Team Rivero

Foreign Direct Investment Moot Competition

Boston, 2-5 November 2017

Arbitration Pursuant to the Permanent Court of Arbitration Rules 2012

In the Matter of

Atton Boro Limited

Claimant

v.

Republic of Mercuria

Respondent

Memorial for the Respondent

September 24, 2017

TABLE OF CONTENTS

INDEX OF LEGAL SOURCES

ARBITRAL DECISIONS:

Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003.
Malaysian	*Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, Award on Jurisdiction, 17, May 2007.
Methanex	*Methanex Corporation v. United States of America*, UNCITRAL (NAFTA) Final Award, 3 August 2005.
Mondev	*Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.
Nicaragua	*Nicaragua v. United States of America*, Intl. Ct. of Justice, Merits Judgement, 27 June 1986.
Nobel	Nobel Ventures, Inc. v. Romania, ICSID Case No. AR/01/11, Award, 12, October, 2005.
Occidental	*Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004.
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007)
Philip Morris	*Phillip Morris Morris Phillip Morris v. Oriental Republic of Urguay,* (ICSID Case No. ARB/10/7), Award, 8 July 2016
Pope	*Pope & Talbot Inc and the Government of Canada,* (Interim Award, NAFTA Chapter 11 Arbitration), 26 June 2000, para 65.
Saluka	*Saluka v. Czech Republic*, UNCITRAL Rules, Partial Award, 17 March 2006.
Salini	*Salini Costrutorri S.p.A and Italstrade S.p.A v. Kingdom of Morocco (Decision on Jurisdiction),* Case No. ARB/00/4, 23 July 2001
Saipem	*Saipem S.p.A. v People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), 21 March 2007
Sedeco	*Sedco, inc. v. National Iranian Oil Co.* Interlocutory Award No. ITL 55-129-3, 28 October 1985, 9 the Iran-Uited States Claims Tribunal Reports 248, p. 275

S.D. Myers	*S.D. Myers, Inc. v. Canada*, Partial Award, (NAFTA Arb. Nov. 12, 2000), 40 I.L.M. 1408 (2001)
SGS	Societe Generale de Surveillance S.A. Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.
SGS II	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Award, 29 January 2004.
Tokios	*Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007.
Thunderbird	*International Thunderbird Gaming Corporation v. United Mexican States*, Award, 26 January 2006.
Ulysseas	*Ulysseas Inc. v. Republic of Ecuador* (UNCITRAL – PCA Case No. 2009-19), Interim Award, 28 September 2010.
Waste Mgmt.	*Waste Management., Inc. v. United Mexican States*, ICSID Case No.ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967.
White	*White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, 30 November 2011.

INTERNATIONAL AND DOMESTIC COURT CASES

Agricultural Labor	*Competence of the ILO to Regulate Agricultural Labour*, Advisory opinion of 12 August 1922, *PCIJ Series* B, Nos 2 and 3, 23.
Golder	*Golder v United Kingdom*, Judgment, App No 4451/70, A/18, ECHR 1, 21st February 1975.
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Polish Nationality	*Acquisition of Polish Nationality*, Advisory Opinion, PCIJ Series B, No7, 6 at 20, 15 September 1923.
Pulau Ligitan	*Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v Malaysia*, Judgment, ICJ Rep 625, 17th December 2002.

TREATIES:

ICESCR	International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, New York.
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969 Hague
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 New York
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1 January 1995 Marrakesh

INDEX OF AUTHORITIES

BOOKS:

ARTICLES:

MISCELLANEOUS:

	INVESTMENT AGREEMENTS II, New York and Geneva, 2012.
India Patent	*India–Patent, Protection for Pharmaceutical and Agricultural Chemical Products*, AB-1997-5, Report of the Appellate Body, WT/DS 50/AB/R, 19 December 1997, para 33.
UNCTAD Exp.	UNCTAD, Series on International Investment Agreements II: Expropriation: A Sequel, New York and Geneva, 2012
YB	Year Book of the International Law Commission, ILC 1966
Responsibility of States	Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 4(1), U.N. Doc. A/56/10 (Oct. 24, 2001).

Index of Abbreviations

¶/¶¶	Paragraph(s)
%	Percent
Award	Arbitral Award in favor of Atton Boro, Ltd. (2008)
Art.	Article
Pt.	Part
Ch.	Chapter
Bash-Merc-BIT	Agreement between the Republic of Mercuria and The Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
BIT	Bilateral Investment Treaty
Facts	Uncontested Facts
NHA	National Health Authority of Mercuria
LTA	Long Term Agreement Between Atton Boro, Ltd. And Mercurian NHA (2004)
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
p./pp.	Page(s)
PCA	Permanent Court of Arbitration
PCA Rules 2012	Permanent Court of Arbitration Rules 2012
PO1	Procedural Order 1
PO1 Annex 1	Procedural Order 1, Annex 1: Mercuria/Basheera BIT
PO1 Annex 2	Procedural Order 1, Annex 2: Minister for Health Statement
PO1 Annex 3	Procedural Order 1, Annex 3: NHA Report 2006
PO1 Annex 4	Procedural Order 1, Annex 4: Law No. 8458/09
PO2	Procedural Order 2
PO3	Procedural Order 3
NA	Notice of Arbitration
NA Exhibit 1	Notice of Arbitration Exhibit I: Timeline of the Proceedings in Enforcement Application No.873/2009 Before the High Court of Mercuria
RRA	Respondent's Response to Notice of Arbitration, 26 November 2016
WTO	World Trade Organization

STATEMENT OF FACTS

1. Atton Boro Limited (Claimant) is a private company incorporated under the laws of the People's Republic of Reef (Reef). In **April 1998,** the Claimant incorporated a wholly owned subsidiary akin to an investment vehicle in Basheera with about 2-6 permanent employees,[1] in order to do business in developing countries in South America and Africa. Four months before Claimants incorporation in Basheera (**January 1998),** the Respondent and Basheera agreed to terms for Bash-Merc BIT.[2]
2. The Claimant had invested in the pharmaceutical product Valtervite and many other patents in about 50 countries including in Mercuria (Mercuria or Respondent).[3] Valtervite is a chemical compound that can be used in Sanior which treats greyscale.[4] The Claimant deals mostly with governmental health agencies in manufacturing public health medicines for competitive rates.[5]
3. In **2003,** the National Health Authority (NHA) of Mercuria issued an annual report that discussed a potentially serious public health concern of a disease called greyscale. Greyscale could have a tremendous effect on the working population of the developing country of Mercuria. Mercuria's treatment options at that time fell well below global standards for treatment of greyscale.[6]
4. In **January 2004**, after an open bidding process, Mercuria announced a Long-Term Agreement (LTA) that the NHA signed with the Claimant to manufacture a greyscale treatment drug using Valtervite.[7] The NHA would purchase the drug at a 25% discounted rate and a clause in the agreement reads, *"This Agreement shall be valid for a period of 10 years effective from commencement date subject to the Supplier's satisfactory performance."*[8]

[1] PO2, ¶ 3.
[2] Facts, ¶¶ 1-2, 4.
[3] Facts, ¶ 1.
[4] Facts, ¶ 3.
[5] *Id.*
[6] Facts, ¶ 5.
[7] Facts, ¶ 8.
[8] Facts, ¶ 10.

5. Since the 2003 report on greyscale, Mercuria paired the launch of awareness campaigns and educational workshops with the patent agreement. In **2006,** the NHA estimated 50% of adults were getting tested as opposed to just 17% three years earlier in 2003.[9]
6. Despite these efforts, the estimated number of greyscale cases increased from 216,900 people in 2003 to 578,390 in 2006. Furthermore, the cost of a single pill for treatment was USD 27 with an annual cost per patient nearly USD 10,000 making it very difficult for a typical citizen of the developing country of Mercuria to treat the disease.[10]
7. The LTA price would cost Mercuria USD 1 billion and would be a third of their annual health budget for just 100,000 of the estimated 570,000 patients. This cost would be for the remainder of their lives since greyscale is incurable.[11]
8. The NHA called the prevalence of greyscale a public health crisis, because of the dramatic rise in the incidence of the disease and the difficulty for the public to adequately pay for treatment.[12]
9. In **early 2008**, the NHA engaged in renegotiation talks with the claimant for the greyscale treatment drug. In order to adequately address this health epidemic given Mercuria's financial constraints, Mercuria asked for a 40% discount on the greyscale treatment drug.[13] The Claimant refused and Mercuria was forced to terminate the agreement in **June 2008.**[14]
10. The Claimant invoked arbitration against the NHA under the LTA and in **January 2009,** a tribunal in Reef passed an award in favor of the Claimant.[15]
11. In **October 2009**, Mercuria passed legislation for its Intellectual Property Law, Law No.8458/07 which included a provision for allowing the use of patents without authorization of its owner in certain circumstances.[16] These circumstances include whether the patent is available to the public at a reasonable price and whether the patent has met the reasonable requirements of the public.[17]

[9] Facts, ¶¶ 12-13.
[10] PO1 Annex 3.
[11] *Id.*
[12] RRA, ¶ 6.
[13] Facts, ¶ 15.
[14] Facts, ¶ 17.
[15] *Id.*
[16] Facts, ¶ 20.
[17] PO1 Annex 4

12. In **November 2009,** HG-Pharma, a Mercurian pharmaceutical company, filed an application for a license to manufacture Valtervite. In **April 2010,** the license was awarded to HG-Pharma until greyscale no longer was a public threat. Pursuant to Law No. 8458/07, the High Court of Mercuria reviewed a petition to grant a license to HG-Pharma, deciding on a 1% royalty to be paid to the Claimant for use of the license. The royalty is in the generally accepted range for drug royalties to treat incurable, non-fatal diseases.[18]
13. In **February 2015**, Claimant announced it would no longer be dealing Sanior in Mercuria.[19]
14. In **March 2009,** Claimant filed arbitration enforcement proceedings in the Mecurian High Court. The next seven years involved tactical delays by the NHA and tactical blunders by Respondent resulting in Respondents frustration and eventual premature move to arbitration.[20]
15. In **November 2016**, Claimant invoked arbitration pursuant to the Bash-Merc BIT even though it was a purely commercial investment made with the NHA that already provided for a specific dispute resolution forum that conclusively decided the matter.[21]

[18] Facts, ¶ 21; PO3.
[19] Facts, ¶ 25
[20] NA Exhibit 1.
[21] RRA, ¶ 8; Facts, ¶ 17.

ARGUMENTS

I – THE TRIBUNAL LACKS JURISDICTION OVER THIS DISPUTE BECAUSE THE AWARD IS NOT AN INVESTMENT

16. Respondent urges this Tribunal to find that it lacks jurisdiction over Claimants allegation due to the award not being an investment as stated in Art. 1(1) of the BIT. (**A**) Using a plain reading of the BIT, the Tribunal should determine that the award is not an investment covered by Art. 1(1) the BIT. (**B**) The award fails to satisfy the definition of an 'investment' under Customary International Law and precedence with past arbitration awards. (**C**) The Claimant does not satisfy the definition of an investor in accordance with Art. 1(2) of the BIT.

A. Claimant Fails the BIT Definition of the Scope an Investment.

17. Claimant alleges that they have made an investment that falls under the BIT and that this affords them the right exercise Art. 8 of the BIT. Respondent submits that the arbitration award does not fall within the definition of an 'investment' under Art. 1 and thus this Tribunal does not have Ratione Materiae jurisdiction in this matter. Claimant does not specify how the award falls under the BIT's definition of an 'investment' only invokes the word investment without providing any evidence demonstrating this.
18. The Tribunal should first exam the Merc-Bash-BIT for guidance on defining an 'investment.' Art. 1(1) states:

> …**"***investment***"** means *any kind of asset* held or invested either directly… by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, *in particular***,** *though not exclusively***,** *includes*:
>
> (a) *movable and immovable property*…any *related property rights*, such as *mortgages***,** *liens* or *pledges*;
> (b) *shares***,** *stock***,** bonds and debentures or any other form of participation in a company, business enterprise or joint venture;
> (c) *claims to money, and claims to performance under contract having a financial value;*
> (d) *intellectual property rights*, including rights…copyrights, patents, trademarks…; or
> (e) *rights, conferred by law or under contract, to undertake any economic and commercial activity*….

19. In all the above wording, nowhere is a legal or arbitration award mentioned yet Claimant seeks to offhandedly claim it is. In doing so the Claimant likely relies on a broad definition laid out in the beginning of Art. 1 "any kind of asset," section (c) "claims to money," and section (e) "rights, conferred by law or under contract" to claim the award as being an 'investment'.
20. The VCLT is recognized as customary international for treaty interpretations, including for non-ratified nations.[22] Art. 31 of the VCLT states:

    > A treaty *shall be* interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.[23]

21. Using VCLT Art. 31 forms 'a unity, a single combined operation' that leaves no room for various means of interpretation.[24] This is seen in this 3-step analysis:
    a. Interpreted in good faith in accordance with the ordinary meaning of terms
    b. In the terms context
    c. In light of the treaty's object and purpose
22. Looking first at *good faith* the tribunal should examine the BIT itself to determine the legitimate expectations of the signing parties when they used their wording.[25] Then pair that with the *ordinary meaning*, that being the literal and linguistic meaning of the words to determine the proper interpretation of the terms.[26]
23. This method of good faith ordinary meaning is adopted in arbitration and demonstrated by *North Atlantic Fisheries* who stated that the treaty in question should be read to show that, "these words are such as would *naturally suggest themselves to the negotiators* of 1818".[27] They later went on to use the approach to define a 'bay' as meaning the plain geographical term instead of adding in additional meaning favoring one parties' interpretation. Additionally, the *Iron Rhine* tribunal stated that plain meaning was the

[22] *Pulau Ligitan*, ¶ 37.
[23] VCLT, Art. 31(1)
[24] *Yb*, 219–220.
[25] *India–Patent*, ¶ 33.
[26] *Polish Nationality*, PCIJ Series B, No7, 6 at 20.
[27] *Hague Court Reports* 163.

"*starting point for interpretation*" and the *Pope* NAFTA tribunal saw interpretation of the treaty as "initially *informed by the ordinary meaning of its terms*".[28]

24. Next the Tribunal should use the term *context* not in a broad sense, meaning the political or social climate, but in the context of the document as a whole.

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

    (*a*) any agreement relating to the treaty...*in connection with the conclusion of the treaty***;**

    (*b*) any instrument…*in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*[29]

25. Context through the lens of the VCLT means looking at the whole document and any documents in connection with the writing of the relevant treaty to ensure that the interpretation of one term is consistent throughout so that that no treaty provision is interpreted to contradict another.

26. This principle was laid out in the Permanent court of International Justice advisory opinion on *ILO Competence* when it stated that, 'the significance of context is that treaty phrases must be interpreted in the light of it, and should not be detached from it.'.[30] This limits context to be relevant up to the point that the word would have a different meaning if taken out of its context. An example of context usage in international law is when the *IMCO* issued an advisory opinion to resolve the meaning of the word 'elected' in the Maritime Safety Committee's founding agreement. It ruled that taken alone it would mean to say there is a choice as to who gets elected but in the context of the agreement the use of the term "shall be elected" made the election of the eight largest ship owning nations a requirement.[31]

27. Finally, the Tribunal should look at the BIT in light of the treaty's *object and purpose*. This acts to provide the reason for the adoption of the treaty and limits the scope and obligations of a treaty to the treaty's purpose.[32] The object and purpose can be garnered

[28] *Iron Rhine*, ¶ 45.; *Pope*, ¶ 69.
[29] VCLT, Art. 31(2)a-b.
[30] *Agricultural Labour*, *PCIJ Series* B, Nos 2 and 3, 23.
[31] *Maritime Safety*, 150 at 158.
[32] Orakhelashvili, 2008 p. 311.

from either a treaty's text, including the preamble, and the overall purpose of the treaty as generally understood on in comparison with other treaties.[33]

28. In international law object and purpose has been used time and again to add clarity to the scope of an interpretation. In *US Nationals in Morocco* the International Court rejected the U.S. claims under the 1880 Madrid Convention to capitulatory rights in Morocco since such a right did not flow from the text of the convention. To adopt such an interpretation would "by implication . . . would go beyond the scope of its declared *purposes and objects*'; this would involve 'radical changes and additions'".[34] Returning to the *ILO Competence* advisory opinion on the definition of 'election' the opinion stated to give that term a definition that was, "*out of harmony with the purposes of the Convention* and which would empower the Assembly to refuse Membership of the Maritime Safety Committee to a State, regardless of the fact that it ranks among the first eight in terms of registered tonnage".[35] This tied the use of plain meaning into the use of object and purpose to reach a more substantial interpretation of the contested term, thus demonstrating the efficacy of the VCLT method of interpretation.
29. Using the above analysis the Tribunal should exam the the statements in (i) Art. 1 "any kind of asset," (ii) section (c) "claims to money," (iii) and section (e) "rights, conferred by law or under contract" in the following manner.

i. Art. 1 "any kind of asset,[36]"

30. This term would on its face, would be any asset just as it says, and an arbitration award could be an asset on a balance sheet. But, taking that plain language and looking at the good faith intentions with it is clear the words are stated in relation to something held or invested not alone. This denotes action is required to obtain the asset or investment. The BIT goes on to define that action as being related to a "property [or] property right….[a] business venture…performance under contract for financial value…IP rights created…or rights…to undertake commercial activity.[37]" In all of the clarifying statements the BIT

[33] MK Yasseen, , 1, 57.
[34] *ICJ Reports*, 1952, 196.
[35] *ICJ Reports*, 1960, 171.
[36] Bash-Merc-BIT ¶ 995.
[37] *Id.*

frames an investment in economic terms, demonstrating that only an economic activity should be considered an investment under the BIT.

31. Then looking at the term in the context of the document as a whole, it only uses the word asset one time in talking about an investment, but it goes on to talk about investments at length. In Art. 6 it talks about investments being nationalized, expropriated, or requisitioned.[38] All of these things are in relation to a physical business being seized or physical 'assets' of that business, but nothing is alluded to about legal awards being taken or squashed. In Art. 4 and 3 it talks about a 'returns on investors'[39] a term meaning profits from an investment as is further illuminated in Art. 1(3) where 'returns' talks solely of economic gain from, "profits, interest, capital gains, dividends, royalties, fees, returns."[40] All of these point to business transactions and not an arbitration award, to construe it otherwise would expand the scope beyond its intended bounds thus contradicting its intended purpose of protecting economic activity.

25. Finally, turning to the object and purpose of the BIT, it clearly states in the preamble that the parties desire to 'promote greater *economic* cooperation…with respect to *investment* by nationals and *enterprises*.'[41] The preamble goes on to talk about how it wants an *investment* to 'stimulate the flow of private *capital* and *economic development*.'[42] Clearly indicating the purpose of an investment in the BIT is to foster commercial activity and to resolve disputes around those activities specifically. It does not seek to grant awards weight as an investment.

ii. Section (c) "claims to money,[43]"

32. On its face, this phrase points towards validity for Claimants position since an award is a claim to money. The Tribunal should read the entirety of section (c) to provide the proper good faith interpretation and context as well. The section continues "and claims to performance under contract having a financial value,"[44] which clearly shows that a claim

[38] Bash-Merc-BIT ¶ 1100.
[39] *Id.* ¶ 1045 and 1060.
[40] *Id.* ¶ 1015.
[41] *Id.* ¶ 975.
[42] *Id.* ¶ 980.
[43] *Id.* ¶ 1000.
[44] Bash-Merc-BIT, ¶ 1000.

to money is said in light of a contractual relationship or business transaction. This is not a blanket statement for every possible claim to money.

26. As stated above the object and purpose of this treaty deals with economic or commercial activity, a laim to money must be related or arise directly out of such an activity to be considered an investment. In our case the Tribunal should see this as a claim arising out of a legal dispute and not similar to claim for payment on a PO or failure to pay out a contract obligation in a business relationship.

iii. Section (e) "rights, conferred by law or under contract[45]"

33. Similar to the claim to money statement above, the BIT's wording must be read in its entirety. The statement goes on to frame a right conferred by law to a specific circumstance "to undertake any *economic and commercial* activity, including any rights to search for, cultivate, extract or *exploit natural resources*."[46] This clause, when read in good faith and for its plain meaning points to rights in law only in relation to perusing economic and commercial activity. This points directly to protection for a legal right such as mineral rights or logging rights, both involving physical investment. Demonstrating the BIT's intended purpose to protect actual economic investment.
34. The object and purpose of this treaty as stated above is for economic and commercial activity and section (e) matches the preamble and other sections in denoting that economic activity is the chief objective of the BIT. Making the claim that an award is a right conferred by a contract to undertake economic and commercial activity is a gross overreach of the actual purpose to foster economic activity and would be an abuse of the term 'investment'.
35. The Contracting Parties to the BIT, concerned with writing a document to further economic investment in each other, ensured this by adopting Art. 1 of the BIT to define the boundaries of the agreement regarding investment. By seeking to exceed the scope of that intent the Claimant incorrectly postulates that a commercial arbitration award as a valid investment. To do so would exceed the scope of the consent of the treaty parties to afford treaty protections not intended at the time of creation of the BIT.

[45] *Id*. ¶ 1005.
[46] *Id.*

B. Failure Under Customer International Law to Qualify as an Investment

36. Claimant may claim under Art. 9[47] of the BIT that customary international law defines and an arbitration award as an investment, citing awards such as *White* or *Saipem.* Respondent urges a rejection of this by the Tribunal for a number of reasons. (I) Even using such cases definition of an investment, it is still not satisfied because the award is distinct from the original investment. (II) The Claimant is not an investor in accordance with the BIT.

i. Not an Investment under customary international law

37. If the Tribunal chooses to see the larger body of awards in customary international law as applicable the Tribunal should then adopt the understanding of an investment from *GEA* as the proper definition of an investment.
38. *GEA* involved a settlement about a supply disruption that had been arbitrated in favor of GEA and then later was ruled unenforceable after several rounds of appeals in the Ukrainian courts.[48] Seeking to use a BIT GEA sought enforcement of the award but was denied by the Tribunal. The reason was that the award did not satisfy the BIT's definition because it was materially distinct from the company's original investment.[49] While the investment in facilities and production was an investment, the right and obligations to the award arose out of a contract dispute settlement not the protection of the facilities and production.[50] This made the award separate from the investment. Additionally, the fact the award added nothing to Ukraine economically indicated it did not represent an investment under the BIT.[51]
39. Similarly, Claimant arbitrated under a commercial contract for the breach of a contract related to the ending of a production and supplier agreement. That related to a business transaction and the production of said supplies. This award itself is not an investment, it does not provide any economic benefit to Mecuria, nor does it pertain to the production

[47] *Id.* ¶ 1165-1195.
[48] *GEA*, ¶ 32 – 85.
[49] *Id.* 157 and 161.
[50] *Id.* 206.
[51] *Id.*

and supply of a product. It deals with an arbitration decision and thus should be resolved via the legal system. Claimant does have the right to enforce that award but not under this BIT. The BIT was conceived as a treaty to encourage economic activity and resolves disputes around economic investment disputes, not legal disputes that can be resolved in local courts. This makes the award materially different from the investment parameters written in the treaty. The Tribunal should adopt this understanding of the award and decide that it is not an investment and thus not enforceable under the BIT.

40. The Tribunal should note the difference between Claimants cases and *White*[52] and *Saipem*[53]. In both of those cases there was widespread government negligence but also a considerable amount of inducement by the local governments to deny the awards in local courts. In both cases the original investment was made and then either only partially paid for or expropriated. In this case there was no taking of facilities by the government nor prohibition against Claimant selling their wares in the country. In those cases a strong message about enforcement of award to prevent expropriation was a motivating factor in allowing an award to be an investment. Contrary to our case where the courts are working to provide justice and the Claimant continues to have a profitable business in Mecuria. The arbitration award is for breach of a contract and the end of a business relationship in regard to only one aspect of Claimants business not the whole. They still have facilities and products being made, used, and protected under the Respondent's laws. This award is a noneconomic award that differs from its original physical investment in Mecuria and does not impact the overall ability of Claimant to operate. The situation differs from *White* or *Saipem* and requires a different approach more alike to the approach the *GEA* tribunal used.
41. The Claimant may seek to use the Salini[54] test to demonstrate they satisfy the requirements needed to be an investor. While frequently used the Salini test's application is erratic to the point of almost being counterproductive in the jurisprudence of Arbitration. Panels on various occasions have used all or only a select few of the factors without giving a reason why. The *Salini* test came out of ICSID arbitration and was

[52] *White*, ¶ 7.6.8.
[53] *Saipem*, ¶ 61.
[54] *Salini*, ¶ 110.

developed due to the need to only apply to what the parties consented to and limit ICSID arbitrations to certain protected investment types. Contrary to that circumstance we have a clear BIT art. that both parties consented to and that limits the BIT's protections. Due to this lack of clarity of the test and the lack of a need for it in this circumstance the Tribunal should rely on a pure reading of the BIT and the economic approach of the BIT.

42. Following customary international law, the Tribunal should determine that this arbitration award is materially different from Claimant's original investment and not an investment in accordance with the BIT. The Tribunal should find that this award not being an investment it does not have jurisdiction and should dismiss this complaint.

C. Investor is not an Investor under Art. 1(2) and International law

43. The Claimant is merely an investment vehicle used to gain an unfair advantage in doing business in Mercuria and thus is not a company incorporated in accordance with the local laws of a contracting company. This will be discussed at length in Section II below.

II. THE TRIBUNAL LACKS JURISDICTION AS CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE BIT THROUGH MERCURIA'S INVOCATION OF ARTICLE 2(1).

44. Mercuria submits that the Tribunal lacks jurisdiction over the dispute as Mercuria has effectively invoked its rights to deny the benefits of the Bash-Merc-BIT to Claimant pursuant to Art. 2(1). Claimant is denied the benefits of the BIT because (1) Claimant is owned and controlled by Atton Boro Company, a legal entity of Reef and (2) Claimant lacks substantial business activities in Basheera.

A. Respondent Has Effectively Invoked Its Rights to Deny Claimant the Benefits of the BIT Under Art. 2(1) of the BIT Through its Response to the Notice of Arbitration.

45. Mercuria has effectively invoked its rights under Art. 2 by submitting notice of denial-of-benefits in the Response to the Notice of Arbitration in compliance with PCA Arbitration Rules. The Response to Notice of Arbitration indicated that Mercuria was exercising its right to deny the benefits of the BIT to Claimant based on the principles set out in Art. 2, thus retroactively invoking Respondent's right.[55]

[55] RRA, ¶5.

46. It is well established by international arbitral tribunals that a State must affirmatively exercise its right to deny benefits under a denial-of-benefits clause.[56] Furthermore, tribunals have recognized that a contracting party's right to deny benefits may be invoked retroactively when the benefits of the BIT are being claimed by an investor.[57]
47. In defining the procedural requirements applicable to a State's exercise of the denial-of-benefits clause, the *Ulysseas,* tribunal indicated that the proper stage in proceedings to announce a denial-of-benefits would be upon raising objections to jurisdiction.[58] Six months after receiving Notice of Arbitration, Ecuador invoked denial-of-benefits under Art. I(2) of the USA-Ecuador BIT, stating that Ulysseas was Brazilian owned company and had no substantial business activities in the United States.[59] The tribunal reasoned that nothing in the in the denial-of-benefits clause prevented the State from exercising its right after Ulysseas sought the benefits of the treaty through arbitration.[60] As no time limit was indicated in the BIT, the tribunal applied Art. 21 of the UNCITRAL Arbitral Rules, and determined that jurisdictional issues should be raised no later than in the Statement of Defense.[61]
48. A similar approach was taken in *GAI,* where the tribunal held that a denial of benefits was sufficiently made when Bolivia indicated in its Statement of Defense that the tribunal lacked jurisdiction over the claim under the denial-of-benefits clause in the U.S. - Bolivia BIT.[62] The tribunal established that it is acceptable that the denial of benefits is "activated" when the benefits of the BIT are being claimed reasoning that the consent by the host state to arbitration is conditional, and may be denied if some objective requirements regarding the investor are fulfilled.[63]
49. Art. 2(1) of the Bash-Merc-BIT allows each contracting party to reserve the "right to deny advantages of this agreement" to investors of third states under specified

[56] Gastrell, p. 82.
[57] *GAI*, ¶371.
[58] *Ulysseas*, ¶172.
[59] *Ulysseas*, ¶172.
[60] *Ulysseas*, ¶174.
[61] *Ulysseas*, ¶174.
[62] GAI, ¶384.
[63] GAI, ¶382.

conditions.[64] However, the denial-of-benefits clause is silent on a time limit for invoking this right.[65]

50. Under Art. 4 of the PCA Arbitration Rules, The Response to the Notice of Arbitration may include any plea that an arbitral tribunal lacks jurisdiction and must be submitted within 30 days of the receipt of the notice of arbitration.[66]

51. In the present case, Claimant submitted Notice of Arbitration to the Respondent on November 7, 2016, indicating that Claimant was filing arbitration under the Mercuria-Basheera BIT.[67] In its Response to the Notice of Arbitration, submitted on November 26, 2016, Mercuria indicated that it was exercising its right to deny benefits of the BIT to the Claimant based on the principles set out in Art. 2.[68]

52. Therefore, Mercuria has effectively invoked its right to deny benefits of the BIT to Claimant because Respondent raised right within timeframe to raise jurisdictional pleas under PCA Arbitration Rules.[69] Furthermore, Mercuria submits that the right to invoke should be applied retroactively as tribunals have correctly indicated that the purpose of the denial-of-benefits clause is to give States the opportunity to withdraw benefits under the BIT once investors improperly invoke those benefits through arbitration.[70]

B. Claimant is Denied the Benefits of the Treaty under Art. 2(1) of the BIT, as it is Merely an Investment Vehicle of Atton Boro Group.

53. Mercuria submits that Claimant's claims are inadmissible because it is owned and controlled by nationals of Reef, namely Atton Boro Group, and ultimately Atton Boro Company, and lacks substantial business activities in Basheera. Art. 2 of the Mercuria-Basheera BIT allows contracting parties to deny advantages to legal entities if (1) "citizens or nationals of a third state own or control such entity" and (2) "that entity has no substantial activities in the territory of the contracting party in which it is

[64] Bash-Merc-BIT, Art. 2(1).
[65] Bash-Merc-BIT, Art. 2(1).
[66] PCA Rules 2012, Art. 4.
[67] NA.
[68] RRA, ¶5.
[69] PCA Rules 2012, Art. 4.
[70] *GAI*, ¶372.

organized,".[71] The inclusion of a denial-of-benefits clause in the Bash-Merc-BIT indicates a deliberate choice of the contracting parties to exclude investors that the parties did not wish to extend the protections to, such as investment vehicles.[72]

i. Claimant is Owned and Controlled by Atton Boro Company, a Legal Entity of Reef.

54. Mercuria submits that Claimant is not a genuine entity of Basheera because it is owned and controlled by Atton Boro Group and ultimately Atton Boro Company, a national of Reef.

55. Tribunals have recognized that ownership and control may be determined by a showing of legal control or effective control.[73] Mercuria submits that Atton Boro Group, and ultimately Atton Boro Company have legal control and effective control over Claimant.

56. First, legal control is established through a majority share of ownership and voting power held by a single investor or by a group of investors acting in concert.[74] Claimant, Atton Boro Ltd., was incorporated in Basheera in 1998 as a wholly-owned subsidiary of Atton Boro Group.[75] Accordingly Atton Boro Group maintains legal control over Claimant, as its majority owner. Furthermore, Atton Boro Company, a corporation organized under the Laws of the People's Republic of Reef, is the primary holding company for Atton Boro Group.[76] Therefore, Claimant's incorporation in Basheera is irrelevant, as Claimant is under the ownership and control of an entity of Reef.

57. Secondly, effective control is the ability exercise substantial influence over the key business decisions of an entity.[77] Furthermore, effective control assures that the owner has the right to make significant decisions with the expectation of an economic return.[78]

58. In *Thunderbird*, the tribunal considered whether Thunderbird, a parent company, owned and controlled EDM entities, which were acquired by two of Thunderbird's subsidiary companies.[79] The Tribunal indicated that control is not just determined by majority

[71] Bash-Merc-BIT, Art. 2(1).
[72] Yannaca-Small, p. 28.
[73] Yannaca-Small, p. 24.
[74] OCECD, Definition.
[75] Facts, ¶4.
[76] Facts, ¶2.
[77] *Thunderbird*, ¶107.
[78] *Id.*
[79] *Id.*, ¶101-10.

shareholder voting rights, but by the ability to effectuate decisions that influences the activity of the corporation.[80] The Tribunal addressed the qualifying factors of "control" stating:

> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know- how and authoritative reputation.[81]

59. The Tribunal ultimately decided that Thunderbird owned and controlled the EDM entities because of several areas of influence in EDM's decision-making, such as EDM's initial capital provided by Thunderbird and Thunderbird's executive officers involvement in key decision making.[82] Accordingly, the tribunal determined that Thunderbird demonstrated effective ownership and control over the EDM entities.[83]
60. Under this decision-maker analysis, Claimant does not exhibit control over its organization, separate from Atton Boro Group and Atton Boro Company. Claimant was incorporated in Basheera as a vehicle for Atton Boro Group, to support its businesses in South America and Africa.[84] Claimant. Furthermore, Claimant was funded by Atton Boro Company to set up its manufacturing unit in Mercuria and to perform the agreement entered into with the NHA.[85] Moreover, Claimant only employed two to six employees in Basheera, including a manager, accountants and lawyers, specifically to manage a patent portfolio and provided support services to Atton Boro Group and its affiliates.[86] As Claimant's employees lack the ability to make substantial decisions on behalf of the business, it is evident that the control and direction of Claimant stemmed from its parent companies.
61. Mercuria submits that Atton Boro Company has direct influence over Claimant as it provided Claimant with funding to perform its obligations to the NHA and set up

[80] *Id.* ¶108.
[81] *Id*.
[82] *Id*. ¶107.
[83] *Id.*
[84] Facts, ¶4.
[85] PO3.
[86] PO2.

manufacturing in Mercuria.[87] The contribution of capital is indicative of an expectation of involvement in decision making and expectation of economic benefit from Claimant. Thus Atton Boro Company maintains effective control over Claimant.

ii. Claimant Lacks Substantial Business Activities in Basheera, Where Claimant is Incorporated.

62. Mercuria has invoked Art. 2(1) of the Merc-Bash BIT to deny benefits of the BIT to Claimant, because it is owned by a Reef corporation and lacks substantial business activities in Basheera. Mercuria recalls that the drafters of the BIT left the term "substantial business activities" undefined, allowing tribunals to make a fact-specific determination as to what constitutes "substantial business activities".[88] Mercuria submits that although Claimant was engaged in certain business activities in Basheera, these minor activities merely provided support to Claimant's parent company, Atton Boro Group and would not be deemed substantial to a leading pharmaceutical enterprise.[89]
63. Claimant's activities cannot be construed as substantial business activities within the territory of Basheera, as these activities primarily consist of support services provided to Atton Boro Group and its affiliates in South America and Africa.[90] Claimant's employees in Basheera supervise its patent portfolio and provide services to its parent company and affiliates in other States.[91] Claimant's status as an investment vehicle is further evidenced by the fact that Claimant only maintained two to six employees working in Basheera during its nineteen years of incorporation in the State.[92]
64. Furthermore, Claimant does not maintain its permanent headquarters or *siege social* in Basheera. Claimant's effective management is not situated in Basheera, as it merely employs lawyers, an accountant and manager.[93] As previously stated, there is no indication of any directors, officers or high-ranking key decision-makers within

[87] PO3.
[88] Bash-Merc-BIT, Art. 2(1).
[89] PO3. *See also*, PO2.
[90] PO2.
[91] *Id.*
[92] *Id.*
[93] *Id.*

Claimant's Basheera operations.[94] Thus, Claimant's substantial business decisions are made in another State.

65. Furthermore, the timing of Claimant's incorporation in Basheera shows that Claimant's adoption of Basheera nationality was for the convenience of accessing the Mercuria Basheera BIT. Claimant, Atton Boro Ltd. was incorporated in Basheera as wholly owned subsidiary of Atton Boro Group in April of 1998, four months after the conclusion of the Merc-Bash BIT.[95] Once Claimant was incorporated in Basheera, the Mercuria Patent for Valtervite was assigned from Atton Boro Group to Claimant, in exchange for shares. Claimant's subsequent uses of the Mercurian Valtervite Patent, such as the execution of the LTA, were directly funded by Atton Boro Company.[96] Accordingly the incorporation of a subsidiary in Basheera and the assignment of the Valtervite Patent, along with the lack of substantial business activities in Basheera, indicate that Claimant was organized as an investment vehicle to obtain the protection of the Merc-Bash BIT.

66. As Claimant is owned and controlled by nationals of Reef, and also lacks substantial business activity in Basheera, the Tribunal should find that Claimant is denied the benefits of the BIT and therefore, hold that this Tribunal lacks jurisdiction over this dispute.

III. MERCURIA'S MEASURES TAKEN TO ADDRESS URGENT PUBLIC HEALTH CRISIS FALLS WITHIN THEIR SOVEREIGN POLICE POWERS AND THUS DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD OF THE BIT.

A. An Appropriate FET Standard must take into account the legitimate interests of the public at large and government in mind.

67. The FET standard as contained in Art. 3(2) of the BIT between the governments of Basheera and Mercuria are as follows:

> Investments and return of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management,

[94] Facts.
[95] Facts, ¶4.
[96] *Id.*

> maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.[97]

68. Examining FET standards according to *Duke Energy*, "requires an attitude towards governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State's decision in question, *including the host State's population at large*."[98]
69. In addition, legitimate expectations must take into account, "the political, socioeconomic, cultural and historical conditions prevailing in the host state."[99]
70. With this in mind, the threshold for the claimant to show a violation of an FET claim is high and requires a finding that is a "gross denial of justice" that falls below customary international standards as seen in *Thunderbird*.[100]
71. Building upon this, an appropriate FET standards must *take into account the legitimate expectations of both parties* at the time at the time of the investment was made. This includes international law that both countries are parties to, customary international law, and other aspects of the BIT, including the preamble.[101]
72. With this all this in mind, the preamble of the BIT is as follows

> "*Building* on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization and other multilateral regional, and bilateral agreements to which they are both parties.
>
> *Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights…"[102]

73. The BIT was made with the intention of *building upon* customary international law and international law in which both states are parties too. The preamble also addresses the importance of the protection of health and safety of the public.

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[97] Bash-Merc-BIT, *Art.* 3(2).
[98] UNCTAD FET, p. 7.
[99] *Duke Energy*, ¶ 340.
[100] *Thunderbird*, ¶ 52.
[101] VCLT, art. 31.
[102] Bash-Merc-BIT, *preamble.*

74. Often the legitimate expectations of the investor does not take into account the legitimate expectations of the state. There must be a balance between the legitimate expectations of both the investor as interpreted by *El Paso,*

> "Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social, or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances…"[103]

75. Under Art. 12.2(c) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), of which both Mercuria and Basheera are parties, states have the right to work towards the "highest attainable standard of physical and mental health" and to "achieve the full realization of this right shall include those necessary for: the prevention, treatment, and control of epidemic, endemic, occupational and other diseases..."[104]
76. In applying the FET standard we recommend this tribunal strongly take into account the following factors:
    a. Weigh the legitimate interests of the public at large in regards to the protection and promotion of health and safety as set out by international standards;
    b. Apply a gross denial of justice standard in analyzing the relationship between property rights of pharmaceutical companies and Mercuria's effort to promote and protect the health and safety of its citizens; and
    c. Consider the legitimate expectations of all parties, investor, state, and public at the time the investment was made including customary international law and other relevant international treaties.

i. TRIPS does not apply to this situation, nonetheless TRIPS Art. 31 allows for the use of patents in matters of public health emergencies.

77. The Claimant has no standing to assert a claim on the basis of commitments in the TRIPS agreement in an investment tribunal. The commitments contained in the TRIPS and the WTO proper exist only between member-states and any disputes are decided solely by the WTO's Dispute Settlement Understanding.[105]

[103] *El Paso*, ¶ 372.
[104] ICESCR, *Art.* 12.2; PO3.
[105] RRA, ¶7; WTO annex 2, DSU *art.* 1; *Itagaki*, pp. 1267-68.

78. Even so, Mercuria recognizes the Preamble of the Bash-Mer-BIT in which we aim to build upon international agreements like the WTO.[106] The TRIPS agreement provides *minimum standards* for intellectual property rights for WTO member-states.

79. We recommend that this tribunal use the TRIPS agreement as persuasive, but not binding, authority for weighing the legitimate public health interests of Mercuria against the property interests of the Claimant.

80. The TRIPS agreement must be read with the principles of the agreement laid out in Art. 8 in mind:

> "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health… and to promote public interest sectors of vital importance to their socio-economic… development, provided that such measures are consistent with provisions of this Agreement."[107]

81. Following the principle of the TRIPS laid out in Art. 8, Mercuria remains in compliance with the TRIPS agreement, namely Art. 31,"Other Use Without Authorization of the Right Holder."[108]

82. Art. 31(a)-(b) of the TRIPS agreement provide in part,

"Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

> (a) "Authorization of such use shall be considered on its individual merits;
> (b) Such use may only be permitted if, prior to such use, *the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions that require such efforts have not been successful within a reasonable period of time*. This requirement *may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency…*. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonable practicable…"[109]

[106] Bash-Merc-Bit, *preamble*.
[107] TRIPS, *art.* 8.
[108] *Id.* at *art.* 31.
[109] *Id.*

83. The intent of the TRIPS agreement clearly allow for the use of compulsory licenses for the promotion and protection of public health, including matters of a public health crisis. It is integral that the health interests of the public at large are considered by this tribunal when examining TRIPS obligations.

ii. Sovereign Police Powers of the State Override Expectations of Investors in the Event of a Public Health Crises

84. It is within customary international law that "where economic injury results from a bona fide regulation within the police power of a state, compensation is not required."[110]

85. Sovereign police powers are described by UNCTAD as:

> "Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as… (c) legislation restricting the use of property, including planning, environments, safety, health, and the concomitant restrictions to property rights…
>
> …police powers must be understood as encompassing a State's full regulatory dimension. Modern States go well beyond the fundamental functions of custody, security and protection…."[111]

86. Furthermore, following the dissent of *Phillip Morris, "*every State has 'the sovereign right to exercise its police powers in a non-arbitrary and non-discriminatory manner to protect public health.'"[112]

87. In *Parkerings*, a state's power to regulate is a greater power than violation claims of FET standards.[113]

88. BITs, like the Bash-Merc BIT, do not infringe on the sovereignty of countries in regulating their economies.[114]

89. In the cases of both *Methanex* and *Saluka,* the tribunal found that States are allowed to, in their exercise of regulatory powers, adopt regulations that affect a foreign investor without compensation to the investor.[115]

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[110] *Sedco*, p. 275.
[111] UNCTAD Expropriation, p. 79.
[112] Phillip Morris, ¶ 382.
[113] Parkerings, ¶ 344.
[114] UNCTAD Expropriation, p. 80. quoting Lowe, p.4.
[115] Methanex, Pt. IV, Ch. D, ¶ 7; Saluka, ¶255.

90. We strongly urge this Tribunal to respect customary international law regarding the sovereign police powers of Mercuria and their right enact regulations for the protection and promotion of the health of its' public.

B. The Enactment of Law No. 8458 and Subsequent Granting of the Compulsory License was a legitimate expectation of all parties falling well below the FET standard claimant relies upon.

91. Claimant's assertion that the law violates the FET standard fails because the passing of the law and granting of the license was a legitimate public interested protected under customary international law and other international obligations including the TRIPS agreements and sovereign police powers. This law and subsequent granting of the compulsory license was a proper given the public health crisis and the urgent need to take concrete action.
92. In this case, it is clearly established that Greyscale is a serious health epidemic for Mercuria and the surrounding region and the passing of this law was done so for the national interests of ensuring the public health. Over 600,000 citizens were estimated to be infected with greyscale.[116]
93. The costs were also a concern for this incurable disease and there was a fundamental need to keep costs down as it neared *USD 10,000 per person per year*. Treating greyscale is incredibly expensive treatment for a disease in which there is no cure and thus must be treated for the duration of an infected individual's life.[117] This especially pertinent given the developing status of Mercuria.[118]
94. Given all of this, Mercuria still made reasonable attempts to negotiate a reasonable commercial terms given the time constraints and urgency of the public health crisis. Even so, in matters of public emergency, Mercuria is entitled to pass a law allowing the granting of compulsory licenses.
95. The language of Law No. 8458/09 establishes a non-arbitrary and reasonable criteria for the granting of compulsory licenses. This is especially true given the fact one of the

[116] PO1 Annex 3.
[117] *Id*.
[118] RRA, ¶ 9.

requirements of granting a non-voluntary compulsory license set out in Law. No. 8458/09 Section 23C as follows:

> "(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied: or
>
> (b)That the patented invention is not available to the public at a reasonable affordable price…"[119]

96. Under the same section, the Law No. 8458/09 provides that 23C will not apply in the case of "circumstances of extreme urgency."[120]
97. The requirements of Law No. 8458/09 Section 23C and the subsequent granting of the compulsory license was granted after a six month process by the High Court[121] in which they found that the reasonable requirements of the public for this patent were not being met because Sanior was far too expensive to realistically or reasonably treat the population affected by Greyscale at a sustainable and affordable rate.
98. Furthermore, the grant of the license was done for a reasonable amount of time, namely for the duration of the greyscale public health crisis and was granted against immediate full and effective compensation with an industry standard 1% royalty rate.[122]
99. For these reasons, we strongly urge this Tribunal to find that the FET standard had not been met because:

    (1) the legitimate expectations of the Claimant that a possible health crisis would occur and Mercuria's right to take regulatory action in responding to a health crisis;
    (2) Rights enumerated international agreements that were known at the time the agreement between Mercuria and the Claimant was made that allow for the protection and promotion of public health including:
    a. Bash-Merc-BIT,

    b. The TRIPS agreement, and

    c. The ICESCR;

    (3) The Sovereign Police Powers of Mercuria which grant the right to enact legislation for the protection and promotion of its citizen's health in the face of a Greyscale threat.

[119] PO1 Annex 4.
[120] *Id.*
[121] Facts, ¶ 21.
[122] Facts, ¶ 21; PO3.

IV. Failure to provide an Effective Means to Exercise a Right

100. Respondent raises the below objections to Claimant's allegation of Judicial misconduct that violated Art. 3[123] during the enforcement proceedings. The conduct of Mecuria's Judiciary did not violate Art. 3 of the BIT because (**I**) its actions do not rise to the level of clear and convincing proof of denial of justice, (**II**) its conduct complies with the *fair and equitable treatment* ("**FET**") standard stated in Art. 3 and the proper venue for this dispute is the Mecurian courts.

A. Respondent argues that the alleged action of the Judiciary did not rise to the appropriate clear and convincing standard necessary to review state action.

101. To examine the Mecurian courts actions the Tribunal should consider that the burden for proving unreasonable conduct by the state rests on Claimant to prove with *clear and convincing evidence*. The Claimant failed to provide evidence that meets this standard but instead mischaracterizes events in order to displace blame onto the judiciary for Claimants tactical legal choices and unjustified expectations of proceedings.

102. Examining the actions of the conduct of state is a serious matter since the authority of state to police its own conduct is a fundamental tenant of international law.[124] This Tribunal should adopt the understanding that it is not an appeals court[125] to Claimant and is not to determine if international law[126] was broken, but if the courts conduct violated the BIT. This means looking at state action "in light of the high measure of deference that international [law] generally extends to domestic authorities to regulate matters within their own borders."[127] As well as "not examining the action of the host state for errors of policy or judgment, but looking for acts that are irrational or arbitrary."[128]

103. To accord itself by this standard the Tribunal should examine the evidence put forth by Claimant to see if it is clear and convincing evidence.[129] To meet this standard the

[123] Besh-Merc-BIT, ¶ 1045.
[124] Responsibility of States art. 4(1).
[125] *Mondev* ¶ 127.
[126] *Loewen* ¶ 132.
[127] *S.D. Myers* ¶ 1408.
[128] *Waste Mgmt.* ¶ 967.
[129] *EDF*, ¶ 221

Tribunal would view that the evidence must be highly and substantially more probable to be true than not and the Tribunal must have a firm belief or conviction in its factuality.

104. This standard should be used as opposed to the typical preponderance of the evidence standard because that standard would weigh items in a 50/50 manner that would not apply the extra weight required in providing deference to the government.

105. This standard provides the necessary deference afforded in international law to Mecuria while still balancing the interest of the Tribunal to ensure that Claimant received the proper protections under the BIT.

B. Respondent argues that the alleged actions by the Judiciary do not rise to the level of an egregious denial of due process and manifest arbitrariness.

106. Claimant urges the Tribunal to examine the courts actions as a failure to provide "effective means to…assert its rights" which is lower standard than the internationally accepted claim of Denial of Justice ("DoJ") that Claimant should use. To not follow the DoJ standard would allow them to fail to exhaust local remedies as well as advocate for a loose standard of review that does not afford the Mecurian government the deference it is owed.

107. This position fails to accord with international law and is violation of the terms of Art. 3[130] which lays out the specific standard for protection of investments, that being FET. The FET standard is synonymous with DoJ, "fair treatment implies there is not denial of justice"[131]and thus the Tribunal should examine the courts conduct under DoJ.

i. Denial of Justice

108. The term denial of justice is a broad statement but with specific criteria, it does not deal with errors in policy or judgment but for court actions that are "irrational or arbitrary,"[132] "willful neglect of duty…insufficiency of action,"[133] "violation of the due process,"[134] "idiosyncratic or aberrant… grossly unfair or unreasonable."[135] and retaliation for political

[130] Besh-Merc-BIT, ¶ 1045
[131] *Liman*, ¶ 268; *Jan de Nul*, ¶ 188 ("the fair and equitable treatment standard encompasses the notion of denial of justice").
[132] *Waste Mgmt.* ¶ 967.
[133] *Genin.*, ¶ 395.
[134] *Parkerings* ¶ 313
[135] *ADF* ¶ 470.

reasons.[136] These terms indicate a high standard where evidence must go far beyond merely the misapplication of domestic law. [137]

109. Examples of this kind of conduct are courts denying access to a Claimant or not taking any action to progress a case for many years. This was case in *White* where a local court did not make any moves to resolve issues around the enforcement of an award for years, contrary to Claimants case that has continued to progress despite issues of law and Claimants procedural position. Another example that clarifies this standard is in *Genin,* where the removing of a charter for a bank appeared arbitrary, due the regulations narrow scope, the country had legitimate regulatory concerns about the solvency of the bank and its impacts on stability of the national banking system.[138]

110. DoJ is a high standard that requires Claimant to prove the actions were more than just unreasonable or inconvenient to them but denied them for arbitrary reasons the benefits of the Mecurian justice system. Respondent argues that Claimant has never been denied the benefits of the Mecurian justice system, it has been allowed access to the court without interference, it has had its complaints heard, it has been allowed to use the systems procedures to transfer its case, as well as had rulings on law clarified by the system. While the proceedings have taken time the complexities of the matter and the conduct of both the Respondent and the defendant in the case lead to delays, not a continued stream of irrational or arbitrary acts that could be defined as grossly unfair.

111. The continued efforts of the court to move proceedings along despite both parties tactical delays and in the face of a recent reshuffling of the courts docket due to a sudden increase in cases demonstrate the court is providing Claimant due process. Despite this Claimant has voluntarily withdrawn from the proceedings without even seeking to attain an initial verdict. This is in clear violation of international law that requires Claimant to first exhaust the local remedies available before considering arbitration.[139]

112. This rule exists because arbitration should not be considered if an effective means of remedy already exists. The judicial system of a country provides this remedy, even in the face of a decision that a claimant might find incorrect they can appeal with in the system.

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[136] *Tokios* ¶ 123
[137] *Liman,* supra note 14, ¶ 274.
[138] *Genin,* ¶ 367
[139] *Loewen,* ¶ 132.

That is because a judiciary is a self-correcting system that should be used and respected. If that systems fails then Claimant is entitled to arbitration.

113. As demonstrated above Claimant is receiving due process and should allow for that process to complete before moving to arbitration, exhaustion is required by a DoJ claim and the Tribunal should find it is required here.

ii. FET

114. Claimant cites "unreasonable delay" due to the Mecurian courts granting of adjournments and entertaining applications by the NHA that clearly had no merits for the reason of this delay. Respondent urges the Tribunal to examine these allegations in accordance with the FET standard. By doing this the Tribunal will find that the Claimants own actions, an overburdened court system, and the complexities involved in properly adjudicating the matter lead to the seven-year delay.

115. To violate this standard Claimant has the burden to demonstrate that the Mecurian courts acted Unreasonably, Discriminatorily, Inconsistently, without Transparency, and in violation of the Due Process expected when Claimant made its investment in Mecuria.

iii. Reasonableness

116. With that limiting factor guiding the Tribunal's analysis it should turn to what is an unreasonable action under an FET claim. The *Genin* tribunal, when looking at Estonia's actions in removing the charter for a bank, used the standard of "a *willful neglect* of duty, an *insufficiency of action* falling *far below international standards*, or even subjective *bad faith*."[140] That tribunal determined that Estonia had a legitimate regulatory need to take the charter from the bank, making the action not unreasonable. Other tribunals have called "arbitrary"[141] or "idiosyncratic"[142] action as unreasonable as well as retaliation for political reasons.[143]

117. But to meet the standard of unreasonableness takes more than a seemingly arbitrary regulatory change or an inference of political motivations. There must be hard evidence of the action occurring. The tribunal in *ADF* for instance found no unreasonableness in

[140] *Genin.*, ¶ 395.
[141] *Noble*, ¶ 182
[142] *ADF* ¶ 470.
[143] *Tokios*, ¶ 123

government action even though a program did counter a court order that applied an older version of a statute. The tribunal acknowledged that the government had a legitimate right to change the regulation and to rely on the old one would have been unreasonable.[144]

27. But examples like *White*[145] stand out as examples of unreasonableness. The tribunal in found that 10 years of no hearings to resolve an issue of law was unreasonable behavior by a judiciary. Other noted examples are *Saipem* and *Chevron* where collusion between a government and its court system to either rule a tribunal as not valid during its proceeding, as in *Saipem*[146], or in *Chevron*[147] where a tribunal forced a judicial system to recognize trials awards it refused to acknowledge. In both cases the judicial systems extreme actions to deny a plaintiff of a typical legal right in its courts was unreasonable.

iv. Discrimination

118. When looking at Discriminatory behavior the Tribunal should view behavior that lacks reasonable justification and is motivated by racism, corruption, or nationalistic reasons as discriminatory. The tribunal in *Eureko* for example found the failure to stick with commitments to privatize a business for "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character"[148] as discrimination on the part of a government. While in *Methanex* the tribunal in contrast found that discrimination based on sectional or racial prejudice might constitute a violation but, California's ban on a chemical applied equally to all investments, thus no discrimination had occurred.[149] An important distinction for examining discriminatory behavior is that the Tribunal must have something to compare it to find discrimination. In *Parkerings* the lack of a comparator in like circumstances to compare Claimant to meant that no comparison could be done and thus there was no way to find discrimination.[150]

v. Inconsistency

[144] *ADF,* ¶ 188
[145] *White,* ¶ *7,6,8.*
[146] *Saipem,* ¶ *61.*
[147] *Chevron,* ¶ 65.
[148] *Eureko,* ¶ 233.
[149] *Methanex,* ¶ 1345.
[150] *Parkerings,* ¶ 29.

119. The Tribunal should define Inconsistency as actions contrary to the *expectation of the investor* at the time of the investment. The tribunal in *Waste Mgmt* found that even though the government was not making payments under the contract for services it was not inconsistent because it was a response to an ongoing financial crisis not inconsistent behavior directed at Claimant.[151] In contrast in *Occidental* a tribunal found inconsistency when the government changed its tax regulation to only avoid having to pay reimbursements to Claimant.[152] The lack of a legitimate reason for the regulation and the reliance of the claimant on "stable business and legal" framework that had already been established made the government's action inconsistent.

vi. Transparency

120. Transparency should be used by the Tribunal to determine if a governments actions are apparent and accessible to Claimant. In Parkerings the tribunal found that an investor should not expect laws and regulation not to change unless there is an explicit assurance by the government they won't. As long as the changes are made public and are not *unfair, unreasonable,* or *inequitable* then there is transparency in the government's actions.[153] In contract in *Saluka* the government's act of refusing to discuss the reason for its discriminatory treatment of the claimant's investment was found to violate the transparency standard.[154]

vii. Due Process

121. Finally, the Tribunal should view Due Process to provide all the rights and privileges expected under domestic law. The Tribunal should look to *Mondev,* where a claimant had gone through all the possible stages of appeal in Massachusetts courts only to lose. While the claimant had three issues with the application of a new law and misapplication of procedural law the tribunal found that the new law was within the limits of common law adjudication and the procedural issues within the *discretion of the local courts.*[155] The tribunal also observed that "…test is not whether a *particular result is surprising*, but

[151] *Waste Mgmt.*, ¶ 967.
[152] *Occidental* ¶ 183.
[153] *Parkerings-Compagniet.*, ¶ 337.
[154] *Saluka.*, ¶407.
[155] *Mondev.*, ¶ 85.

whether the *shock or surprise*…leads…to *justified concerns* as to the judicial propriety of the outcome."[156]

122. Another example of the high standard of shock that is needed to be considered a violation of due process is *Jan de Nul*. The local courts took 10 years to issue a final opinion due the complexities of the proceedings and the use of multiple expert panels to clarify issues. That complexity being needed and the lack of "discrimination or severe impropriety" demonstrated to the tribunal that a due process violation had not occurred.[157]

viii. FET Fact Analysis

123. The Tribunal should first frame its review of the Mecurian courts with deference to the courts right to manage its own docket and hear any reasonable request of the court with the requisite impartiality. With that frame in mind the Tribunal should examine the courts conduct to see if it willfully disregarded the law in an arbitrary way that allowed for the delay of proceeding.

124. Claimant will allege the NHA was allowed numerous absences the court disregarded as well as many procedural mistakes that went unchecked to ensure more friendly treatment of the NHA. Claimant will likely allege that this conduct is politically motivated to ensure Claimant cannot enforce the award and that this conduct is similar to *White* or *Chevron*. But these proceeding differ in how the court and government comported itself and as it was said in *White*, nine years of delay alone do not make a failure to provide effective means to exercise a right.

125. Both *Chevron* and *White* involved multiple court transfers and proceedings happening over the course of several years without the courts providing any substantive resolution or enforcement. Contrarily in this case, the issue of jurisdiction was resolved and hearings were progressing to trial. There were some tactical delays on the part of the NHA but those are not considered illegal as Claimant has no expectation of the NHA to be cooperative.

126. The court continued to move proceedings ahead despite the NHA absences, it limited an extension of time in later proceedings, on several occasions it acknowledged Claimant's

[156] *Id.* ¶ 127.

[157] *Jan de Nul.*, *¶199 – 206.*

procedural protests, and committed to reprimanding the NHA if they continued in their tactics. This demonstrates that the court was aware of the NHA's behavior and was working around it and not willfully ignoring Claimant, but was choosing to push proceedings forward despite the conduct of the NHA. Allowing for the parties involved, NHA with its absences and Claimant by moving courts, the court is give a reasonable accommodation to both parties to make legitimate tactical decisions while still moving proceedings. This is a reasonable action for a court to take since it allows for all involved to operate for the best interest of their clients while still providing due process.

127. Additionally, the burden is on the opposing side to object and fight any tactics the opposing side makes in court. On three out of seven cases Claimant did not object to the absence of the NHA, they also did not object to seven out of nine requests to extend the proceedings for more time for the NHA to make a response. If proceedings where truly being delayed and allowed for by the court then the Claimant should have objected more regularly.

128. Included in Claimant's behavior was its decision to transfer courts, something neither the court nor the NHA wanted, but after a fair hearing was allowed. That was a purposeful tactical maneuver by Claimant that resulted in a delay of two years, not the Respondent who advocated for not moving the case.

129. The above indicates that due process was reasonably afforded to Claimant who on many occasions did not choose to exercise. When the Claimant did choose to exercise their rights to due process it was reasonably granted and resulted in an self-inflicted additional delay.

130. Claimant may claim that the new law was inconsistent in its application and interpretation but Respondent disagrees. The fact that a lower court disagreed with a higher court is not dispositive, this is the method by which legal systems work in general. To expect that a new law will be interpreted correctly at all stages of its implementation is unreasonable. Additionally, the introduction of new laws that affect the proceedings of a judiciary are not unheard of and in this case a reasonable attempt by the judiciary to resolve a congested court system.

131. The final decision on the jurisdiction of the commercial bench was the result of a Supreme Court decision, a court not even hearing Claimant's case, and affected not only

Claimant but enough other cases to cause the High Courts to be further congested. This indicates not a behavior directed at Claimant but a judicial decision affecting many other cases, demonstrating a lack of discrimination by the courts system. One procedural decision affected all applicable cases equally, demonstrating consistency in the judiciary's decisions impact.

132. These kinds of jurisdictional changes and there corresponding procedural delays are not unknown to occur in a judicial system. Particularly in regards to a new law that had to be interpreted and clarified many times before a firm standard was achieved. Claimant was aware of the new law and its possible impacts, it proactively sought those impacts out in the hope of using the new law. The decisions reached were made public and their application was made public demonstrating the transparency of the Mecurian judiciary. But like any legal gamble, it can fail, and in the face of a claimant knowing the court was overburdened Claimant should have expected a delay in proceedings it the gamble failed.

133. That expectation is similar to *Waste Mgmt* in that a crisis was occurring in the system and the system took steps to ensure that justice could continue, be it at a slower pace for some. It is not like *Occidental* in that the judicial system didn't change an entire procedure just to avoid paying Claimant, it impacted many cases, and there is still an avenue for remedy in the original court. This demonstrates to the Tribunal that Respondent acted with consistency to all parties involved considering the public crisis the judicial system is experiencing.

134. Looking at the courts behavior, this law, the proceedings around its interpretation, and implementation all public there is a question as to the expectation that Claimant should have had when it moved to enforce this arbitration. To merely claim that the New York Convention ensures enforcement shows a wanton disregard for reality. Enforcements are often challenged in court and have been known to legal be unenforceable. Nothing is certain in a legal challenge and to believe so would be fooling. Much like in ***Parkerings.*** where there was no explicit BIT condition ensuring this law wouldn't occur there was no assurances that Mecuria made specifically to Claimant or in the BIT that all awards that they sought to enforce would be. Claimant works in developing nations regularly and knew that Mecuria was one of those nations with a court system like any other. The judiciary has worked to provide a reasonable level of service in accordance with what is to

be expected from a developing nation. Just because Claimant made mistakes to exacerbate the situation does not give them standing to claim a DOJ.

135. Finally, Claimant was afforded Due Process in the judicial system. Claimant's issues were heard and it was able to challenge the proceedings, as well as the new law, during each step. It complaints were heard in an unbiased manner that resulted in action that they favored. The courts is the best avenue to decide such issues, as in ***Mondev***, they have made decisions that were not shocking or surprising nor that violates international law. Claimant may claim that the NHA was somehow favored by the court and in doing so disrupted their due process right. *Waste Mgmt.* clearly holds up that if the court had endorsed the NHA's conduct regularly or had granted the NHA some special status then a claim of failure of due process can be claimed. But, aside from one instance where the court encouraged patience with the NHA to Claimant, the court never endorsed the NHA's conduct and on many occasions admonished it. Nor was the NHA granted some extraordinary power in proceedings that disadvantages Claimant.

136. Claimant was not denied access to the courts or forcefully moved through several meaningless proceedings. Claimant's process has been long but that is a hurdle the entire system is facing for ongoing disputes, not something unique. Lengthy proceedings are not unheard of, as demonstrated by *Jan de Nul*, where it took ten years to reach a verdict.

137. Additionally, the Claimant has not even finished its current proceedings, but has voluntarily withdrawn from them instead of pursuing the current functioning avenue to a verdict. Additionally, Claimant has not even finished its current proceedings, but has voluntarily withdrawn from them instead of pursuing the current functioning avenue to a verdict. It is typical in international law, as the tribunal in Loewen decided, to first exhaust your local remedies before trying to move to arbitration, something Claimant has not completed the even the first step of.

138. It is clear that Respondent has afforded Claimant an effective means to exercise their rights and has not been misled or induced Claimant to act in a way contrary to the expected conditions inherent in a developing nations overburdened judicial system. The hurdles in the Claimants way were known to them and in some instances caused by them. They are to this day still afforded the opportunity to exercise their rights to a judicial

enforcement of the award and should first exhaust that avenue before proceeding with this arbitration.

V. TERMINATION OF THE LTA AND ENACTMENT OF LAW NO. 8458/09 DO NOT BREACH ARTICLE 3(3) OF THE BIT.

A. The Enactment of Law No. 8458/09 Does Not Breach an Investment Obligation as Patent Rights are General Legal Obligations, Not Specific to Any Investment.

139. Mercuria did not breach an investment obligation to Claimant through the enactment of Intellectual Property Law No. 8458/09 and subsequently granting a compulsory license for the manufacture of Valtervite. Art. 3(3) (the "umbrella clause"), of the Bash-Merc-BIT states: "[e]ach Contracting Party Shall observe any obligation it may have entered into with regard to investments of investors of the other contracting party."[158] However, it is well recognized by investment tribunals that "obligations entered into with regard to investments" do not extend to general obligation imposed through the laws of a State.[159] The tribunal in *Nobel* indicated that the phrase "entered into" indicates specific commitments and not general commitments such as legislative acts.[160] Furthermore, the grant intellectual property rights are not a promises to perform obligations, but rather give rise to entitlements that are subject to the awarding State's laws, and thus are subject to change.[161] Thus, the issuance of the Valtervite patent to Atton Boro Company did not create an investment obligation between Mercuria and Claimant.

140. The Tribunal in *Philip Morris*, rejected the claim that Uruguay breached its obligations to Phillip Morris under the umbrella clause when Uruguay enacted a law that inferred with Phillip Morris's Uruguayan trademark rights.[162] The tribunal reasoned that intellectual property rights granted in a trademark are not unique commitments agreed to in regard to a specific investment, and therefore, interference with those rights did not amount to the breach an umbrella clause.[163]

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[158] Bash-Merc-BIT, *Art.* 3(3).
[159] *SGS II*, ¶121.
[160] *Nobel*, ¶51.
[161] Phillip Morris, ¶481.
[162] *Phillip Morris*, ¶481.
[163] *Id.*

141. When Mercuria granted the Valtervite patent to Atton Boro Company in 1998, it was not entering into a particular obligation with regard to a specific investment. Mercuria merely allowed Atton Boro Company to access the same rights under patent laws that are available to any other person or entity.[164] As the *Philip Morris* tribunal stated, the granting of intellectual property rights are general legal commitments, and therefore the rights granted to Atton Boro Company may not be construed as investment obligations.

142. Moreover, the patent was granted in February of 1998, one month after the enactment of the Bash-Merc-BIT.[165] Thus, Atton Boro Company applied for the Mercurian patent well before the Bash-Merc-BIT was in place.[166] Accordingly, the Mercurian Valtervite patent was not pursued with the expectation that it would be protected by the BIT.

143. Furthermore, the Mercurian Valtervite Patent was obtained by Atton Boro Company, a Reef corporation and was later assigned to Claimant.[167] As Atton Boro Company is not a beneficiary of the BIT, the Mercurian Valtervite Patent cannot be considered an investment of obligation under the umbrella clause of the Bash-Merc-BIT.

144. Lastly, Claimant may not argue that the issuance of a compulsory license breaches Mercuria's obligations under the BIT, as Claimant has not exercised its rights to question the validity of the license under Law 8458/09.[168] The law provides a patent holder with the opportunity to question the validity of the compulsory license and the royalty before a two-judge bench of the High Court.[169] There is no record that Claimant has followed the appropriate procedures to oppose the license under the Mercurian law.[170] As Claimant has not exhausted its available remedy for the issuance of the compulsory license, it cannot prematurely pursue this claim under the BIT.

145. For the foregoing reasons, the Mecurian Valtervite patent does not qualify as an obligation with regards to an investment, and therefore, the granting of a compulsory license for Valtervite under Law 8548/09 does not amount to a breach of Art. 3(3) of the BIT.

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[164] Facts, ¶3.
[165] *Phillip Morris*, ¶481.
[166] Facts, ¶1-3.
[167] Facts, ¶4.
[168] PO3, ¶1580.
[169] *Id*.
[170] Facts.

B. Termination of the LTA Should Not Be Elevated to a Breach of International Law as it is Merely a Contract Claim to be Resolved Under the Terms of the LTA.

146. Termination of the Long-Term Agreement by the NHA does not violate Art. 3(3) as the alleged breach of the LTA is a contractual dispute, not an investment dispute. Furthermore, the LTA designates a forum for contractual disputes and through which the matter has already been decided and award enforcement is still pending.[171] In the alternative, should the Tribunal find that Art. 3(3) is applicable to the termination of the LTA, the termination is not attributable to Respondent because the NHA is not an organ of the Mercuria nor did the NHA act under Mercuria's authority or direction.

i. Termination of the LTA Was Not a Breach of an Investment Obligation as the LTA is Merely a Commercial Contract for the Sale of Goods.

147. Claimant's claim that termination of the LTA amounts to a breach of the BIT is inadmissible because the NHA was acting in a commercial capacity and the dispute is contractual. Investment tribunals have held that claims that are contractual in nature should not be elevated to a breach of international treaty through use of an umbrella clause.[172]

148. An ordinary commercial contract for the supply of a good does not amount to an investment obligation.[173] The *Joy Mining* tribunal held that a bank guarantee agreement amounted to no more than an ordinary sales contract which is distinguishable from an investment contract.[174] The tribunal stated:

> "[i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case."[175]

[171] PO3, ¶1595.
[172] *Joy Mining*, ¶81.
[173] *Id.*
[174] *Id.*
[175] *Id.*

149. Similarly the *Malaysian* tribunal held that a salvage contract did not amount to an investment, reasoning that contract merely provided benefits to Malaysia, but did not make a sufficient contribution to Malaysia's economic development.[176]

150. In the present case, the LTA between Claimant and the NHA was a commercial agreement.[177] There is no indication that the LTA was intended to facilitate foreign investment, as the NHA invited bids and evaluated offers from various pharmaceutical companies to supply FDC Greyscale medications.[178] The NHA subsequently entered into a long-term agreement where the NHA would place periodic purchase orders of *Sainor* from Claimant for a period of 10 years subject to satisfactory performance.[179] The terms of the LTA were not specified or tailored to Claimant as a foreign investor under the Mercuria-Basheera BIT nor did the purchase of *Sainor* contribute to the economic development of Mercuria.[180] This was merely a commercial agreement for the purchase and sale of goods.[181] Therefore, the failure of NHA to perform any of its obligations under this contract, should not amount to a breach of an investment obligation under an investment treaty.

151. In order for a breach of a contractual obligation to amount to an investment dispute, it must amount to a clear violation of the "substantive standards of the BIT".[182] The *SGS,* tribunal rejected the argument that an umbrella clause extends to all contractual disputes.[183] The tribunal considered whether the termination of a shipment inspection services contract with SGC after becoming dissatisfied with SGS's performance should be resolved under the umbrella clause of the Switzerland-Pakistan BIT.[184] The tribunal determined that the umbrella clause did not automatically extend all breaches of the service contract to breaches of the "substantive standards of the BIT".[185] The tribunal reasoned that this would lead to the indefinite expansion on the umbrella clause to any

[176] *Malaysian*, ¶109
[177] Facts, ¶5-10.
[178] Facts, ¶9.
[179] Facts, ¶10.
[180] Facts, ¶10.
[181] Facts, ¶9-10.
[182] SGS, ¶173.
[183] *Id.*
[184] *Id.*, ¶163-174.
[185] *Id.* ¶173.

breach of contract claim involving a state contract setting out commitments to an investor.[186]

152. The Bash-Merc-BIT sets out numerous substantive provisions regarding the treatment of investments and investors, such as according fair and equitable treatment, full protection and security, most-favored nation standards, and expropriation measures.[187] The early termination of a commercial contract is not a breach any of these substantive standards. The allegation that the NHA terminated the agreement prior to the ten year effective date is merely a contractual dispute.[188] If Claimant contends that termination of the contract breaches a substantive provision of the BIT this claim should be analyzed under the respective provision of the BIT and not as a breach of an investment obligation under Art. 3(3).

ii. The LTA Provides for a Specific Dispute Resolution Forum for Disputes Arising from the LTA and the Award Granted from this Forum is Still Pending.

153. The LTA provides for a specific dispute resolution forum for claims arising under the agreement, and by Claimants own admission, Claimant has exercised has already this right.[189] Claimant may not bring a claim under Art. 3(3) of the BIT as second mechanism to arbitrate a dispute as the dispute resolution forum was contractually agreed upon. The fact that the LTA contains a dispute resolution forum clause indicates that the parties intended that any claims arising out of the LTA, including a breach of contract claim, to be arbitrated per the terms of the agreement.[190] Therefore, the Art. 3(3) is not a proper mechanism to arbitrate this dispute.

154. Tribunals have held that a forum selection clause are given precedence over bilateral investment treaties when the dispute arises out of the agreement containing the forum selection clause.[191] In *SGS II*, the tribunal declined jurisdiction over a contractual dispute arising out of a service agreement between SGS and the Philippines because the clause

[186] *Id.*¶173-174
[187] Bash-Merc-BIT.
[188] Facts, ¶17.
[189] RRA, ¶9.
[190] *Id.*
[191] *SGS II,* ¶155.

applied specifically to disputes arising from the service agreement, while the BIT was more broadly applicable to numerous agreements and investment.[192] The tribunal further reasoned that the purpose of BITs is to support, rather than displace, negotiated agreements between investors and States.[193]

155. Claimant contends that Mercuria breached its obligation under Art. 3(3) of the BIT when the NHA prematurely terminated the LTA.[194] However, Claimant has agreed to arbitrate all disputed arising out of the LTA under the terms of this agreement.[195] Thus, any breach of contract claim arising under the LTA is inadmissible under the BIT.

156. Furthermore, Claimant already invoked arbitration against the NHA for the early termination of the LTA and this dispute is currently pending.[196] Although Mercuria contends that the termination of the LTA was not a breach of the agreement, a tribunal in Reef has already decided this matter in determining that the LTA was breached by the NHA.[197] Enforcement of this award is currently pending in the Mercurian Courts.[198] Claimant may not seek recourse for termination of the LTA through the BIT as this matter currently pending. As termination of the LTA was not an investment obligation and an award regarding this dispute is currently pending, Art. 3(3) is not applicable.

iii. Termination of the LTA is Not Attributable to Mercuria as the NHA was not Specifically Authorized or Directed by Mercuria to Terminate the Agreement.

157. Mercuria is not liable for the conduct of the NHA, as the NHA is not empowered by law to contract on behalf of Mercuria nor was it directed to terminate the LTA on behalf of Mercuria. State attribution is governed by the ILC Articles on Responsibility of States for Internationally Wrongful Acts.[199] Art. 5 indicates that liability can be imposed on a State for the conduct of an entity that is empowered by the law of that State to exercise elements

[192] *Id.*
[193] *SGS II,* ¶154-155.
[194] NA, ¶13.
[195] RRA, ¶9.
[196] Facts, ¶17-19.
[197] Facts, ¶17.
[198] PO3, ¶1595.
[199] ILC, Responsibility of States

of the governmental authority.[200] Art. 8 imposes liability for conduct a person or group of persons acting on the instructions of or under the direction or control of the State.[201]

158. Mercuria submits that termination of the LTA may not be attributable to Mercuria under Art. 5 as the NHA is not empowered by law to exercise elements of governmental authority. In *White*, the Tribunal indicated that the fact that the State initially establishes an entity through legislation is not a sufficient basis to attribute conduct of that entity to the State.[202]

159. Although the NHA trusts were established by the National Health Authorities Act, it operates as public-sector corporation, with independent corporate governance.[203] There is no indication that the Nation Health Authorities Act authorizes the NHA to enter into commercial contracts on behalf of Mercuria.[204]

160. Moreover, the termination of the LTA is not attributable to Mercuria under Art. 8 as Mercuria does not generally control the NHA, nor did it direct the NHA to terminate the agreement. In analyzing Art. 8, the ICJ in *Nicaragua v. United States* set out the "effective control test" stating that the in order to attribute responsibility to the United States, it must be show that the United States had effective control over the military operations in the course of which the violations were permitted.[205] The *Jan de Nul* tribunal expanded on the effective control test, by indicating that the test requires both general control of the state over an entity and also *specific* control over the act of which attribution is in question.[206]

161. In the present case, Mercuria did not have specific control over the act of terminating the LTA. The LTA was a commercial agreement negotiated and executed exclusively by the NHA.[207] Although Claimant is likely to argue that the Mercuria's Ministry of Health directed the NHA to solicit offers for the supply of Greyscale treatment drugs, the performance of the agreement was the responsibility of the NHA.[208] The Ministry of

[200] ILC, Responsibility of States, Art. 5
[201] ILC, Responsibility of States, Art. 8
[202] PO3.
[203] Facts.
[204] Facts, ¶17.
[205] *Nicaragua*, ¶109 and 115.
[206] *Jan de Nul*, ¶1373.
[207] Facts, ¶9-10.
[208] *Id.*

Health did not participate in the negotiation efforts between the NHA and Claimant and there is no indication that the NHA required or obtained approval from any Mercurian official to terminate the LTA.[209] As Mercuria had no control over the negotiation, execution or termination of the LTA, it is clear that the decision to terminate its agreement was made independently by the NHA without the instruction or direction of Mercuria.

[209] *Id.*

V. REQUEST FOR RELIEF

For the aforementioned reasons, Mercuria respectfully requests the Tribunal to:

1. Find that it lacks jurisdiction over any claims in relation to the enforcement of the Award;

A. Declare that Atton Boro cannot avail itself to the benefits of the BIT by virtue of application of Article 2(1) of the BIT;

B. Where the tribunal does not grant the second request for relief, declare that no act of Mercuria's violates the substantive protections of the BIT;

C. Find that Mercuria is entitled to restitution by Atton Boro of all costs related to these proceedings; and

D. Grant such further relied as counsel may advise and that the Tribunal deems appropriate.

Respectfully submitted on 24 September 2017 by

Team Rivero

On behalf of Respondent

Republic of Mercuria