the Mercurian Post on 1 April 2010, "*Atton Boro Group has expended well over USD 1-billion to develop Valtervite and bring it to market. Are we to be compensated with a mere 1% of Valtervite revenues from a*

state-owned entity just as likely to give away the drug as sell it? This is an April Fool's prank - it's just not funny!"

26. 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.
27. Between May and August of 2013, the websites of three neighbouring States of Mercuria carried letters from their respective government offices expressing gratitude for the greyscale medicines received in the form of humanitarian aid from Mercuria. Valtervite was patented in the three neighbouring States that received Sanior in the form of humanitarian aid. These are developing countries facing financial difficulties
28. By 2014, Atton Boro had lost nearly two-thirds of its market share to the generic FDC pill. Several distributors with whom Atton Boro had long-standing relationships began indicating their intention to switch to the more cost effective alternative once the extant contracts with Atton Boro expired.
29. In February 2015, the head of Atton Boro's Mercuria division announced that the company would no longer be dealing in Sanior in Mercuria, stating that ". . . *an innovative drug developer with billions of dollars to recoup before turning a profit cannot sustain a price war with a generic company which never invested a dime into risky R & D . . . and while Atton Boro intends to continue pursuing every available legal recourse against this usurping of its intellectual property, it will ensure that the people of Mercuria can continue to benefit from its range of other health and lifestyle products.*

SUMMARY OF ARGUMENTS

JURISDICTION. First, that the Claimant lacks locus standi to bring the claim before this Tribunal. This is because it is not protected by the Mercuria-Basheera BIT. Second, the subject matter brought before the Tribunal is inadmissible because an 'Award' is not a stand-alone investment and this Tribunal lacks jurisdiction to determine the matter. Third, the Claimant has not exhausted all the available avenues through which it can assert its rights and enforce its claims.

MERITS. First, the Respondent has not denied the Claimant or its investment in Mercuria fair and equitable treatment because it did not frustrate Atton Boro's legitimate expectations. What the Claimant raises as its legitimate expectations are in fact expectations which cannot be justified, which are not reasonable and which cannot be termed as legitimate. Second, even though the actions of Mercuria's High Court are attributable to the Respondent, its conduct in regard to the enforcement proceedings do not amount to internationally wrongful acts. They do not amount to a denial of justice or a failure to provide the Claimant with an 'effective means' of enforcing its claims and asserting its rights. Third, the NHA's termination of the LTA with the Claimant was a purely independent contractual breach which should not be subject to the BIT or international law. A re-determination of any matter regarding the termination of the LTA is *res judicata*.

ARGUMENTS

PART I: JURISDICTION

1) RATIONE PERSONAE

1.0 Locus Standi

30. The respondent avers that the Claimant does not qualify for the protection of the BIT because it does not meet the requirements set out in the Article 2 (1) of the BIT. The respondent does not contest the fact that the Claimant, Atton Boro Ltd was incorporated according to the laws of the Kingdom of Basheera but rather the conjunctive limb test set out in Article 2(1).

31. Article 2(1) of the BIT renders protection of the BIT advantages to the two classes of investors.

    a) Natural persons from the state party to the BIT and,

    b) Juridical person incorporated according to the laws of another contracting party.

    The second limb includes investors that have a defeasible right to the protection of their investments under the BIT and the host state has the power to divest such investors of this right. With these kind of investors, are legal entities that satisfy the nationality requirement by the way of incorporation but are owned or controlled by nationals of another third state which may not be acceptable to the host state.

32. The respondent ***reserves*** the right to deny any ***legal entity*** advantages set in the BIT if two conjunctive requirements are not met.

    I. If the Ownership and Control of such entity is done by citizens of a third state to the BIT and,

    II. If the entity does not have substantial business activities in the country where it was incorporated.

33. The Claimant does not satisfy the two prongs; the ownership and control and have no substantial business operations in Basheera where it was incorporated. Mercuria and Basheera reserved the right to deny any unqualified investor to gain protection under the BIT at any given time.

i. The Meaning of the Clause "Each Contracting Party Reserves the Right"

34. It is imperative to note that Article 2(1) embodies ***a reserved right*** that will allow a party to the BIT deny the benefits in that BIT. The right reserved must be exercised by a way of a positive action and only through a contracting party who benefits from such right. The right reserved under this clause, can only be fulfilled if both two criterions are fully met by a party invoking it.

35. Article 17(1) of the ECT is identical to Article 2(1) of the Mercuria – Basheera BIT which reserves a right to deny benefits of the BIT to a legal entity which has been incorporated under the laws of the other contracting party. This means, having reserved its right, Mercuria may or may not deny a investor advantages of the BIT if it proves the conjunctive test set under Article 2. The Respondent submits that a Contracting Party need not take any further step to realize its right to deny the benefits conferred by the BIT. While relying on the reservation clause, the tribunal in ***Plama Consortium v Bulgaria***[1] ruled that:

> Article 17(1) [of the ECT] requires the Contracting State to exercise its right of denial and such exercise operates with prospective effect only,…[2]

[1] *Plama Consortium v. Bulgaria* (2005), paragraph 155 - 156
[2] Ibid, paragraph 179

This implies that the right reserved can only be invoked only where the intention had been declared in advance. Mercuria had signed the BIT earlier before the claimant contracted with NHA.

36. The Respondent submits that the BIT already had the denial of benefit clause earlier before it was invoked. The Claimant is denied the benefits of the BIT even though it is a juridical person under the laws of the Contracting Party. This is because it is controlled and owned by a citizen (Atton Boro Group) of the third state and does not operate any substantial business activities in the territory of Basheera where it was organized.

ii. Definition of a third state

37. A third state is a party not privy to the BIT. Article 1(4) defines the territory of each Contracting Party and Article 1(2) defines an "investor" to mean a natural person or a juridical person from the Contracting Party states. The requirement of an entity being organized under the laws of another party fulfils, *mutatis mutandis*, the conditions specified under Article 1(2) of the BIT.
38. The Respondent implores this Tribunal apply contextual interpretation to the BIT. Article 31 of the VCLT requires such as any other interpretation will amount to assigning a "special meaning" as stipulated under Article 31(4) of the Convention. It is thus conclusive that parties to the BIT are Basheera and Mercuria, Reef's citizens or any person from another country cannot enjoy any protection rendered in the BIT.

1.1 Ownership and Control

39. Atton Boro Ltd was incorporated as a wholly owned subsidiary in Kingdom of Basheera by Atton Boro Group, an entity under the umbrella of Atton Boro and Company.[3] 'Wholly owned' means 100% shareholding by Atton Boro Group which is under Atton Boro and Company a citizen of People's Republic of Reef.[4]

    Article 25 (2) (b) of ICSID defines a citizen to include a juridical person incorporated under laws of a party state.

40. The Respondent submits that since Atton Boro and Company controls Atton Boro Group affiliates and all shares of Atton Boro Ltd are currently held by Atton Boro Group, the full control of the Claimant is in the hands of the parent company, Atton Boro and Company, a citizen of Republic of Reef.[5]

41. In ***Barcelona Traction v. Spain***[6] it was decided that if the owner of a legal entity is from a third state, it could not enjoy the protection under the BIT. Owners of Barcelona Traction co. were Belgians seeking benefits of the Spain-Canada BIT but were not successful owing to the fact that they belonged to a third state. Atton Boro and Company being a primary holding company for Atton Boro Group, controls the Claimant which disqualifies the Claimant from enjoyment of any advantages of the BIT under Article 2(1).

    Article 2(1) bars Investors that are legal entities rather than natural persons, if such legal entity has no real connection with its *nominal nationality*.

42. **Karshaw** opines that:

[3] Record, index 859- 865, p.28
[4] Record, index 845, p.28
[5] Record, index 1509 -1510, p. 48
[6] *Barcelona Traction v. Spain (1970)*

> Board of Directors have only delegated powers in a wholly owned subsidiary since the parent company maintains 100% shares ownership, can hire or fire the directors.[7]

This means that any powers given to the board could still be retained by the shareholders unless the company statutes provides otherwise. The board of directors in Basheera could be rendered powerless if they do not get these powers from the parent company, Atton Boro Group which influences its control and autonomy in dealings. The record is silent on whether the directors wielded these powers. **Karshaw** further points out that:

> …it is the shareholder body that empowers the board of directors.[8]

The shares of Atton Boro Ltd are currently held by Atton Boro Group, which is ultimately controlled by Atton Boro and Company,[9] the shareholder which empowers the Claimant's directors.

1.2 Substantial Business Activities in Basheera

43. The Respondent contends that the Atton Boro Ltd has no substantial business activities in Basheera where it was organized. Article 2(1) of BIT, reserves for the Contracting Parties the right to deny benefits or advantages set out in the BIT to a legal entity, if it ascertains that the entity has no substantial business activity where it was incorporated.
44. The Respondent submits that Atton Boro Ltd has failed to prove that it has substantial business in Basheera. The Claimant has an office which was set up to help the parent company operate its business in South America and African continent and although it maintains staff, bank account and an office, its activities do not amount to ***substantive***

[7] Karshaw, p.191
[8] Ibid, p.192
[9] Record, index 1509 -1510, p. 48

business operations in Basheera. It is a 'mere vehicle', a mailbox company set up to carry out businesses for the parent company.[10]

45. In ***Amto v. Ukraine***, the tribunal reasoned that:

> …'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question….[11]

The office and a few employees maintained by the Claimant in Basheera does not meet the condition of 'substance' but is just a formality of legal entity to acquire the title from the parent company. This position was reached in ***Guaracachi v Bolivia***[12] a case with similar facts to the one before this Tribunal. BVI companies which controlled Guaracachi had been constituted according to the laws of United States but wholly owned Gai Company which was operating in Bolivia. The question of substantive business activity emerged when Bolivia relied in the Denial of Benefit clause in the U.S - Bolivia BIT contending that Guaracachi did not carry out any substantial business activity in the United States. Although the claimant argued that they had an *office, carried out board and shareholders' meetings*, this did not amount to substantial business activity. It was held that Guaracachi was just a *special purpose vehicle* to carry on businesses for BVI Group of Companies.

46. It can be inferred from the record that Atton Boro Ltd has permanent employees to help operations of the parent company in South America and Africa but not in Basheera, this renders the claimant a mere 'mail box company'.[13] Renting an office and having a few permanent employees does not amount to having substantial business operations.

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[10] Record, index 860 -861, p. 28

[11] *Amto v. Ukraine (2008)*, paragraph 69

[12] *Guaracachi v. Bolivia (2014)*

[13] Record, index 1511 -1515, p. 48

i. Bright – line test and Surrogate Foreign Corporation

47. For persuasive and comparative purposes, the Respondent relies on the Bright - Line Test used by the United States Internal Revenue Service (IRS) as a formula for determining what constitutes 'substantial business'.

48. For the United States to apply its section 7874(a)(2)(B)(i) of IRS to the Expanded Affiliated Group (EAG) members, an expatriated entity has to be a domestic corporation or partnership with respect to which a foreign corporation is a "surrogate foreign corporation."

> An entity or a person is a surrogate of a foreign corporation if; after the acquisition the EAG that includes the entity does not have substantial business activities in the foreign country in which, or under the law of which, the entity is created or organized, when compared to the total business activities of the EAG.

49. The test stipulates that an EAG member will have substantial business activities in a foreign country if the Bright-line test is met. This mechanical test requires the EAG of a foreign parent corporation to have at least 25% of its employees, assets, and income located in the country of organization of the foreign parent corporation.[14]

50. The group regulations focuses on how individuals are considered employees and determine the amount and timing of employee compensation as well as the group asset test to provide relief for mobile assets, both tangible and intangible. Group assets are thus calculated by taking the assets used in the active conduct of a trade or business and applying the ratio of the number of assets in that country to the total number of assets. A foreign corporation's failure to meet the standard under this test leads to a conclusion that it has not engaged in substantial business activities.

[14] Glicklich

51. The record does not indicate that at least 25% of Claimant's employees are from Basheera, there is also no proof of its revenue from the business operations in Basheera. In addition, its shares are 100% owned by Atton Boro Group which wholly owns it.
52. For the above reasons, the Respondent submits that the Claimant lacks the locus standi to bring the matter before this Tribunal since it is denied the benefits of the BIT by Article 2(1).

2) RATIONE MATERIAE

i. Investment under ICSID

53. Article 25 (1) of ICSID does not show the scope of what amounts to an investment. The Convention restricts jurisdiction of arbitral tribunals to only legal disputes that arises directly out of an investment. Although an investment may acquire more sophisticated form, it is equally important to put into consideration what an investment is by liberally interpreting the Article. It has been observed that:

> …the ICSID Convention should not be seen merely as a means of dispute settlement. It is also "an instrument of international policy for the promotion of economic development"….[15]

54. The Respondent contends that an award is not an investment. To qualify the claim before this Tribunal as an investment, the Claimant should satisfy the requirements set out in ***Salini v. Morocco.*** The four limb test requires one to prove that:

    a) There is a certain duration of time
    b) An element of risk taken
    c) Contribution of money or assets
    d) Contribution to the economic development of the host state.

[15]UNCTAD*:* Issues in International Investment Agreements, p. 66

55. The inherent common meaning of investment will thus be of assets, the commitment of capital, the expectation of gain or profit, the assumption of risk and contribution to the economic development of the host state.

ii. Contribution to economic development of the host state

56. The tribunal drew its authority from the preambular wordings to draw the criterion on economic development of the host state as it was seen as a very important factor that defined the nature under the jurisdiction of the ICSID[16]. It has been observed that the primary objective of BITs is to foster development in the host state.[17] While confirming to the *Salini test,* the ICSID tribunal in ***Mitchell v. Congo*** quoted the preamble of the BIT affirming that the contribution element has always been taken into account either explicitly or implicitly. The tribunal pointed out that:

> "[T]hat agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties."[18]

57. In same judgment, under paragraph 33, it is clear that the criteria for assets to be said they are investments, they must have such characteristics and one of them is on the economic development of the host state. It was pointed out that:

> The ad hoc Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.[19]

[16] *Salini v. Morroco (2006)*
[17] UNCTAD, Dispute Settlement, p. 14
[18] Ibid, paragraph 32
[19] Ibid, paragraph 33

iii. Mercuria – Basheera BIT's Preamble

58. Article 31 (2) of the VCLT provides for contextual interpretation of treaties. This includes taking into account the purposes and objectives of the treaty as envisioned under its preamble. It is the Respondent's submission that this Tribunal should adopt a contextual interpretation of the BIT.

59. The preamble of the BIT between Basheera and Mercuria recognizes the element of economic development of the host state which was one of the characteristic requirements in *Salini test*.

> 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[20]

60. The United States - Democratic Republic of Congo BIT's preamble provisions used to draw the conclusion in ***Mitchell v. Congo*** are similar to ones in the Basheera-Mercuria preamble.

61. An award is thus not a qualified investment even where it has been placed in the BIT as a "claim for money" since it does not contribute to the economy of the host state.

62. The Brunei - Japan EPA (2007) under Article 56 (h) (x) in note 3 states that:

> Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.

This provision draws the scope of operations of the term investment. Despite the fact that the same Article has defined what can be meant by 'investment', it also shows that it is not exclusively limited to the wording but also to the substantial part as well. This implies that failure to reach the said characteristics laid out in Brunei - Japan EPA's Article 56, an

[20] Record, index 980, p.32

investor may not submit a claim to an arbitral tribunal. This stipulation is not distinct from the *Salini test.*

63. The dispute in ***Joy Mining v. Egypt*** was whether the claimant was entitled to release a bank guarantee. The tribunal ruled that for an arrangement to qualify as an investment, it should have all the elements set in *Salini test* and added substantial commitment and regularity of profits and returns as other factors to qualify any arrangement as an investment. Article 1 (3) of the Mercuria - Basheera BIT defines what 'returns' mean and an award does not fulfill any of the characteristics in the definition. Article 1(3) provides that:

> [A] certain duration, a regularity of profit and return, an element of risk, **a substantial commitment and that it should constitute a significant contribution to the host State's development**".[21]

64. The development element is dominant in determining whether an arrangement is indeed an investment and it has to be met in most cases even when other requirements have been satisfied.[22]

iv. Scope of the PCA operation under Article 8 of the BIT

65. Article 8 (1) of the BIT draws the scope of operation of the PCA when determining an investment dispute between a Contracting Party and an investor from the other Contracting Party. The parties specified in the Article that they intend to submit disputes to this Tribunal if amicable resolution fails. The Article covers matters arising out of or in relation to;

a) Agreement
b) The existence
c) Interpretation
d) Application
e) Breach
f) Termination or invalidity of the BIT

[21] Supra note 18 paragraph 53
[22] Supra note 15, p. 53

Where parties have failed to resolve their disputes regarding the above stipulated matters, the dispute shall be settled through arbitration.

66. The dispute in this Tribunal arises purely from commercial contractual obligation which is *res judicata* since it has been concluded by the tribunal in Reef. Besides, an Award does not feature the scope laid down under Article 8(1) of the BIT. It will be a violation of the spirit of interpretation of Article (8) written in relation to Article 31 of VCLT which requires interpretation in good faith.

3) ADMISSIBILITY

i. Exhaustion of Local Remedies

67. Although exhaustion of local remedies is not expressly stated in the Mercuria - Basheera BIT, it is implied. Article 8(1) provides that, failure in settling disputes through amicable negotiations shall subject the matter to be settled by arbitration.[23]Additionally, the preamble of the BIT also recognizes the need to resolving matters using national law and international law in dispute resolution.[24]

68. Even though the BIT does not expressly provide for the requirement of exhaustion of local remedies, ICSID is a ***lex specialis*** in relation to the BIT. Article 26 of the ICSID provides for this requirement before parties can bring their claims before the tribunal.

[23] Record, index 1144 – 1145
[24]Record, index 982 – 984, p. 32

ii. *Lis pendens* principle

69. The claimant abandoned proceedings in the respondent's judiciary to bring claims before this Tribunal. This violates the ***"lis pendens"*** principle. After the adjournment of the case on 30th October 2016, the Claimant concluded that the court had failed to settle matters amicably and chose to submit the matter before this Tribunal. The High Court of Mercuria did not conclude the case neither did it refer it to another court or tribunal. We therefore submit that the Claimant's implied assertions on the failure of our judicial system to handle the matter as lacking basis. In fact the Claimant abandoned the proceedings which were adjourned to 2nd January 2017.[25]

iii. Clean hands maxim

70. The maxim lays down the principle that *he who comes to equity, must come with clean hands.*

> Anybody praying for an equitable relief over a particular matter should show that he has behaved honestly and fairly in regard to that matter.[26]

71. The Respondent avers that the delays in the enforcement proceedings are attributable to both parties. The Claimant in its response dated 7th November 2016 denies the responsibility in delays to the proceedings and attributes them to the Respondent's judiciary and the NHA. It submitted that:

> …the Court indulged every delay tactic employed by the NHA, granted adjournments for the asking and entertained applications that were clearly lacking in merit, causing the Award to remain unenforced….[27]

[25] Records, index 353 – 354, p. 12
[26] Bakibinga, p. 30
[27] Record, index 130 – 135, p.4

Atton Boro Ltd is not without a blemish when it comes to the adjournments since it had a hand in it. It sought leave on 23rd February 2011[28] and similarly on 29th June 2013[29] and also requested for more time to make its submissions. All these were contributory factors that caused delays which the Claimant terms as "unreasonable."

72. Lengthy arguments in other cases equally contributed to the delays. For example, paragraphs, 9, 15, 20, 24 and 40 of **Exhibit 1**[30]shows clearly that such adjournments were not as the result of any one's fault. The Claimant consider the backlog of cases in the Respondent's courts and the fact that Mercurian judiciary is an overburdened one and serving a population of more than 67 million people.[31] When determining whether the delays in the Indian high court amounted to a denial of justice, the tribunal in ***White Industries v. India*** was of the opinion that it was relevant to bear in mind that the respondent was a developing country with a population of over a billion and a judiciary which was overstretched.[32] The Claimant should have been aware of the situation in the Mercurian judicial system and should not have expected that its case was going to receive preferential treatment at the expense of other cases and the public interests of the Respondent state.

iv. There is no time limit for enforcement of an award under The New York Convention

73. The New York Convention is silent on time limit on enforcement of arbitral awards. This allows for parties to exercise their own discretion on when to enforce arbitral awards based on their domestic laws. For example the US Federal Arbitration Act limits enforcement to

[28] Record, index 219 – 222 p.7
[29] Record, index 284 – 286 p.9
[30] Record, Exhibit 1 p. 7 – 11
[31] Record, index 512, p. 17
[32] *White Industries v. India,* paragraph 10.4.18

three years after an award is issued, England limits it to six years, Switzerland ten years and China one year from the date of the award if at least one of the parties is a natural person, and six months if all parties are juridical persons. However, these time limits must be consented to by all the parties to the arbitration for it to take effect.

74. The Respondent submits that it has no laws governing the enforcement of awards and no time limits either.[33] NHA does not intend to set aside the award but due process of the law should be followed to make such enforcements.[34]The conduct of the Claimant in abandoning the enforcement proceedings is not justifiable.

75. The Respondent's submits that it has not contravened New York Convention in regards to the enforcement of the award.

[33]Record, index 1518 – 1520, P. 48
[34]Record, index 1517 – 1518 , p. 48

PART II: MERITS

1) CLAIMANT WAS NOT DENIED FAIR AND EQUITABLE TREATMENT BY THE RESPONDENT

i. Fair and Equitable Treatment Standard

76. The Respondent submits that it did not deny the Claimant or its investment within Mercuria fair and equitable treatment. To support this position it is important that what constitutes fair and equitable treatment is defined. The Mercuria-Basheera BIT does not provide a definition of fair and equitable treatment, the closest it comes to defining it is where it states that:

> [E]ach Contracting Party shall encourage and create favourable conditions for investors from the other Contracting Party.[35]

It is therefore prudent to rely on relevant case law to define fair and equitable treatment.

77. The tribunal in ***Tecmed v. Mexico*** ties fair and equitable treatment to the international law principle of good faith and construes it to mean a provision of treatment to international investments which does not affect the basic expectations taken into account by foreign investors when investing.[36] The tribunal further stresses the need for the contracting parties to act in a consistent and transparent manner in order to provide fair and equitable treatment to foreign investors and their investments.

78. In ***Saluka v. Czech Republic***, fair and equitable treatment is linked to legitimate expectations. Here the tribunal observes that when it comes to the fair and equitable

[35] Mercuria-Basheera BIT, Article 3(1)
[36] *Tecmed v. Mexico* (2003), at paragraph 154

treatment standard, the dominant element is the notion of legitimate expectations.[37] Legitimate expectations being the conduct or representations of a state which gives rise to justifiable expectations on the part of a foreign investor and which are relied upon by the investor, expectations whose failure to be met might cause the investor's investment to suffer detriment. This was the observation of the tribunal in ***Thunderbird v. Mexico***.[38]

79. This Tribunal should therefore consider whether there were any representations or assurances made by the Respondent to the Claimant which were relied upon by it when setting up business in Mercuria. This will be helpful in establishing what the Claimant's legitimate expectations were and whether they have been frustrated in order to determine if the Respondent has denied the Claimant and its investment fair and equitable treatment.
80. We also submit that the Tribunal has to consider whether the Claimant's expectations were justifiable, legitimate and reasonable in order for it to conclusively determine whether their frustration amounts to denial of fair and equitable tresatment.
81. The Claimant alleges that the Respondent's enactment and enforcement of an amendment to its intellectual property law, denied its investment fair and equitable treatment. This is an implication that its legitimate expectations were pegged on the stability of Mercuria's legal regime.
82. The Respondent submits that it did not deny the Claimant or its investment, fair and equitable treatment, neither did it frustrate its legitimate expectations. The Respondent further submits that the Claimant's expectations were unreasonable, unjustifiable and illegitimate in as far as the enactment and enforcement of Mercurian Law No. 8458/09 is concerned.

[37] *Saluka v. Czech Republic*, at paragraph 302
[38] *Thunderbird v. Mexico* (2006), at paragraph 147

83. The Respondent qualifies its positions on the Claimant's expectations by bringing to the Tribunal's attention the reasoning in ***Parkerings v. Lithunia*** where it held that:

> A State has the right to enact, modify or cancel a law at its own discretion. *Save for the existence of an agreement, in the form of a stabilisation clause or otherwise*, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time.[39] (Emphasis added)

84. A state's sovereign right to legislate can only be constrained where it makes a promise not to engage in an exercise of this privilege and where that promise is relied upon by an investor. Once such a representation is relied upon by an investor, an obligation on the part of the state is arises. The state is obligated not to break the promise since such an action could possibly be detrimental to the investor.

85. In the present case there was no assurance or representations made by the Respondent to the Claimant in regards to Mercuria's legal regime remaining stable or unchanged for the time the Claimant conducted business there. Nowhere in the record of facts indicates this. In fact the Mercuria-Basheera BIT does not have a stabilization clause in which the Contracting Parties assure foreign investors that the existing business legal frameworks will remain unchanged for the duration of the treaty.

ii. The Contracting Parties' WTO Membership And Its Implications.

86. Under the Mercuria-Basheera BIT the Contracting Parties agree that they have rights and obligations under the Marrakesh Agreement Establishing the WTO.[40] This implies that they are WTO members.

[39] *Parkerings v. Lithuania* (2007), at paragraph 332
[40] Record, BIT preamble, p. 32

87. By virtue of their membership to the WTO, the Contracting Parties accept WTO agreements including the TRIPS Agreement.[41] TRIPS objective is to guarantee protection of intellectual property rights by the members.[42]

88. The TRIPS Agreement however grants its members flexibilities upon which a state can infringe on intellectual property rights including patents. It provides for compulsory licensing on patented inventions where it states that:

> Where the law of a Member allows for other use of the subject matter of patent without the authorization of the right holder... [43]

iii. Mercurian Law No.8458/09 Conforms To The Provisions Of The TRIPS Agreement

89. Laws providing for compulsory licencing by TRIPS members must meet the conditions set out in TRIPS Agreement under Article 31. One of the conditions which allows for enforcement of such law, is that there has to be a situation of "national emergency" or a circumstance of "extreme urgency."[44]

90. The Republic of Mercuria is faced with a public health crisis which qualifies as a situation or circumstance of extreme urgency or national emergency. Greyscale, a disease affecting Mercuria's population is categorized as one of the "critical epidemic diseases that threaten populations in the developing world."[45] A report by the NHA advised that aggressive measures should be taken to combat greyscale. It has to be noted that even though this report was generated by an agent of the Respondent, the recommendation it

[41] Chow and Schoenbaum, p. 203
[42] TRIPS Agreement preamble
[43] *Ibid*,Article 31
[44] *Ibid*, Article 31(b)
[45] Record, Annex No. 1, Index 850, p. 28

makes is contained in the statement of uncontested facts.[46] It is not challenged by the Claimant.

91. The Respondent submits that its enactment and enforcement of Law No. 8458/09 is an exercise of the compulsory licensing flexibility found within the TRIPS Agreement.

92. The Claimant being aware that the Respondent is a WTO member faced with a public health crises should have anticipated that she might take measures allowed by the TRIPS Agreement in order to protect her citizens' public health. The Doha Declaration on TRIPS provides clarity on the exercise of these measures. Under it, the member states declare that:

> We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health.[47]

93. The binding nature of the Doha Declaration on the TRIPS Agreement is rooted in the VCLT's rule of interpretation of treaties. The Convention provides that:

    i. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

        > Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty[48]

    ii. There shall be taken into account, together with the context:

        > Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions[49]

94. The Respondent submits that it did not make representations to the Claimant that it will refrain from exercising the flexibilities contained within the TRIPS Agreement and it was therefore not reasonable for Atton Boro Ltd to expect such.

[46] *Ibid,* Index 875
[47] The Doha Declaration on Trips Agreement and Public Health, para 4
[48] VCLT, Article 31(2)(a)
[49] *Ibid*, Article 31 (3)(a)

95. The Respondent anticipates that the Claimant may protest the award of a 1% royalty on generic Valtervite medicines manufactured by HG Pharma as not meeting the TRIPS requirement of "adequate remuneration."[50] We submit that the WTO does not provide a royalty calculation formula but in order conform to customary international practices, the Respondent relies on the precedent set by Canada's *Jean Chrétien Pledge to Africa Act* as a benchmark. This piece of legislation by Canada which is a WTO member, provides a royalty rate calculation formula for compulsory licensed pharmaceuticals.[51] The formula bases the rate awarded on the United Nation's Human Development Index (HDI) ranking of the country importing the generic medications. Highly ranked countries (developed countries) pay a maximum of 4% royalty on the medicines while developing countries like Nigeria will pay 0.61%.[52] Mercuria is a developing country[53] and its award of 1% royalty on compulsory licensed pharmaceuticals is appropriate if not generous when subjected to the standard set by Canada. The Act was presented to the WTO Council for TRIPS and it was not objected to, the Council circulated it amongst the member states.[54]

96. The Respondent also anticipates that the Claimant may challenge its assertion that the public health crisis posed by greyscale amounted to a circumstance of "extreme urgency" or a "national emergency." We again submit that the Respondent's classification of the health crisis in Mercuria as such, is an exercise of a flexibility within the TRIPS Agreement. The Doha Declaration clarifies this flexibility by pointing out that:

> …each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health

[50] *Ibid*, Article 31(h)
[51] The Jean Chrétien Pledge to Africa, available at http://canadagazette.gc.ca/partII/2005/20050601/pdf/g2-13911.pdf
[52] WTO Council for TRIPS, IP/C/W/464 (14 November 2005), paragraph 17, p. 4
[53] Record, Response to Notice of Arbitration, Index 511, p. 17 & Index 1524, p. 48
[54] Supra note 60

> crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.[55]

97. It is also the Respondents submission that it was not 'reasonably practicable' to contact Atton Boro immediately prior to the exploitation of its patent by HG Pharma due to the urgency posed by the health crisis.

iv. Law No. 8458/09 Is In Tandem With The Provisions of the Mercuria-Basheera BIT.

98. The BIT protects the rights to enjoy, control, possess or own investments and makes an exception where these protected rights may be infringed upon. The exception is contained under Article 6(1) where the statute states that:

> *[S]ave* where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction (emphasis added).

99. The amendment enacted by the Respondent is a *law* in every sense of that word as used under Article 6(1). Its application and conclusive determination of a matter based on it by the Mercurian High Court (a court having jurisdiction in a Contracting Party's territory) is a *judgment* envisioned under the Article.

100. The Respondent therefore submits that by virtue of the exceptions provided under Article 6(1), the enactment and enforcement of Law No. 8458/09 by the Respondent did not violate the BIT.

101. It is also the Respondent's position that its actions of protecting Mercuria's public health were carried out in national interest and therefore meets the requirements under article 6(2).

[55] Supra note 12, on paragraph 5 (c)

102. Enactment and enforcement of legislation which conforms to international intellectual property protection standards/requirements and which does not contravene the BIT, should be reasonably foreseeable and therefore does not frustrate any legitimate expectations. In fact the enactment and enforcement of such law should be anticipated. The Claimant should have foreseen the enactment of non-voluntary licensing legislation in Mercuria.

103. For all the above reasons, the Respondent believes that it has exhaustively elucidated why the enactment of Law No. 8458/09, and the grant of a non-voluntary licence to HG Pharma does not breach the Fair and Equitable Treatment standard under the BIT.

104. The Respondent implores this Tribunal to come to a conclusion that the Claimant's expectations were unreasonable, unjustifiable and illegitimate and therefore declares that the Respondent did not deny Atton Boro Ltd or its investment fair and equitable treatment since it did not have any legitimate expectations that were frustrated by the Republic of Mercuria in its enactment of Law 8458/09 and the grant of a non-voluntary license.

2) ATTRIBUTION OF THE CONDUCT OF MERCURIA'S JUDICIARY TO THE RESPONDENT.

105. The Respondent is not contesting that it is liable for some of the acts of its judiciary in regards to the enforcement proceedings.

The Respondent however asserts that the conduct of its judiciary falls below the threshold of amounting to internationally wrongful acts on the part of domestic courts. This is the Respondent's position as earlier submitted in its response to the notice of arbitration.[56]

The conduct of the Mercurian High Court will only be considered wrongful under international if it denied the Claimant justice or an effective means of asserting its rights and enforcing its claims. This was not the case here.

i. Claimant Has Not Been Denied Justice.

106. The tribunal in ***White Industries v. India*** accepted the respondent's position that when it comes to assessing whether there has been a denial of justice, the test is stringent.[57] In demonstrating the stringency of the test, the tribunal referred to ***Chevron & Texaco v. Ecuador*** where the tribunal held that:

> [T]he test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.[58]

107. Atton Boro has not demonstrated that the actions of the Mercurian High Court meets these standards, that the actions of the court were 'egregious, shocking and surprising the sense of judicial propriety.'

[56] Record, Index 508, p. 17
[57] *White Industries v. India* paragraph 10.4.5
[58] Ibid, paragraph 10.4.7 quoting *Chevron & Texaco v. Ecuador (2010)* paragraph 244

While the tribunal does provide factors to be considered when determining whether judicial delay amounts to a denial of justice, it makes an important observation that:

> [P]ublic international law does not provide fixed time limits within which certain classes of cases must be resolved.[59]

The tribunal further refers to the position of the ICSID tribunal in ***Toto v. Lebanon*** where it observed that:

> … [I]nternational law has no strict standards to assess whether court delays are a denial of justice.[60]

108. The Republic of Mercuria asserts that the seven year duration of the enforcement proceedings does not amount to a denial of justice and that in fact the Claimant was partly complicit in the delay as stated above in jurisdiction part.

The Claimant filed its application at the High Court without serving a notice of the application to the NHA and thereby causing a two month delay.[61] The Claimant further caused a three month delay by seeking leave to file a reply to NHA's response.[62] This in turn caused the NHA to seek leave to file a rejoinder, causing another four month delay.[63] Atton Boro's request to have the matter transferred to the Commercial Bench caused another five month delay.[64] A delay amounting to one year and two months is solely attributable to the Claimant.

109. The Respondent submits that the other adjournments (those not caused by the Claimant) were not undue delays but rather a result of what was beyond the High Court's control. Some

[59] Ibid, paragraph 10.4.9
[60] Ibid
[61] Record, Exhibit 1, Index 201, p. 7
[62] Ibid, Index 220
[63] Record, Exhibit 1, Index 223, p. 8
[64] Ibid, Index 257-262

were due to lengthy arguments[65] in the court and the fact that the Mercurian judicial system is an overburdened one.[66]

110. The Mercurian High Court was not tolerant of NHA's absences. After the first absence of the NHA during the proceedings, the court promised to hear the matter *ex-parte* in case the NHA failed to be present during the next hearing.[67] At the second absence of the NHA during the proceedings, the court vowed that it will take 'adverse measures' if the it missed the next hearing.[68]

111. The Claimant's requests were accommodated by the court. Atton Boro's request to transfer the case to the newly established Commercial Bench was allowed by the court.[69] Its request for a hearing within a short time was not objected to by the court, the court gave a hearing date which was exactly one month after the request was made.[70] Its second request for an expedited hearing was rejected but with an explanation that the court had an overwhelming caseload.[71] Atton Boro was also granted leave which it sought.[72]

The conduct of the High Court towards the Claimant and its adversary in that court does not demonstrate a denial of justice.

ii. Effective Means of Asserting Claims

112. The Respondent avers that the Claimant had effective means of asserting its claims and enforcing its rights at its disposal within Mercuria.

[65] Record, Exhibit 1, Index 217, 244, 269, 343
[66] Supra note 17, Index 510
[67] Record, Exhibit 1, Index 208
[68] Ibid, Index 273, p. 9
[69] Ibid, Index 257
[70] Ibid, Index 280
[71] Ibid, Index 317, p. 10
[72] Ibid, Index 221, p. 7

113. The Republic of Mercuria has a properly constituted and effective judiciary complete with a Supreme Court, High Court, and a Commercial Bench. The delays regarding the enforcement proceedings were not deliberate on the part of the High Court, they were not undue delays. The Respondent also submits that the backlogs in the Mercurian judicial system are not regular and extensive and lastly, that the Claimant never sought relief beyond the Mercurian High Court before submitting the matter to international arbitration. All the above conditions were laid out in Texaco v. Ecuador to be used in determining if effective means of accessing justice are available.

114. We therefore submit that Mercuria provided the Claimant with effective means to assert its rights and enforce its claims.

3) TERMINATION OF THE LTA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT.

i. Umbrella Clauses Should Not Be Applied To Breaches Of Contractual Obligations.

115. It is the Respondent's position that this Tribunal should not apply Article 3(3) of the BIT being invoked by the Claimant in regards to the termination of the LTA. This Article which is an umbrella clause, can only be applied to contractual breaches if they have been occasioned by a state exercising its sovereign power. That is to say, only a breach of a contract resulting from a state abusing its governmental powers is subject to umbrella clauses within a BIT.

116. We persuasively rely on the work of some of the well-known and respected experts in this field and bring to your attention the views of **Yannaca-Small** who finds Thomas Wälde's position on this matter to be moderate and not on the fringes. Wälde contends that

> …the principle of international law would only protect breaches and interference with contracts made with government or subject to government powers, if the government exercised its particular sovereign prerogatives to escape from its contractual commitments or to interfere in a substantial way with such commitments.[73]

117. In our case the termination of the LTA by the NHA was not an exercise of Mercuria's sovereign powers. In fact it is stated that the NHA operates independently and that the LTA negotiation did not involve Mercurian officials.[74] Based on these unchallenged facts we submit that NHA was acting on its own capacity as a contractual party and not as a representative of the government of Mercuria when it when it entered into and when it terminated the LTA with the Claimant. It is also worth noting that the LTA was terminated by the NHA subject to the terms of that contract. The NHA cited unsatisfactory performance by Atton Boro as a ground for the termination.[75] Validity of the LTA was subject to *satisfactory performance*[76] as agreed to by the parties.

118. The termination of the LTA by the NHA does not amount to a breach of the BIT. Considering it as such would amount to interpreting the BIT broadly and elevating a breach of a contract into a breach of a treaty and thereby subjecting it to international law. The tribunal in ***SGS v. Pakistan*** rejected such a broad interpretation of an umbrella clause opining that

[73] Yannaca-Small, p. 9
[74] Record, Index 1591-94, p. 50
[75] Record, Index 930, p. 30
[76] Record, Index 899, p. 29

> The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law.[77]

119. The Respondent urges this Tribunal to adopt such a narrow interpretation of Article 3(3) given that such a broad interpretation does not serve the purposes of the Article as intended by the Contracting Parties and further creates far reaching legal consequences on a state which are detrimental as noted by earlier tribunals which decided to tread carefully on this matter.[78] The treaty does not explicitly state that breaches of contracts between Contracting Parties and foreign investors protected under the BIT, amount to breaches of the treaty. In ***Vivendi v. Argentina*** it was rightly observed by the tribunal that

> A state may breach a treaty without breaching a contract...[79]

With the vice versa also being possible.

120. In the case before this tribunal it is the Respondent's submission that a breach of the LTA does not amount to a breach of the BIT.

121. Another authority on this matter is the one laid down by the tribunal in ***El Paso Energy v. Argentina***. In that case the Argentina-US BIT had an umbrella clause with the exact same wording as the Mercuria-Basheera BIT in Article 3(3) stating that

> …each Party shall observe any obligation it may have entered into with regard to investments.

[77] SGS v. Pakistan, paragraph 166
[78] One of the tribunals justification of their narrow interpretation of umbrella clauses *vis-a-vis* breaches of contractual obligations of a state to an investor in *SGS v. Pakistan* and *El Paso Energy v. Argentina*
[79] *Vivendi v. Argentina (Award, 2007*)

122. El Paso Energy Company argued that contractual breaches by Argentina amounted to violation of the umbrella clause in the BIT but the tribunal did not accept its argument. It instead held the position that

> In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentine-US BIT can be interpreted in the light of Article VII(1) which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorization, or the BIT……Interpreted this way, the umbrella clause read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign – such as stabilization clause – inserted in an investment agreement[80]

123. We have sufficiently demonstrated that the contract between the Claimant and the NHA was an ordinary commercial contract and not one that would be considered to be a contract entered into by Mercuria as a sovereign. Going by the above authority, the breaches of the said contract would not be subject to the protection of the BIT.

124. The Respondent agrees with, and brings to the attention of this Tribunal, the position that disputes involving the use of government powers are the target of customary international law and the disciplining element of treaties, and that contractual disputes should be subject to domestic laws and the jurisdiction of domestic courts or arbitral tribunals set up by the terms of a contract.[81]

125. In the present case, the LTA provided a specific recourse in case a dispute arose between the parties bound by the contract.[82] The avenue agreed to by the parties (NHA and the

[80] *El Paso Energy v. Argentina*, paragraph 81

[81] Wälde, p. 6-7

[82] Record, Index 505, p. 17 (Respondent's unchallenged submission that the LTA provided for its own dispute resolution mechanism).

Claimant) to solve contractual disputes was the tribunal in Reef which issued an award in favour of the Claimant.[83]

ii. A Re-Determination of Any Matter Regarding the Termination of the LTA is *Res Judicata*

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126. Atton Boro has already received a remedy for the termination of the LTA from a tribunal in Reef which considered NHA's actions to amount to a breach of the agreement. It is for this reason that any issue concerning this matter should not be re-opened.

127. The Respondent submits that if this Tribunal embarks on deciding any issue regarding the termination of the LTA it will be contravening the doctrine of *res judicata* since the matter has been conclusively decided. The affirmative defense of *res judicata* is sufficiently relied upon by the Respondent since it

> bars the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit.[84]

128. The tribunal in ***Vivendi v. Argentina*** held that its determination on whether it had jurisdiction on claims arising under the BIT would be *res judicata* since the matter had already been adjudicated by another tribunal.[85] The principle was also applied by this Tribunal in its first case, the ***Pious Fund Case*** where it decided that a claim brought to the tribunal by the United States of America against the United Mexican States on behalf of California bishops was governed by the principle of *res judicat*a by virtue of an earlier award on the same[86] and it could therefore not re-determine it.

[83] Record, Index 931, p. 30
[84] Black Law Dictionary on *res judicata,* p. 1425
[85] *Vivendi v. Argentina (Jurisdiction, 2005),* paragraph 107
[86] *Pious Fund Case (1902),* paragraph 1

PRAYERS.

The Respondent urges this Tribunal to find that:

1) It lacks jurisdiction to decide the matter before it,
2) That the Respondent did not deny the Claimant's investment fair and equitable treatment because its legitimate expectations were not frustrated;
3) That the umbrella clauses under Article 3 cannot be applied in regards to the termination of the LTA or the conduct of the Mercurian judiciary; and
4) Any other relief that this Tribunal deems fit for the sake of justice and fairness.