THE 2017 FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT COURT COMPETITION

IN THE

PERMANENT COURT OF ARBITRATION

PCA CASE NO 2016-74

IN THE MATTER OF AN ARBITRATION UNDER ARTICLE EIGHT OF THE MERCURIA-BASHEERA BILATERAL INVESTMENT TREATY AND THE PERMANENT COURT OF ARBITRATION RULES 2012

ATTON BORO LIMITED	THE REPUBLIC OF MERCURIA
CLAIMANT	RESPONDENT

MEMORIAL FOR THE RESPONDENT

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TABLE OF DEFINITIONS

Basheera	Kingdom of Basheera
BIT	Bilateral Investment Treaty
Claimant	Atton Boro Limited
ICSID	International Centre for Settlement of Investment Disputes
LTA	A Long Term Agreement, between Claimant and the NHA, entered into on 25 November 2004
LTA Award	The award rendered in January 2009 by a tribunal constituted under the LTA in favour of Claimant
Mercuria-Basheera BIT	The Agreement between the Republic of Mecuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments, entered into force on 11 January 1998
NHA	Mercurian national Health Authority
Parties, the	Claimant and Respondent, collectively
PCA	Permanent Court of Arbitration
Reef	The People's Republic of Reef
Respondent	Republic of Mercuria
Tribunal, this	The PCA Arbitral Tribunal constituted under the Basheera-Mercuria BIT in relation to PCA case number 2016-74.
VCLT	Vienna Convention on the Law of Treaties

SUMMARY OF FACTS

The Parties

1 The Parties to this arbitration are the Claimant and Respondent. The Claimant is a company incorporated in Basheera. The Claimant was incorporated by affiliates of the Atton Boro Group; a collective of investors whose shares are primarily held by a company incorporated in Reef. The Claimant is a pharmaceutical manufacturer of essential medicines for patients across the developing world. The Respondent is a developing nation, whose population is affected by a critical epidemic known as 'greyscale'.

The Mercuria-Basheera BIT

2 On 11 January 1998, the Respondent and Basheera concluded the Mercuria-Basheera BIT. The Respondent and Basheera concluded the Mercuria-Basheera BIT to promote greater economic cooperation between their nations, with respect to investments.

Greyscale epidemic and treatment

3 Greyscale is a chronic, pervasive, incurable disease that is increasingly threatening the well-being of millions of working-age individuals in Mercuria. The symptoms of greyscale include cracking and flaking of the skin, stiffening muscles, joint pain and swollen limbs. In 2006, approximately 72% of Mercuria's population were vulnerable to infection by greyscale.

4 The Claimant synthesised a treatment for greyscale named 'Sanior', which became available to the Mercurian public in 2005. The Claimant owns the patent for Valtervite (the active compound in Sanior) in Mercuria. The Claimant alleges that Sanior is a blockbuster treatment for greyscale. Several studies have reached diverse conclusions on the ability of Valtervite to prevent the transmission of greyscale.

The LTA

5 On 25 November 2004, the Claimant and the NHA entered into the LTA. The LTA obliged the Claimant to manufacture and supply the NHA with Sanior over the course of ten years. On 10 June 2008, the NHA terminated the LTA in accordance with its rights under the LTA.

LTA award and enforcement proceedings

6 In response to the termination of the LTA, the Claimant sought, and obtained, an arbitral award against the NHA in the state of Reef. On 3 March 2009, the Claimant attempted to enforce the award in the High Court of Mercuria. The NHA contested the enforcement of the LTA award. Both parties sought several delays in the enforcement proceedings. However, in light of the fact that the Mercurian Courts are overburdened, the enforcement proceedings have not yet been finalised.

The patent

7 On 10 October 2009, the President of Mercuria promulgated legislation to liberalise the Mercurian intellectual property legislation. The new legislation allows third parties to apply to the High Court to obtain a license to use a patent in circumstances concerning public welfare. In November 2009, the Mercurian High Court granted a licence to HG-Pharma to manufacture Valtervite. The Court ruled that HG-Pharma pay the Claimant royalties to use the patent. HG-Pharma wrote to the Claimant to obtain its bank details. However, the Claimant chose not to respond.

SUMMARY OF PLEADINGS

PLEADING I

8 This Tribunal does not have jurisdiction over the Claimant's submissions concerning the LTA Award. This Tribunal only has jurisdiction over disputes arising out of the BIT, including disputes concerning investments. The LTA Award, in and of itself, is not an investment because it does not constitute a claim to money under the Mercuria-Basheera BIT. Further, the LTA Award is not an investment because it is not held in Mercuria because it was rendered by a tribunal in Reef. The LTA itself is also not an investment because it is a commercial arrangement that does not differ from a commercial contract.

PLEADING II

9 The Respondent's invocation of Article 2(1) of the Mercuria-Basheera BIT denies the Claimant the ability to rely on the benefits of the Mercuria-Basheera BIT, including the law and jurisdiction clause invoked as the basis for this Tribunal's jurisdiction. This Tribunal, therefore, does not have jurisdiction to hear this dispute. The Respondent's invocation of Article 2(1) is effective because the Respondent has complied with each and every requirement contained in Article 2(1). In particular, the Respondent has exercised its prerogative to explicitly invoke Article 2(1). By invoking Article 2(1) prior to its statement of defence, the Respondent has complied with the applicable procedural rules. Additionally, the Respondent's invocation of Article 2(1) applies retrospectively to all investments under the Mercuria-Basheera BIT, including the LTA and the Claimant's patent. The Claimant falls within the scope of Article 2(1) because it lacks any substantial business activities in Basheera and is wholly owned by Reef nationals. As a result, the Claimant is barred from relying on any benefit under the BIT, including the ability to commence arbitration.

PLEADING III

10 The Respondent's enactment of Law No 8458/09 and grant of the license to HG-Pharma do not violate any provision of the Mercuria-Basheera BIT. The Respondent has afforded the Claimant fair and equitable treatment under Article 3(2) of the Mercuria-Basheera BIT. The Respondent was consistently transparent with the Claimant regarding the increased prevalence of greyscale and the Respondent's desire to take aggressive measures to combat the critical epidemic. The Respondent afforded the Claimant due process in relation to the application for the Valtervite licence. The Claimant was included as a party in the hearing for the licence and had recourse to exhaust further local remedies to challenge the license. The Respondent did not take arbitrary or discriminatory measures by enacting Law No 8458/09 and granting the license to HG-Pharma because its actions were for a public purpose. The Respondent's actions equally affected all patent holders in Mercuria and did not target the Claimant. Additionally, the Respondent did not expropriate the Claimant's patent because its actions were a legitimate exercise of a State's police powers.

PLEADING IV

11 The Respondent has not violated Article 3 of the Mercuria-Basheera BIT by its judiciary's conduct in relation to the enforcement of the LTA Award. The time the Mercurian Courts have taken for the enforcement proceedings does not amount to a breach of the fair and equitable treatment standard contained in Article 3 of the Mercuria-Basheera BIT. The judiciary's conduct does not amount to a denial of justice because it is relative to the complexity of the case and the overburdened nature of the Mercurian Courts. Additionally, the judiciary has not acted discriminatorily or unreasonably affect the Claimant. The Respondent has also not breached the fair and equitable treatment standard because it has provided the Claimant with an effective judicial framework to enforce its rights. The time taken in the enforcement proceedings does not amount to a breach of the full protection and security clause contained in Article 3 of the Mercuria Basheera BIT. Specifically, the Respondent has exercised due diligence by providing the Claimant with a legal framework by which it can assert its rights.

PLEADING V

12 The Respondent has not violated Article 3(3) of the Mercuria-Basheera BIT as a result of the NHA terminating the LTA. Preliminarily, the NHA's actions are not attributable to the Respondent insofar that any breach of the LTA is not a breach of the BIT. Any breach of the LTA cannot amount to a breach of the BIT because the LTA is not an investment but is instead, a commercial contract. In any event, an umbrella clause which acts to elevate any breach of an investment to a breach of a BIT is void and ineffective. The NHA has not performed a sovereign act by terminating the LTA because it has acted within its normal course of business. Therefore, the NHA's action cannot amount to a breach of the BIT. Finally, the Claimant is not entitled to claim under the BIT for a breach of the LTA because the Claimant has already exercised its rights under the dispute resolution clause contained in the LTA.

I THIS TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS IN RELATION TO THE LTA AWARD

13 This tribunal has the power to rule on its own jurisdiction under the principle of Competence-Competence.[1] This Tribunal lacks jurisdiction over the claims relating to the LTA Award because: (**A**) the LTA is not an investment; and, alternatively (**B**) the LTA Award is not itself an investment for the purposes of the Mercuria-Basheera BIT.

A The LTA is not an investment

14 This Tribunal has jurisdiction over investments made by investors in the territory of a Contracting State. Article 1(1) of the Mercuria-Basheera BIT provides that an investment includes a claim to money under a contract. However, the term 'investment' has an intrinsic meaning, independent of the categories enumerated in a BIT.[2] Tribunals have determined a number of objective factors to take into account when determining what constitutes an investment.[3] This Tribunal should use the objective test to determine whether the LTA is an investment. The objective test promotes uniformity amongst investor-state arbitrations and imposes reasonable hurdles so that not every commercial contract concluded by a foreign entity in a State is protected by a BIT.[4]

15 The objective test takes into account: first, the duration of the project; second, the regularity of profit and return of the project; third, the risk entailed in the project; fourth, whether the project is a substantial commitment; and finally, whether the project constitutes a significant contribution to the host State's development.[5] A project must meet every element of the objective test to constitute an investment.[6] The LTA failed to encompass the required level of risk and failed to constitute a significant contribution to the host State's development.

16 Risk flows from the nature of the contract in issue and relates to, amongst other things, the risk entailed in the termination of the contract or a change in law that effects the

[1] PCA Rules 2012, Rule 23.
[2] *Romak v Uzbekistan*, 47 [188].
[3] See eg *Salini v Morocco*; *Romak v Uzbekistan.*
[4] *Romak v Uzbekistan,* 48–53 [199]–[207].
[5] *Salini v Morocco*, 622–3 [52]–[58].
[6] Ibid.

operation of the contract.[7] If the risk contained in the contract was the same as a normal commercial contract then the contract is not deemed to be an investment.[8] There was no risk in the LTA beyond that which would affect any other commercial contract in Mercuria.

17 An investment contributes to a State's development when it provides a benefit to the State which is in line with the purpose of the BIT.[9] One of the purposes of the BIT is to protect a contracting State's nation's health and safety.[10] The Claimant has stated that Sanior is a blockbuster treatment for greyscale[11] which would radically improve the treatment of greyscale patients.[12] In fact, the number of case of greyscale in Mercuria has only sharply increased since the introduction of Sanior.[13] Further, there is no medical consensus that Valtervite actually prevents the transmission of greyscale.[14] Therefore, the LTA does not contribute a significant contribution to Mercuria's development.

18 It is less likely that a contract is an investment if the terms of the contract are entirely normal commercial terms and the parties do not take any steps to qualify the contract as an investment.[15] Even if the Sanior production facility, the Sanior or the Valtervite patent are investments, the LTA is still only a commercial contract between the Claimant and the NHA. The terms of the LTA are entirely akin to that of a normal contract. Further, there is no evidence that the LTA contained any terms designating it as an investment.

19 Given that the LTA does not contain the required element of risk or contribution to the host States development, it does not satisfy the criteria of an investment. The LTA is therefore, not an investment and cannot be afforded protection under the Mercuria-Basheera BIT.

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[7] *Salini v Morocco,* 623 [55]; *Joy Mining v Egypt*, 9 [40].
[8] *Poštová banka v Greece*, 44 [146].
[9] *Siemens v Argentina*, 31 [81] 'The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble.'.
[10] Mercuria-Basheera BIT, Preamble.
[11] FDI Moot Case 2017, 4 [113].
[12] Ibid 27 [855].
[13] Ibid 29–30, 42 [1337]–[1344].
[14] Ibid 50 [1583]–[1587].
[15] *Joy Mining v Egypt*, 13 [56].

B The LTA Award is not itself an investment for the purposes of the Mercuria-Basheera BIT

20 The parties to a BIT may expressly determine the limits they place on protected investments.[16] Article 1(1) of the Mercuria-Basheera BIT restricts protected investments to assets held in the territory of a contracting State. An arbitral award may rule on the rights and obligations contained in a contract but that does not mean that the award is itself part of that contract.[17] As such, an award that rules on the rights arising out of an investment does not equate the award with that investment.[18]

21 This Tribunal must distinguish between the LTA Award and the LTA in its analysis because the LTA Award does not form part of the original contract. Even if this Tribunal does find that the LTA is an investment, this does not mean that an arbitral award which details a tribunal's ruling on the rights and obligations arising from the investment is also part of that investment. Further, the LTA Award was not made or held in the territory of a contracting State. The LTA Award was rendered by a tribunal constituted in the Reef and has no further physical or legal presence in Mercuria. The LTA Award does not itself constitute an investment and therefore this Tribunal does not have jurisdiction to rule on the claims in relation to the LTA Award.

[16] See *White Industries v India*.
[17] *GEA Group v Ukraine*.
[18] Ibid.

II THE RESPONDENT'S INVOCATION OF ARTICLE 2(1) OF THE MERCURIA-BASHEERA BIT DENIES THIS TRIBUNAL JURISDICTION TO HEAR THIS DISPUTE

22 Article 2(1) of the Mercuria-Basheera BIT allows either contracting State to deny the advantages of the treaty to:

> 'A legal entity, if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the territory of the Contracting Party in which it is organized'.

23 The Respondent's invocation of Article 2(1) of the Mercuria-Basheera BIT effectively denies the Claimant recourse to any of the protections under the treaty because: (**A**) the Respondent has satisfied the procedural requirements to invoke Article 2(1); and (**B**) the Claimant falls within the scope of Article 2(1); and, as a result (**C**) the Claimant cannot rely on the benefits in the Mercuria-Basheera BIT, specifically Article 8.

A The Respondent has satisfied the procedural requirements for invoking Article 2(1)

24 On 26 November 2016, the Respondent, in its Response to the Notice of Arbitration, elected to invoke Article 2(1) of the Mercuria-Basheera BIT. The Respondent has successfully invoked Article 2(1) because: (**1**) the Respondent has exercised its prerogative under Article 2(1); and (**2**) the Respondent has complied with all formal requirements; and (**3**) the invocation of Article 2(1) applies retrospectively to all investments made under the Mercuria-Basheera BIT.

1 *The Respondent has exercised its prerogative under Article 2(1)*

25 The Denial of Benefits clause enshrined in Article 2(1) states that each contracting State 'reserves the right' to deny the benefits of the Mercuria-Basheera BIT to a legal entity. The ordinary meaning of the phrase 'reserves the right' demonstrates that the

clause does not operate automatically.[19] The contracting State relying on the provision must actually exercise the right enshrined in the Denial of Benefits clause in order for the benefits of the treaty to be denied to a particular entity.[20]

26 In the Response to the Notice of Arbitration, the Respondent stated that Article 2(1) applied to the Claimant and provided the reasons for the article's application. By explicitly stating in the Response to the Notice of Arbitration that the Respondent seeks to rely on Article 2(1), the Respondent has exercised its right and has taken an active step to deny the benefits of the Mercuria-Basheera BIT to the Claimant.

2 *The Respondent has complied with all formal requirements*

27 The Mercuria-Basheera BIT does not contain any express procedural restrictions on a party invoking Article 2(1). A tribunal should not imply additional procedural requirements that parties could themselves include in a treaty but chose not to.[21] In the event that a BIT does not contain a method to invoke a denial of benefits clause, a tribunal may take into account the procedural requirements in the applicable arbitral rules.[22] The PCA Rules, as the applicable arbitral rules, provide that a challenge to a tribunal's jurisdiction must be made no later than the statement of defence.[23]

28 The Mercuria-Basheera BIT does not impose any formal requirements for a party to invoke Article 2(1). It is not appropriate for this Tribunal to usurp the contracting parties' common understanding of the Mercuria-Basheera BIT by imposing additional terms which Basheera and the Respondent either: contemplated and rejected; or did not contemplate at all. The Respondent raised its plea regarding Article 2(1) in the Response to the Notice of Arbitration. Therefore, the Respondent has complied with the procedure in the PCA Rules to deny the Claimant recourse to arbitration because it has invoked Article 2(1) prior to its statement of defence.

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[19] VCLT, art 31(1); Gastrel and Le Cannu, 83; Dolzer and Schreuer, 55; *Plama v Bulgaria*. Cf ASEAN Framework Agreement on Services, art VI, which states 'the benefits of this Framework Agreement *shall* be denied to a service supplier who [is] not engaged in substantial business operations in the territory of Member States' (emphasis added).
[20] *Plama v Bulgaria*, [153]–[155]; *Yukos v Russia*, [456]; *Amto v Ukraine,* [62]; *Ascom v Kazakhstan*, [745].
[21] See *Global Trading v Ukraine*.
[22] *Ulysseas v Ecuador*, [172]; *Empresa v Ecuador*, [71].
[23] PCA Rules 2012, Art 23.

3 *The invocation of Article 2(1) applies retrospectively to all investments made under the Mercuria-Basheera BIT*

29 A denial of benefits clause operates to deny the benefits of the BIT to an investor, regardless of when its investment was made.[24] The appropriate time for a State to invoke a denial of benefits clause is the time when an investor seeks to rely on those benefits.[25] This is the appropriate time because the substantive requirements of the clause cannot be accurately assessed until the time at which the investor seeks to rely on the benefits of the treaty.[26]

30 On 7 November 2016, the Claimant commenced arbitration under Article 8 of the Mercuria-Basheera BIT. The Claimant alleged that the Respondent's conduct in relation to its Mercurian pharmaceutical ventures violated the substantive protections of the Mercuria-Basheera BIT. On 26 November 2016, the Respondent deposited its Response to the Notice of Arbitration. In that Notice, the Respondent invoked Article 2(1) of the Mercuria-Basheera BIT, denying the benefits of the BIT to the Claimant. Those benefits included the dispute resolution mechanism enshrined in Article 8.

31 The Claimant is an entity incorporated in Basheera and limited by shares. The shareholding and control of a company may fluctuate over time. It was not until the Claimant sought to rely on the benefits of the Mercuria-Basheera BIT that the Respondent was in a position to assess whether the Claimant was owned or controlled by citizens of a third state. Further, it was also not until this time that the Respondent was able to assess the current existence of the Claimant's business activities in Basheera.

32 Therefore, the benefits of the Mercuria-Basheera BIT are denied to the Claimant retrospectively. Consequently, this Tribunal does not have jurisdiction over this dispute, as the benefit of the arbitration clause in Article 8 of Mercuria-Basheera BIT is not available to the Claimant.

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[24] *Pac Rim v El Salvador*; *Ulysseas v Ecuador*, [172]; *Empresa v Ecuador*, [71].
[25] *Rurelec v Bolivia*, [376].
[26] Ibid [379].

B The Claimant falls within the scope of Article 2(1)

33 Article 2(1) can be invoked by a contracting State when two substantive requirements are satisfied cumulatively.[27] First, the entity must be owned or controlled by nationals of a third state and second, the entity must not have any substantial business activities in the territory of the State in which it is organised.

34 The substantive requirements for invoking Article 2(1) are satisfied because: (**1**) the Claimant is owned by nationals of Reef; and (**2**) the Claimant lacks any substantial business activities in Basheera.

1 *The Claimant is owned by nationals of Reef*

35 The Respondent need only establish that the Claimant is either owned *or* controlled by nationals of a third state in order to satisfy the first requirement of Article 2(1) of the Mercuria-Basheera BIT.[28] At international law, a State's domestic laws determine the legal status of a corporation.[29] Ownership of an entity is a question of fact that does not require reference to the ultimate control of the entity.[30] International law recognises the principle that companies have a separate legal personality separate from their subscribers and directors.[31]

36 The Claimant is a company incorporated under the laws of Basheera. Atton Boro and Company is a company incorporated in the Reef. Atton Boro and Company wholly owns the Claimant. The Claimant is merely a shell company used as a vehicle for investment within countries that fall under Basheera's investment treaty scheme. As such the Claimant is an entity incorporated in the territory of a contracting State but is wholly owned by nationals of a third state.

[27] See *Ulysseas v Ecuador*, [167]–[168]; *Pac Rim v El Salvador*.
[28] *Pac Rim v El Salvador*.
[29] *Barcelona Traction*.
[30] *Pac Rim v El Salvador*, [4.80]-[4.82].
[31] *Ahmadou Sadio Diallo Case*, 689 [155].

2 *The Claimant lacks any substantial business activities in Basheera*

37 A company that acts as a mere shell company, holding only rights to be exercised by another member of the corporate group, cannot be said to have substantial business activities merely by virtue of its incorporation.[32] It is immaterial if the parent company or any other company in the corporate group has substantial business activities in the contracting State.[33]

38 The Claimant does not have substantial business activities in Basheera. The Claimant was established to facilitate investment in foreign countries outside of Basheera.[34] The fact that Atton Boro Group has established business activities in Basheera does not mean that the Claimant also has substantial business activities in Basheera. Any and all activities undertaken by the Claimant were in furtherance of its foreign business activities. Notably, the Claimant has only employed between two and six permanent employees since its incorporation in 1998. Further, these employees were merely managing the portfolio of registered patents in South America and Africa and providing administrative support to Atton Boro Group affiliates in those territories.[35] The Claimant has no identifiable or substantial business activities in the territory of Basheera.

C The Claimant cannot rely on the benefits in the Mercuria-Basheera BIT, specifically Article 8

39 A dispute resolution mechanism in an investment treaty is an advantage that is denied to an investor by operation of a denial of benefits clause.[36] Therefore, when a denial of benefits clause is invoked, a tribunal cannot exercise jurisdiction over any of the investors' claims.[37] As a tribunal constituted under PCA Rules has the power to rule on its own jurisdiction, parties do not consent to the jurisdiction of a tribunal merely by agreeing to participate in the arbitration.[38]

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[32] *Pac Rim v El Salvador*.
[33] *Plama v Bulgaria*, [169].
[34] FDI Moot Case 2017, 28 [859]–[865].
[35] Ibid 48 [1512]–[1515].
[36] *Generation v Ukraine*, [15.7].
[37] See *Ulysseas v Ecuador*, [110]–[113]; *Rurelec v Bolivia*, [366], [373], [377].
[38] PCA Rules, Rule 23.

40 The Respondent has successfully invoked Article 2(1) by satisfying the procedural and substantive requirements of that clause. The Claimant is therefore denied the benefit of relying on Article 8 and pursuing arbitration. The Respondent's participation in these proceedings does not constitute acquiescence to the jurisdiction of the Tribunal. This Tribunal does not have the jurisdiction to hear this dispute.

III THE ENACTMENT OF LAW NO 8458/09 AND/OR THE GRANT OF A LICENSE FOR THE CLAIMANT'S INVENTION DOES NOT AMOUNT TO A BREACH OF THE MERCURIA-BASHEERA BIT, IN PARTICULAR, THE FAIR AND EQUITABLE TREATMENT STANDARD

41 On 10 October 2009, the President of Mercuria promulgated legislation to liberalise the Mercurian intellectual property legislation. The new legislation allows third parties to apply to the High Court to obtain a license to use a patented invention in circumstances concerning public welfare. The Respondent's enactment of Law No 8458/09 and the grant of the license to HG-Pharma does not violate the Mercuria-Basheera BIT because: (**A**) the Respondent is not liable for any breach under Article 3 of the Mercuria-Basheera BIT; and (**B**) the Respondent has not breached Article 6 of the Mercuria-Basheera BIT; and, in any event (**C**) the Respondent can rely on Article 12 of the Mercuria-Basheera BIT to defend its actions.

A The Respondent is not liable for any breach under Article 3 of the Mercuria-Basheera BIT

42 Article 3 of the Mercuria-Basheera BIT specifically concerns the protections afforded to investments. Article 3(2) imports the international law concept of fair and equitable treatment,[39] which provides, in effect, that a state must act in good faith towards investors. A tribunal should interpret fair and equitable treatment broadly and on a case-by-case basis when the relevant BIT does not make specific referral to customary international law.[40] (**1**) Any claim for denial of justice is inadmissible. The Respondent fulfilled its obligations under Article 3 of the Mercuria-Basheera BIT because: (**2**) the Respondent's actions did not frustrate the Claimant's legitimate expectations; and (**3**) the Respondent's actions were not arbitrary or discriminatory.

[39] Mercuria-Basheera BIT, art 3(2).
[40] *PSEG v Turkey*, [239]; *AWG v Argentina*, [184].

1 *Any claim for denial of justice is inadmissible*

43 A failure to exhaust local remedies is a bar to admissibility for a denial of justice claim.[41] In order to exhaust local remedies, an investor must give the domestic judiciary an opportunity to address the alleged breach of international law.[42] A party cannot claim that it has exhausted local remedies if any potential remedial avenue still exists in the host State.[43]

44 The Claimant was present in the the High Court of Mercuria when that Court granted HG-Pharma the Valtervite license.[44] Mercurian law allows the Claimant to appeal against the validity of the license and the fixed royalties before a two-judge bench of the High Court.[45] The Claimant did not make any attempt to appeal the High Court's decision despite potential relief. The Claimant failed to exhaust all local remedies and therefore any claim for denial of justice is inadmissible.

2 *The Respondent's actions did not go beyond the Claimant's legitimate expectations*

45 An investor's legitimate expectations arise from the host State's perceptible framework for the protection of the investment.[46] This includes, but is not limited to, domestic law, rules of international law and representations made by the host State.[47] As a result, a host State has an inherent obligation to be transparent to investors about its legal framework and any subsequent reasonable evolutions thereof.[48] An investor should be aware that a host State may amend its laws within a reasonable margin of change.[49] An investor's legitimate expectations can evolve during the course of its investment, so long as the investor is aware of the changing circumstances affecting host State's territory and legal framework.[50]

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[41] *Loewen Group v USA*, [164]; *Toto v Lebanon*, [156]–[168]; *Interhandel*, 26–7; Bjorklund, 857.
[42] *Interhande*l, 26–7.
[43] Ibid.
[44] FDI Moot Case 2017, 50 [1576].
[45] Ibid 50 [1579]–[1580].
[46] Schreuer, 374.
[47] *Grand River v USA*, [136]; Schreuer, 374.
[48] *Tecmed v Mexico*, [154]–[157]; *Metalclad v Mexico*, [113].
[49] Dolzer and Schreuer, 148.
[50] *Eli Lilly v Canada*, [310].

46 The legal framework that the Claimant conducted its investment in is formed by the Mercuria-Basheera BIT, representations by the Mercurian government and Mercurian domestic law. The Mercuria-Basheera BIT is subject to the rules of interpretation in the VCLT. Article 31(1) of the VCLT provides that a treaty is to be interpreted in its context and in light of its object and purpose. A treaty's object and purpose can be determined from its preamble and other surrounding articles within the treaty.[51]

47 The preamble to the Mercuria-Basheera BIT establishes the desire to achieve the objectives of the treaty 'in a manner consistent with the protection of health [and] safety.'[52] Articles 3, 6 and 12 of the Mercuria-Basheera BIT afford investors protection with specific carve-outs for the contracting State's domestic laws.[53] These exceptions allow a contracting State to pursue the objectives of the Mercuria-Basheera BIT to the full extent of their domestic law without substantively breaching the Mercuria-Basheera BIT. Specifically, the fair and equitable treatment standard in Article 3(2) is 'without prejudice to [the laws]' of the Contracting Parties. Article 3(2) must be read alongside Article 3(1)[54] which reserves the right of States' to create favourable conditions for investment 'subject to [the State's] right to exercise powers conferred by it's laws and investment policies.'

48 The Respondent was consistently transparent regarding changes in circumstances at the domestic level and the need to take measures to combat these circumstances. In 2003 the NHA issued an annual report which cautioned that the greyscale epidemic was so pervasive that it could 'spiral into a national crisis within a decade unless aggressive measures were taken to combat it.'[55] The report makes clear that the NHA's engagement of the Claimant was but one measure in the Respondent's grander scheme towards greyscale prevention.[56]

49 Subsequently, the 2006 NHA report made clear that the current measures were not sufficient to combat the ever increasing greyscale epidemic.[57] The report outlined that the cost for treating only the poorest 100,000 patients for one year with Sanior would exceed the greyscale program budget by 500% and constitute nearly a third of

[51] VCLT, art 31(2).
[52] Mercuria-Basheera BIT, Preamble.
[53] Mercuria-Basheera BIT, arts 3(1), 3(2), 6(1), 6(4) and 12.
[54] See VCLT, art 31(2).
[55] FDI Moot Case 2017, 28 [875].
[56] Ibid 29 [904].
[57] Ibid 43 [1363]–[1366].

Mercuria's overall health budget.[58] In December 2006, the Minister for Health publically addressed the greyscale epidemic and stated that 'the government would take every measure it deemed necessary to make ensure [sic] that patients of greyscale could avail treatment.'[59]

50 The Claimant is aware that the order value for Sanior doubled in each quarter of 2007 due to the rapidly increasing number of patients.[60] Further, Law No 8458/09 was active for eleven months prior to HG-Pharma filing its application for Valtervite. Therefore, the Claimant cannot assert that it could not expect the High Court of Mercuria to grant a license for its patented invention.

51 The Respondent was consistently transparent about the worsening of the greyscale epidemic in its territory, the unachievable cost of treating patients with Sanior and the need to take aggressive measures to combat the critical public health crisis. The Mercuria-Basheera BIT is not an insurance policy against changes in the Respondent's legal framework,[61] particularly because the Claimant agreed that the protections afforded in the treaty are without prejudice to the laws of the Contracting Parties.

3 *The Respondent's actions were not arbitrary or discriminatory*

52 A host State must not take arbitrary or discriminatory measures against an investor.[62] An arbitrary measure is an action with no reasonable basis which is motivated by inappropriate considerations and a view to further the State's interests.[63] Arbitrary measures include when a State changes its law 'without providing any clarity about its meaning and extent'[64] or then acts inconsistently against its supposed purpose.[65]

53 The Respondent made clear to the Claimant that it did not have the financial means available to continue purchasing Sanior at the 25% discounted rate.[66] The Respondent also made clear that the greyscale epidemic worsened and that aggressive measures had

[58] Ibid 43 [1363]–[1366].
[59] Ibid 29 [914].
[60] Ibid 29 [916].
[61] See *EDF v Romania*, [217].
[62] Mercuria-Basheera BIT, art 3; *Eli Lilly v Canada*, 134; *Saluka v Czech Republic*, [309].
[63] *LG&E v Argentina*, [158].
[64] *Occidental v Ecuador*, [163].
[65] Ibid.
[66] FDI Moot Case 2017, 29 [919].

to be taken to combat it.[67] These considerations gave reasonable motivation for the Respondent to amend its laws. One of the primary purposes of Law No 8458/09 was to allow the High Court to grant non-voluntary licenses on that grounds that the patented invention has not met the reasonable requirements of the public or that the patented invention is not available to the public at a reasonably affordable price.[68] In this respect, the meaning and extent of Law No 8458/09 is both clear and unambiguous.

54 A discriminatory measure is one that treats investors differently on the basis of any 'unjustifiable distinction'.[69] A host State is bound to implement its policies in an non-discriminatory way when it acquiesces to the fair and equitable treatment standard it.[70] However, a tribunal must consider the surrounding social and economic context of a State when determining if it has discriminated against an investor.[71] Taking into account that social and economic context, a law may not be discriminatory merely because it has affected a particular investor in an adverse way.[72]

55 Law No 8458/09 is drafted in a broad and neutral manner. The law is intended to apply to any patented invention where the interests of the Mercurian public require its application. The factors discussed in Law 8458/09 are objective and apply to the social and economic context of Mercuria and not to any specific patented invention. The Respondent recognises that the Claimant's invention has been adversely impacted by the operation of Law No 8458/09 in this case. However, this was a necessary measure to address the public health crisis in Mercuria and in no way specifically discriminated against the Claimant.

B The Respondent has not breached Article 6 of the Mercuria-Basheera BIT

56 Under Article 6 of the Mercuria-Basheera BIT, a State cannot directly or indirectly expropriate tangible or intangible property without adequate compensation.[73] Article 6(4) provides that measures adopted by a State that aim to protect legitimate public welfare objectives do not constitute indirect expropriation so long as they are not

[67] Ibid 28 [875].
[68] Ibid 44 [1394-1398].
[69] *Saluka v Czech Republic*, [290].
[70] Ibid [337].
[71] *National Grid v Argentina*, [180].
[72] *Saluka v Czech Republic*, [337].
[73] Mercuria-Basheera BIT, art 6(1).

discriminatory.[74] Article 6 of the Mercuria-Basheera BIT reflects customary international law.[75] The Respondent has not breached Article 6 of the Mercuria Basheera BIT because: (**1**) the Respondent has not indirectly expropriated the Claimant's patent; and in any event, (**2**) Article 6(4) applies to the Respondent's interference with the Claimant's patent.

1 *The Respondent has not indirectly expropriated the Claimant's patent*

57 An indirect expropriation occurs when a State deprives an investor of its fundamental rights of ownership and enjoyment in its property.[76] Expropriation can only occur when a State's measures interfere so severely with the investor's rights that they are rendered useless.[77] The impact must be substantial in order for compensation to be claimed for expropriation.[78] A State's measures will not constitute an interference when the investment continues to operate, even if profits are diminished.[79] To determine if an expropriation has occurred, tribunals must look to the nature and purpose of the State's actions.[80]

58 On 17 April 2010, The High Court of Mercuria granted a license to HG-Pharma for the manufacture of Valtervite.[81] The Claimant may contend that the grant of the Valtervite license and the affixing of royalties at 1% amounts to an indirect expropriation of their patented invention. However, there are three reasons why the Respondent's measures do not constitute an expropriation. First, the Claimant still maintains the legal title to the patented invention. Second, the Claimant maintains a right to 1% of the profits generated by HG-Pharma in addition to any profits from their own Sanior transactions. Finally, the Claimant still maintains one-third of the Mercurian marketshare for Valtervite. These reasons show that the Respondent's measures did not deprive the Claimant of substantial use, ownership, enjoyment or rights to its patented invention. Further, the mere fact that the profits generated from the Claimant's investment have decreased is not sufficient to establish a claim for indirect expropriation.

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[74] Ibid; *Saluka v Czech Republic*, [255]–[264].
[75] *Saluka v Czech Republic*, [262]; *Eli Lilly v Canada*, [181]; *Philip Morris v Uruguay*, [307].
[76] *Indirect Expropriation and the Right to Regulate in International Investment Law*, 3.
[77] *Starret v Iran*, [154].
[78] Ibid.
[79] *LG&E v Argentina*, [191].
[80] *Tecmed v Mexico*, 122; *Saluka v Czech Republic*, [255]–[264].
[81] FDI Moot Case 2017, 30 [950].

2 *Article 6(4) applies to the Respondent's interference with the Claimant's patent*

59 Article 6(4) of the Mercuria-Basheera BIT reflects the doctrine of police powers at international law. The doctrine of police powers allows a State to take regulatory and enforcement measures in order to safeguard an essential interest in its territory.[82] Although the police powers doctrine is not self judging, tribunals afford a great degree of deference to States when the measures taken concern threats to public health or order, or other essential security interests.[83] The protection of a State's population from infectious disease is recognised as a legitimate public health concern that warrants the valid exercise of a State's police powers. Article 6(4) allows a contracting State to take measures in order to safeguard such interests, so long as the measures do not discriminate against an investor.

60 The 2006 NHA report showed a 1300% increase of confirmed greyscale cases from 2003 to 2006 and a 250% increase in estimated cases within the same time frame. The report outlined that the cost for treating only the poorest 100,000 patients for one year with Sanior would exceed the greyscale program budget by 500% and constitute nearly a third of Mercuria's overall health budget.[84]

61 Greyscale has persisted as a serious and pervasive epidemic since the early 1980's.[85] Treatment for greyscale has existed since the late 1990's.[86] However, these treatments were not economically viable to address the ever increasing demand for greyscale treatment in Mercuria. In order to reduce the per-patient costs for treating greyscale in Mercuria, the Respondent sought a cost effective alternative in the Claimant's Sanior product. However, due to the 1300% and climbing increase in confirmed greyscale patients in Mercuria, the Respondent had no choice but to seek a discount on the price of Sanior. In an attempt to both protect the safety of its population and respect its obligations under the Mercuria-Basheera BIT, the Respondent first attempted to renegotiate its arrangement with the Claimant. Despite being aware of the pressure on the Mercurian health budget, the Claimant refused to negotiate a discount on reasonable terms. In the face of a rapidly escalating public health crisis, the Respondent was forced to exercise its police powers to safeguard the health and safety of its citizens.

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[82] *Methanex v USA*, [410].
[83] *Philip Morris v Uruguay*, [297], [418]; *Lemire v Ukraine*, [505].
[84] FDI Moot Case 2017, 43 [1363]–[1366].
[85] Ibid 41 [1297].
[86] Ibid 41 [1308].

62 In exercise of its police powers the Respondent amended its intellectual property law framework. Subsequently, HG-Pharma applied for and was granted a license for the manufacture of Valtervite in Mercuria.[87] This license had profoundly positive effects on the Mercurian economy and allowed more patients to gain access to greyscale treatment.[88]

63 The amended legal framework was neutral in application and the 1% royalties affixed by the High Court of Mercuria are well within the normal royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases.[89] Therefore, the measures taken by the Respondent were non-discriminatory exercise of its police powers under Article 6(4) of the Mercuria-Basheera BIT.

[87] Ibid 30 [949]–[953].
[88] Ibid 30 [953]–[955].
[89] Ibid 50 [1590].

IV THE CONDUCT OF THE RESPONDENT'S JUDICIARY DOES NOT BREACH ANY OBLIGATIONS OWED UNDER ARTICLE 3 OF THE MERCURIA-BASHEERA BIT

64 On 3 March 2009, the Claimant sought to enforce the LTA award in the High Court of Mercuria.[90] The NHA challenged the enforcement of the LTA award on public policy grounds.[91] The Respondent accepts that the Mercurian judiciary's conduct is attributable to the Respondent. However, the Respondent maintains that its judiciary has not breached the Mercuria-Basheera BIT. In these proceedings, the Mercurian Courts have not breached Article 3 of the Mercuria-Basheera BIT because: (**A**) the Mercurian Courts' conduct does not amount to a breach of the fair and equitable standard; and (**B**) the Mercurian Courts' conduct does not amount to a breach of the full protection and security standard.

A The Mercurian Courts' conduct does not amount to a breach of the fair and equitable standard

65 Article 3 of the Mercuria-Basheera BIT enshrines the fair and equitable treatment standard. The fair and equitable treatment standard protects against denial of justice and unreasonably or discriminatorily measures, and protects an investors legitimate expectations. (**1**) Any claim made by the Claimant for denial of justice is inadmissible. The Mercurian Courts' conduct does not amount to a breach of the fair and equitable standard because: (**2**) the Respondent's conduct does not amount to a denial of justice; and (**3**) the judiciary has not acted unreasonably or discriminatorily; and (**4**) the Respondent is not obliged to provide effective means to the Claimant. Even if this Tribunals finds that the Respondent is obliged to provide effective means to the Claimant: (**5**) the Respondent has not failed in providing the Claimant effective means.

[90] Ibid 4 [129].
[91] Ibid 30 [936]–[937].

1 *Any claim made by the Claimant for denial of justice is inadmissible*

66 A failure to exhaust local remedies is a bar to admissibility for a claim of denial of justice.[92] In order to exhaust local remedies, an investor must give the domestic judiciary an opportunity to address the alleged breach of international law.[93] A party cannot claim that it has exhausted local remedies if any potential remedial avenue still exists.[94] The Claimant has not attempted to remedy the perceived shortcoming of the Respondent's judiciary by any means. Further, the Claimant still has the potential opportunity to seek a remedy from the Supreme Court of Mercuria.

2 *The Respondent's conduct does not amount to a denial of justice*

67 Denial of justice is a fundamentally unfair manner of administering justice to foreign investors.[95] A denial of justice must be egregious conduct that shocks a sense of judicial propriety.[96] Exhaustion of local remedies is a factor to consider when determining if denial of justice has occurred.[97] There is an especially high threshold required to establish denial of justice.[98] A delay may establish denial of justice when the is delay unwarranted.[99] A delay is unwarranted when the additional time is not required to resolve the dispute. This is determined by reference to the complexity of the case and the behaviour of the litigants.[100] A delay is even less likely to be a denial of justice when the delay conforms with usual practices. [101]

68 The delays in the proceedings for the enforcement of the LTA award were not egregious or unwarranted. First, Mercurian Courts were tasked with determining the appropriate jurisdiction for the dispute, in the face of inconsistent and varying Supreme Court precedent. Second, the dispute also required determination on sensitive public policy issues. Third, in the pursuit of procedural fairness and justice between the parties the courts granted extensions requested by both parties. Further, in light of the fact that

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[92] *Loewen Group v USA*, [164]; *Toto v Lebanon*, [156]–[168]; *Interhandel*, 26–7; Bjorklund, 857.
[93] *Interhandel*, 26–7.
[94] Ibid.
[95] Newcombe, 692.
[96] *Mondev v USA*, [127]; *Chevron v Ecuador*, [244].
[97] Bjorklund, 857.
[98] *Chevron v Ecuador*, [244].
[99] Ibid [168]
[100] Ibid [169].
[101] Bjorklund, 845.

the Mercurian judiciary is overburdened, the period of time taken for the dispute is not an egregious departure from the Court's usual practice. Therefore, the time taken for the proceeding is a reasonable product of the complexity of the case and the capacity of the Courts and so is not egregious or unwarranted.

3 *The judiciary has not acted unreasonably or discriminatorily*

69 An unreasonable measure is an action made on an arbitrary basis.[102] The delays in the enforcement proceedings were all caused by identifiable and justifiable reasons, including a backlog of cases, failure of parties to appear and the granting of extensions requested by the parties.[103] The courts acted on the according to the Parties' instructions and not on some arbitrary basis.

70 To establish whether a judiciary has discriminated against an investor, a tribunal must take into account the judiciary treatment of other investors.[104] There is no evidence of comparable cases where the Mercurian Courts have treated other investors in a more favourable manner.

4 *The Respondent is not obliged to provide effective means to the Claimant*

71 Effective means clauses require host States to provide investors access to a proper system of laws and institutions, which work effectively in any given case.[105] Effective means clauses are generally expressly incorporated within a BIT or imported by through the operation of a most favoured nation clause. Most favoured nations clauses allow a party to rely on protections contained in other investment treaties to which the host State is party. The Claimant cannot rely on an effective means clause because the Mercuria-Basheera BIT does not contain an effective means clause. Further, despite the Mercuria-Basheera BIT containing a most favoured nations clause,[106] there is no evidence that the Respondent is party to a treaty containing an effective means clause.

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[102] *LG&E v Argentina*, [158].
[103] FDI Moot Case 2017, 7–12.
[104] *Nykomb v Latvia*, 34.
[105] *Chevron v Ecuador*, [268]; *White Industries v India*, [11.3.2].
[106] Mercuria-Basheera BIT, art 4.

72 Further, the Claimant cannot claim that they legitimately expected to be afforded effective means of asserting their rights. Legitimate expectations must be reasonable and justifiable expectations on the part of an investor.[107] When determining if an expectation is reasonable, the level of development of the host nation must be taken into account.[108]

73 The Respondent is a developing nation, with an overburdened judiciary, that is having difficulty meeting its current caseload.[109] It is unreasonable for the Claimant to expect that it would be provided effective means in circumstances where the Respondent was already struggling to cater for its own population.

5 *The Respondent has not failed in providing the Claimant effective means*

74 A State will only have provided effective means when its establishes a proper system of laws and institutions.[110] In certain circumstances, an undue or indefinite delay may amount to a breach of the effective means standard.[111] When determining whether a delay is undue, a tribunal may consider surrounding factors such as the behaviour of parties and complexity of the case.[112]

75 The Claimant has enjoyed access to the Respondent's established judicial mechanisms. The delays did not result from the Mercurian judicial framework itself. Rather, the complex legal questions and requests from the parties occasioned the matter to be extended.[113] It is clear that the delays in the enforcement proceedings resulted from the circumstances of this particular dispute and not from any failings in the Mercurian legal framework.

[107] *Thunderbird v Mexico*, [147]; *Jan de Nul NV v Egypt*, [186].
[108] *Duke v Ecuador*, [340]; *Parkerings v Lithuania*, [355]–[356].
[109] FDI Moot Case 2017, 17 [510]–[515].
[110] *Chevron v Ecuador,* [268]; *White Industries v India*, [11.3.2].
[111] *White Industries v India*, [11.3.2] (d).
[112] Ibid [11.3.2] (i).
[113] See above Ground IV(A)(2).

B The delay does not amount to a breach of the full protection and security clause

76 Article 3 of the Mercuria-Basheera BIT includes a full protection and security clause.[114] The full protection and security clause requires 'Host States to take active measures to protect investments from adverse effects that stem from the Host State and its organs.'[115] The standard manifests in the obligation for host States to provide an appropriate legal framework for investors to vindicate their rights.[116] Host States must exercise due diligence in the performance of this obligation.[117] Due diligence involves not only the adoption of appropriate rules and measures but also vigilance in monitoring the implementation of those measures.[118] A significant delay can evidence a failure of due diligence.[119] A host State does not fail to provide full protection and security simply because an investor believes that there was more that the State could have done in the circumstances. [120]

77 The Respondent has clearly provided the Claimant a legal framework by which they can assert their rights. The proceedings were extended by a variety of factors not controllable by the Respondent. Alternatively, even if this Tribunal finds that the judiciary could have been more efficient, that is not enough to show that the Respondent has breached the full protection and security clause. The conduct of the Respondents judiciary has not breached any of the obligations created by Article 3 of the Mercuria-Basheera BIT.

[114] Mercuria-Basheera BIT, art 3(2).
[115] *Frontier v Czech Republic*, [261].
[116] Ibid [263].
[117] Ibid [270].
[118] *Pulp Mills on the River Uruguay*, [69].
[119] *ELSI Case*, [112].
[120] *Frontier v Czech Republic*, [273].

V NHA'S TERMINATION OF THE LTA DOES NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE MERCURIA-BASHEERA BIT

78 NHA's termination of the LTA does not amount to a violation of Article 3(3) of the Mercuria-Basheera BIT because: (**A**) NHA's actions are not attributable to the Respondent; and, in any event (**B**) the LTA is not an investment; and, in any event (**C**) the termination does not amount to a breach of the BIT; and, in any event (**D**) Respondent terminated for a commercial purpose; or, alternatively (**E**) the LTA had a dispute resolution clause.

A NHA's actions are not attributable to the Respondent

79 The conduct of a State organ may be attributable to the State.[121] The term 'state organ' includes a body that exercises an executive, judicial or legislative function.[122] An organ exercises an executive function when it administers governmental decision and laws.[123]

80 Despite having some accountability to the Mercurian Government, the NHA operates entirely independently to the Mercurian Government.[124] Further, the NHA does not exercise any judicial or legislative function. There is no evidence that the NHA is responsible for administering Mercuian laws. Additionally, there is no evidence that the NHA exercises any quasi-judicial functions in relation to those laws. Even in circumstances where members of the NHA have met with the Mercurian Government, this has not occasioned the NHA to exercise an executive function. The NHA is not a state organ of the Respondent and its actions, including the termination of the LTA, are not attributable to the Respondent.

B The LTA is not an investment

81 The substantive protections of the Mercuria-Basheera BIT are only afforded to investments.[125] Article 1(1) of the Mercuria-Basheera BIT provides that an investment

[121] ARSIWA, Art 4(1).
[122] Ibid.
[123] See eg *ELSI Case*.
[124] FDI Moot case 2017, 50 [1591].
[125] See Mereminskaya and Mascareño, 826.

includes a claim to money under a contract. This Tribunal should take into account the intrinsic meaning of the term investment to determine whether the LTA is an investment.[126]

82 The LTA does not meet the objective criteria for an investment.[127] Therefore, the LTA is not entitled to the benefits of the Mercuria-Basheera BIT and this Tribunal cannot decide on matters relating to the LTA.

C The termination does not amount to a breach of the BIT

83 Article 3(3) of the Mercuria-Basheera BIT is an umbrella clause. When a contract is an investment, an umbrella clause attempts to elevate a breach of that contract to a breach of a BIT. A provision of a treaty, which requires contracting parties to observe any obligation flowing from an investment, is not valid.[128] This is because an umbrella clause would otherwise hold States accountable for an indeterminate amount of investment contracts operating in their territory.[129] Such a clause will not extend a breach of an investment to a breach of a treaty.[130] The tribunal in *SGS v Pakistan* found that a clause stating '[e]ither contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other contracting party' was not valid.[131]

84 Article 3(3) of the Mercuria-Basheera 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.' This clause is invalid and does not have the effect of elevating a breach of the LTA to a breach of the Mercuria-Basheera BIT.

D Respondent did not terminate as a sovereign act

85 While the Respondent maintains its position that umbrella clauses are invalid, some tribunals have found that a breach of an investment will be elevated to a breach of the

[126] See above Ground I(A).
[127] Ibid
[128] *SGS v Pakistan*, 367 [173].
[129] Ibid.
[130] Ibid.
[131] See Ibid.

treaty only when the breach is a sovereign act.[132] Therefore, a State's breach of a contract 'in ordinary commercial intercourse' does not constitute a violation of international law.[133] A State performs a sovereign act when it significantly interferes with a party's performance of a contract.[134]

86 In 2008, the NHA terminated the LTA on the basis of the Claimant's unsatisfactory performance.[135] This was a commercial decision based primarily on the Claimant's failure to maintain an acceptable pricing arrangement for Sanior. The NHA required a discount on the price of Sanior to continue treating the exponentially increasing prevalence of greyscale. The NHA elected to terminate on its own volition and not as a result of interference by the Mercurian government.

E The LTA had a dispute resolution clause

87 When parties to an investment contract specifically negotiate a dispute resolution mechanism for that contract, that mechanism prevails over any dispute resolution in an applicable BIT. A BIT is intended to form a framework that supports and supplements, but does not override or replace, the actual negotiated investment agreements between the investor and the host State.[136] Therefore, a tribunal constituted under a BIT does not have jurisdiction over disputes covered by a separate dispute resolution mechanism within the underlying investment.[137] An investment's dispute resolution clause is more likely to apply to the extent that the BIT 'was not concluded with any specific investment or contract in view'.[138]

88 In 2004, the Claimant and the NHA concluded the LTA which stipulated the parties' rights and obligations regarding the supply of Sanior in Mercuria.[139] The LTA contained a dispute resolution mechanism specifically designed to resolve disputes under the LTA.[140] In contrast, Article 8 of the Mercuria-Basheera BIT provides for potential resolution of any dispute which may fall under the ambit of that treaty. It is

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[132] Schwebel, 431–2; *El Paso v Argentina* 28 [81]; *CMS v Argentina*, 86–7 [299]; *Sempra v Argentina*, 92 [310].
[133] Schwebel, 431–2.
[134] *CMS v Argentina*, 86–7 [299]; *Joy Mining v Egypt*, 17 [72].
[135] FDI Moot Case 2017, 30 [930].
[136] *SGS v Philippines*, 54 [141].
[137] Ibid 43–49 [113]–[129], 53–60 [136]–[155]; *Bureau Veritas v Paraguay*, 63 [159].
[138] *SGS v Philippines*, 54 [141].
[139] FDI Moot Case 2017, 28 [840[–[844].
[140] See Ibid 30 [930]–[931].

apparent that the Mercuria-Basheera BIT was drafted in general terms without any consideration of specific investments. Because the LTA contains a specifically negotiated dispute resolution mechanism for breaches of the LTA, that mechanism prevails over Article 8 of the Mercuria-Basheera BIT. Therefore, this Tribunal should decline to exercise jurisdiction over any of the Claimant's submissions concerning alleged breaches of the LTA.

PRAYER FOR RELIEF

The Respondent respectfully requests that this Tribunal adjudge and declare that:

I This Tribunal does not have jurisdiction over the claims in relation to the LTA Award;

II The Respondent's invocation of Article 2(1) of the Mercuria-Basheera BIT denies this Tribunal jurisdiction to hear this dispute;

III The enactment of Law No 8458/09 and/or the grant of a license for the Claimant's patented invention does not amount to a breach of the Mercuria-Basheera BIT, in particular, the fair and equitable treatment standard;

IV The conduct of the Respondent's judiciary does not breach any obligations owed under Article 3 of the Mercuria-Basheera BIT; and

V The NHA's termination of the LTA does not amount to a violation of Article 3(3) of the Mercuria-Basheera BIT.

25 September 2017

Signed for and on behalf of the Republic of Mercuria

Jeff Lang

Jeff Lang

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