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Memorial for Respondent

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PCA Case n. 2016-74

On behalf of

The Republic of Mercuria

Respondent

v.

Atton Boro Limited

Claimant

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Statement of Facts

1. Atton Boro Limited (hereinafter the "**Claimant**") is a private company with limited liability incorporated under the laws of the Kingdom of Basheera ("**Basheera**"). On 11 January 1998, the Republic of Mercuria ("**Mercuria**") and the Kingdom of Basheera concluded an Agreement for the Promotion and Reciprocal Protection of Investments (the "**BIT**").
2. Atton Boro and Company, a corporation organized under the laws of the People's Republic of Reef ("**Reef**"), incorporated Atton Boro Limited as subsidiary company responsible for carrying on business in South American and African countries for the Atton Boro and Company. For this purpose, a number of patents were assigned to Atton Boro Limited, guarantying Atton Boro Group an established presence in Basheera's pharmaceutical market.
3. Atton Boro entered in Mercurian market by concluding some agreements with its government and with the recently created NHA. The Ministry of Health directed the NHA to estimate the requirement in Mercuria and invited offers from pharmaceutical companies for long-term strategic supply of FDC greyscale medicines at discounted rates.
4. Atton Boro Group synthesized a compound called Valervite, which radically improved greyscale's treatment and went on to obtain patents in 50 jurisdictions, including the Mercurian Patent n. 0187204 granted on 21 February 1998. With these patents, Claimant created the medicine Sanior, which contains the active ingredient, Valtervite.
5. A Long Term Agreement ("**LTA**") was signed due to an invitation of the NHA to Atton Boro. Under the LTA, the NHA would purchase Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders. The LTA also stipulated the minimum guaranteed annual order-value, and a validity period of 10 years effective from commencement date subject to the Supplier's satisfactory performance.
6. Claimant set up a robust manufacturing base in Mercuria, and eventually expanded into other verticals in the pharmaceutical sector in Mercuria. By the end of 2006 about a third of all greyscale patients were being treated using Sanior. Sanior supply in

healthcare centers was successful and its demand was increasing each year. Atton Boro scaled up it operation to timely supply of the required quantities of medicine.

7. In early 2008, NHA informed Atton Boro that it would need to renegotiate the price for Sanior, stating that it had "grossly underestimated the number of greyscale cases in Mercuria" and needed to supply medicines for nearly twice the number of patients. NHA demanded further discounts of 40% and refused to engage in reasonable negotiation even upon being told that it would reduce Atton Boro's margins to virtually nothing

8. On 10 June 2008, the NHA unilaterally terminated the LTA, citing unsatisfactory performance by Atton Boro, after the Minister for Health and the President of Mercuria met privately with NHA's directors to resolve budgetary problems that had arisen in government healthcare programs.

9. Atton Boro challenged the termination in arbitration and obtained an award in its favor. The award determined NHA to pay USD 40,000,000 in damages for breach of the LTA. On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy.

10. The court granted some adjournments and other procedural issues caused the award to remains unenforced. However, Atton Boro presumably was aware that Mercuria is a developing country with an overburdened judiciary struggling to cater to its population of 67 million people. The claim is based solely on pendency or mere delay of proceedings, and therefore must fail.

11. On 10 October 2009, the President of Mercuria promulgated national Legislation for its intellectual property law, introducing a provision for use of patented inventions without the authorization of the owner (LAW n. 8458/09). In November 2009, HG-Pharma, a mercurian generic drug manufacturer, filed an application before the High Court for grant of a license to manufacture Atton Boro's patented active ingredient, Valtervite.

12. Because greyscale is a severe and pervasive epidemic which threatens the well-being of thousands of working-age individuals in Mercuria, the court heard the matter through a fast-tracked process, and granted HG-Pharma the license on 1 April 2010 to manufacture and market the drug by paying a mere 1% royalty of its total revenues to Atton Boro.

13. In February 2015, the head of Atton Boro's Mercuria division announced that the company would no longer be dealing in Sanior in Mercuria, while Atton Boro intends

to continue pursuing every available legal recourse to try to achieve any kind of economic gain over the State of Mercuria.

Arguments

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS IN RELATION TO THE AWARD.

14. This tribunal does not have jurisdiction over the claims because **(A)** the Award itself does not constitute an investment under the BIT and does not fulfill its definition under the article 1.1, and **(B)** because the contractual relationship that gave rise to the Award is not an investment under the BIT, being the Award, as result of the entire operation, not an investment as well.

A. THE AWARD ITSELF DOES NOT CONSTITUTE AN INVESTMENT UNDER THE ARTICLE 1.1 OF THE BIT.

15. The Award itself does not constitutes an investment under the treaty because the Contracting parties have adopted a specific purpose to the present treaty, which brings the necessity of contribution to the local economy to an investment be constituted; and the Award does not fulfill the inherent meaning of investment.
16. The first source of interpretation for determining what constitutes or not investment under a given treaty is the "ordinary meaning to be given to the terms of the treaty in its context and in the light of its object and purpose" [1]. Although one of the Contracting States has not yet ratified VCLT, its standards of interpretation must be considered as customary international law, being fully applicable at the international level, independent of ratification of the Treaty, according to the firm position of the International Court of Justice [2].
17. In Mercuria-Basheera BIT, Article 1.1, the Contracting States expressly stipulated that investment means “any kind of asset held or invested [...] by an investor of one Contracting Party in the territory of the other ". At first glance, it may seem that a broad definition of investment by the Contracting States was adopted by stipulating "an extremely general statement of coverage" [3], however, the interpretation of this clause must take into account the object and purpose of the treaty to be interpreted.

[1] Vienna Convention on the law of treaties, art. 31
[2] ICJ Reports 53 (1991), at 69–70, para. 48. In the Iron Rhine (‘Ijzeren Rijn’) Railway Arbitration (Belgium v Netherlands), 24 May 2005, available at <www.pca-cpa.org>, at para. 45. Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, 20 April 2010, at para. 65.
[3] Noah RUBINS, International Investment, Political Risk and Dispute Resolution, 2005, p. 291

18. One of the first elements to be taken into consideration by many tribunals to determine the standard of application and interpretation of the treaty is the preamble, as it is a statement in which Contracting parties outline their objectives in signing the BIT [4]. In the present BIT, the preamble is clear in stating that States celebrate the treaty

> *"Recognizing that agreement on the treatment accorded to such an investment will stimulate the flow of private capital and the economic development of the Contracting Parties".*

19. Clearly, one of the purposes of this Bilateral Treaty is the stimulation of the capital flow providing economic development of the States. This objective must be taken into account by the tribunal at the time of interpretation of any contractual clause, in particular clause 1.1, which establishes the concept of investment, since it is the cornerstone for determining what facts are or are not under the protection of the treaty.

20. An investment must be related to the productive sector of the local economy [5], since it must be an enterprise that generates internal wealth in a country, generating employment and direct participation in productive capacity and economic development, as the parties intended to make clear in the preamble of the BIT. It is this purpose that must be taken into account when interpreting Article 1.1, under the light of what is stipulated in Article 31 of the VCLT.

21. In *Lemire v. Ukraine* case, the tribunal interpreting the preamble provision to promote economic development stated that

> *"economic development is an objective which should benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy"* [6].

22. Thus, for an investment to contribute to local development, there must be some increase in some aspect of the economy of a State. A contribution can take any form. It is not limited to financial terms but also includes know-how, equipment, personnel and services [7]. None of the mentioned forms of contribution occurred. What Atton Boro

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[4] Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award (1 July 2004); CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006).

[5] STERN, Brigitte. O contencioso dos Investimentos Internacionais. Translated by Maria Eugência Chiampi Cortez. Barueri, SP: Manole. 2003.

[6] Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), ¶ 273.

[7] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, (31 October 2012), ¶ 297.

Limited is trying convince this tribunal is that an Award, that has as sole beneficiary this company, without any kind of contribution to the State, can be interpreted as an investment under the BIT.

23. There is no doubt that when interpreting clause 1.1 of the BIT under its object and purpose, there will be a need to have a contribution to the economy of the host State, which was not even close to occur with the attempt to enforce the arbitral Award. Therefore, this tribunal has no jurisdiction to decide over this claim.

24. If these reasons are not enough, the term investment has in itself an inherent meaning that must be taken into account by the court. In *Romak S.A. v. Uzbekistan* case, the tribunal makes clear that the inherent meaning of investment entails "a contribution that extends over a certain period of time and that involves some risk" [8] and that even though an asset falls within some broad concept stipulated in the BIT, if there is not the fulfillment of the inherent meaning it "does not transform it into an 'investment'" [9], because "labeling [...] is no substitute for analysis" [10].

25. Also, in the economic debate, it is clear the existence of an inherent meaning of investment, generally taking into account requirements such as

> *"(a) the transfer of funds, (b) a longer-term Project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the Project, and (e) a business risk"* [11].

26. None of these requirements are fulfilled, which definitively demonstrate the lack of jurisdiction of this tribunal over claims in relation to the Award, since it does not fulfill the concept of investment, nor what is provided in Article 1.1 of Mercuria-Basheera BIT.

B. THE AWARD IS NOT AN INVESTMENT BECAUSE IT DERIVES FROM THE LTA, WHICH IS NOT AN INVESTMENT BY ITSELF.

27. Some precedents hold that an Award can be considered an investment for the purpose of protecting and applying a BIT because it is the result of an investment already constituted under the BIT. According to this position, the Award is the crystallization of the rights and obligations of the parties in relation to an investment previously made.

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[8] Romak SA v Uzbekistan, Award, PCA Case No AA280, IIC 400 (2009), 26th November 2009, Permanent Court of Arbitration [PCA], ¶ 207.

[9] Ibid.

[10] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award (1 November 1999), ¶ 90.

[11] DOLZER, Rudolf and SCHREUER, Christoph. Principles of International Investment Law. 2. ed. United Kingdom: Oxford University Press. 2012.

The rights contained in the Award are not the creation of the Arbitral Tribunal, but are the adjudicatory interpretation of the underneath contractual relationship, which is the source of the rights and obligations contained in the Award.

28. Such a position was defended in the leading case *Saipem v Bangladesh*, in which the tribunal held that the arbitral award could be considered an investment for the purposes of tribunal jurisdiction, since "the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract" [12]. However, the tribunal asserts that "the entire operation" [13] should be taken into account, because only if the facts that gave rise to the arbitral award derive from an investment, there is protection under the BIT.

29. Following the same understanding, the tribunal in *Romak SA v Uzbekistan* asserted that

> *"if the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising therefrom in an arbitral award can not transform it into an investment"* [14].

30. Therefore, what the tribunal states is that the characterization of an Award as an investment is directly bond to the characterization or not of the contract that gave rise to the Award as an investment, and this should be the route taken by the court to determine its jurisdiction over the matter.

31. In the same line the tribunal in *White Industries v India* case stated that to the Award constitutes an investment it should "constitute part of White's original investment (i.e., being a crystallization of its rights under the Contract)". [15]

32. Therefore, only if the contract that gave rise to the arbitration proceedings and to the Award that is invoked as an investment is an investment *per se*, the Award, as a result of the operation in its entirety and the crystallization of these contractual rights, becomes an investment also protected by the investment treaty.

33. In the present case, the Award came from the unilateral termination of the Long-Term Agreement signed by Atton Boro Limited and NHA. The arbitral tribunal understood that there was a breach in the LTA, therefore this decision was directly derived from the contract, being an extension of its rights and obligations. However, even though the NHA is politically accountable to the government of the state and funded by national taxation, which confirms its nature as a public company, the agreement entered into

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[12] Saipem S.p.A. v. The People's Republic of Bangladesh (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), ¶ 127.

[13] Ibid. ¶ 110.

[14] Romak SA v Uzbekistan, Award, PCA Case No AA280, IIC 400 (2009), 26th November 2009, Permanent Court of Arbitration [PCA], ¶ 211.

[15] White Industries Australia Limited v The Republic of India, UNCITRAL, Final Award of 30 November 2011, ¶ 7.6.10.

with Atton Boro Limited was an agreement between Claimant and the State of Basheera acting "*iure gestionis*". The State signed a contract regulated under the civil and commercial law, acting exclusively in is private nature. Therefore, it was a State action outside its sovereign power, which does not characterize an investment agreement between Atton Boro Limited and NHA.

34. It is undeniable that LTA signed by the Claimant and the NHA and the Award object of the present claim is not an investment for purposes of the BIT, therefore, this court does not have jurisdiction for the present case.

ISSUE 2: THE DENIAL OF BENEFITS CLAUSE IS APPLICABLE TO CLAIMANT.

35. The article 2 of the present BIT is applicable to claimant because **(A)** Claimant is a “mailbox company” and does not have substantial business activities on the State of Basheera. Furthermore, **(B)** the invocation of this clause would not constitute a retrospective application of the article 2 of the BIT.

A. CLAIMANT IS A “MAILBOX COMPANY”.

36. Although Atton Boro Limited is legally incorporated company in Basheera, it has no substantial business activities in its territory and it is not whole protected by the underlying BIT. Atton Boro Limited is also a “mailbox company” for the purpose of the article 2 of the BIT application because it is completely controlled by a third state company.

37. Article 1.2 (b) of the BIT provides for a “place of incorporation” standard to determine the nationality of corporate investors. As a broad clause, the treaty also sets forth an article of denial of benefits with the aim of preventing companies that do not have an economic connection with the Contracting State from using this instrument.

38. To this end, two standards for denial of benefits have been established in the BIT article 2.1. The first one occurs when a legal entity is controlled or owned by nationals or nationals of a third State and, in addition, the second one when the company does not have substantial business activities in the territory of the Contracting State. Both requirements are autonomous to deny the benefits of the treaty [16]. If one of them is fulfilled, Article 2 of the BIT can be invoked.

39. One of the established requirements was the possibility of denial of benefits "if citizens or nationals of a third state own or control such entity". This first requirement is

[16] SCHREUER, Christoph. Nationality of investors: Legitimate restrictions vs. Business interests. ICSID Review - Foreign Investment Law Journal, Volume 24, Number 2, Fall 2009, pp. 521-527.

evidently fulfilled, since the fact that the shares of Atton Boro Limited are all ultimately controlled by Atton Boro and Company, which is a corporation organized under the laws of Reef.

40. Therefore, clearly by the first requirement, Atton Boro Limited is a "mailbox company" because it is a company whose entire shares are owned by another company, with diverse nationality, and therefore have no shares or capital of nationality of the State of Basheera , legitimizing its exclusion from the benefits of the BIT.

41. But even if it was understood by the need to cumulate the requirements, Claimant does not also have substantial business activities in the State of Basheera. In Amto v. Ukraine case [17], the tribunal, interpreting this standard, stated that the purpose of this clause was to exclude investors "which have adopted the nationality of convenience" [18].

42. Therefore, it is clear that Atton Boro Limited is a "mailbox company" and has no substantial business activities in the Basheera territory, as it is only a vehicle for carrying on business in South American and African countries. It is only a paper company that does not have an effective participation in the local market, nor any type of management over any substantial activity of the Atton Boro Group, being all kind of directive and asset provided by the main company Atton Boro and Company.

43. Atton Boro rented out an office space, opened a bank account, hired a manager and an accountant, and commenced administrative activities in Basheera, this was everything that was done by this company, which shows that it effectively has the sole purpose of being a company with bureaucratic services for the maintenance of its constitution and legality, without any objective of commercial participation. Since 1998, Claimant has had only 2 to 6 permanent employees working in the management of its portfolio of patents in South America and Africa, as well as providing tax and regulatory approval services at that location to the Atton Boro Group, confirming its administrative purpose and shell company nature.

44. The BIT intends to exclude those companies that exist only on paper, without any activity, which does not have a life of its own [19]. It is not necessary that the company has activity of a large magnitude or that it is the headquarters of the group of companies, but must have at least a real activity in the territory, have some type of commercial purpose, and not to be a company whose sole and exclusive activity in the

[17] Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award (26 March 2008).
[18] Ibid. ¶ 69.
[19] Denial of Benefits and Article 17 of the Energy Charter Treaty Loukas A. Mistelis* and Crina Mihaela Baltag

territory of origin is to maintain its own regularity, nothing more, such as Atton Boro Limited.

45. In the present case, it is extremely evident that Claimant is a "mailbox company" for the purposes of Article 2 of the BIT, since it is a company whose sole activity is self-preservation, with no entry in the local market, nor any type of commercial activity, thus the requirements for invoking Article 2 of the treaty are fully met.

B. THE INVOCATION OF THE DENIAL OF BENEFITS CLAUSE DOES NOT CONSTITUTE A RETROSPECTIVE APPLICATION OF THE BIT.

46. The precedents under the ECT state that the application of the denial of benefits after the initiation of arbitration would give an undue retrospective effect to this clause [20], however, it is not correct to understand that the application of the denial of benefits would have this effects, since, despite the similar wording of Clause 2 of the BIT and clause 17 of the ECT, the precedents that applied the latter can not be applied in the present case, given the total difference in object and purpose between the treaties.

47. The wording of the clause adopted by the parties to discipline the denial of benefits provision is similar to clause 17 in the Energy Charter Treaty. But the adoption of this same wording does not lead to a necessary adoption of an understanding similar to that given clause 17 of the ECT. It is known that the standard of interpretation in customary international law is the "ordinary meaning of the words to be given to the terms of the treaty in its context and in the light of its object and purpose" [21], therefore, even though Contracting Parties have adopted a normative provision similar to that existing in the ECT, one must always keep in mind the object and purpose of the treaty to be interpreted for the correct application of its provisions.

48. Thus, for the interpretation of Article 2 of the BIT, the understandings of arbitral tribunals that have already applied clause 17 of the ECT are not applicable because the object and purpose of the multilateral treaty are not the same as in this BIT, which renders two different interpretations for these instruments. First, the ECT is a multilateral treaty, so its object, purpose and interpretation must take this factor into account, since its relation covers several states and investors from different nations, all

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[20] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), ¶ 162.; Liman Caspian Oil BV andNCL Dutch Investment BV v.Republic ofKazakhstan, ICSID Case No. ARB/07/14, Award (22 June 2010) (Böckstiegel, Hobér, Crawford), ¶ 225; Anatolie Stati et al. v. The Republic of Kazakhstan, SCC Arbitration V (116/2010), Award (19 December 2013); Yukos Universal Ltd (Isle of Man) v. TheRussian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (30 november 2009)

[21] Vienna Convention on the law of treaties, art. 31.

covered by the same treaty. Second, ECT in its Article 2 expressly states that its purpose is "to promote long-term co-operation in the energy field", therefore

> *"Such long-term co-operation requires, and also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages."* [22]

49. The nature of a multilateral treaty, which establishes a long-term relationship between several States, besides having as its object a strategic sector that is that of energy, makes ECT a unique treaty, which, by its delicacy, requires a greater protection coverage, as well as a greater predictability of the agents who submit to them, or believe so, at the time of their application and interpretation. Thus, applying the same understanding of precedents on the basis of this treaty is wholly misplaced.

50. The leading case involving denial of benefits under the ECT was *Plama v. Bulgaria*, which is used up to the present day as an interpretive parameter and precedent for the application of the denial of benefits under this treaty. The tribunal of this case held that in order to be applicable to the denial of benefits clause, the State should have informed the investor of its intention to deny the benefits of the treaty before the actual realization of the investment [23], and can not invoke this clause after the party already have invested in its territory and invoked the trusteeship of the arbitral tribunal.

51. For the tribunal, the denial of benefits clause *per se* constitutes a "half notice" [24], and the State must complete its interest in denying the benefit through other mechanisms, prior to the investment.

52. Finally, the tribunal held that giving retrospective effect to the denial of benefits clause would be inconsistent with the purposes of the investment protection treaty, and that the State's denial of benefit to that investor would only have effect from that date onwards, not reaching past and accomplished facts [25].

53. Indeed, the *Plama v. Bulgaria* Decision on Jurisdiction has led to an entirely separate line of investment arbitration jurisprudence concerning the impermissible "retrospective" application of denial of benefits provisions. A number of tribunals have come to interpret the denial of benefits clause following the same reasoning as this leading case.

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[22] LimanCaspian Oil BV andNCL Dutch Investment BV v.Republic ofKazakhstan, ICSID Case No. ARB/07/14, Award (22 June 2010)

[23] Plama Consortium Limited v.Republic ofBulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), ¶ 162.

[24] Ibid., ¶ 157.

[25] Ibid., ¶ 165.

54. However, only tribunals invoking this clause under the ECT follow this line of interpretation. When this clause was invoked under other treaties, the understanding of the tribunals is usually diverse, demonstrating that the interpretation under the ECT is unique and exclusive to that treaty.
55. The tribunal of *Guaracachi v. Bolivia* case understood that whenever a BIT includes a denial of benefits clause, "the consent by the host State to arbitration itself is conditional and thus may be denied by it" [26]. Moreover, in this case all investors shall be "aware of the possibility of such denial, such that legitimate expectations are frustrated by that denial of benefits" [27]. Finally, it said that the denial of benefits clause is part of the pact between Contracting Parties, and investors should be aware of this possibility [28].
56. Other tribunals followed the same line. In *Pac Rim Cayman LLC v. El Salvador*, the tribunal understood that

> *"Any earlier time limit could not be justified on the wording of [the provision] ... and, further, it would create considerable practical difficulties... Inconsistent with this provision's object and purpose".* [29]

57. In the *Ulysseas, Inc. v. Republic of Ecuador* case the reasoning was that the denial of benefits right can "be exercised by the State at the time when such advantages are sought by the investor through a request for arbitration" [30]. And lastly, *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador* case, the tribunal stated that the State "announced the denial of benefits […] at the proper stage of the proceedings, i.e. upon raising its objections to jurisdiction". [31]
58. It is undeniable that the application of Article 2 to the Claimant is not to give a retrospective effect to denial of benefits clause, but rather to enforce what was previously agreed by the Contracting Parties in the BIT. The investor should be aware that this provision exists in the treaty and must therefore structure its investment so that the BIT duly covers it. Denial of benefits clauses are intended to limit broad treaties, such as that of the case, to shell companies, in order to encourage that there is no such

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[26] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award, (31 January 2014). ¶ 372.
[27] Ibid.
[28] Ibid, ¶ 375.
[29] Pac Rim Cayman LLC v. The Republic ofEl Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) (Veeder, Tawil, Stern), ¶ 4.85
[30] Ulysseas, Inc. v. Republic of Ecuador, UNCITRAL, Interim Award (28 September 2010) (Bernardini, Pryles, Stern), ¶ 172
[31] Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/9, Award (2 June 2009) (Sepúlveda Amor, Rooney, Reisman), ¶ 71

practice by investors. If Claimant used a "mailbox company" to carry out the investment, it should be aware of the reservation made by the State of Mercuria and the possibility of it being invoked at the objections to jurisdiction stage.

59. Therefore, Clause 2 of the BIT is fully applicable to Atton Boro Limited, since there is no time reservation in the treaty, and the State of Mercuria may invoke its effects even after the arbitration has been initiated.

ISSUE 3: THERE WAS NO VIOLATION TO THE FAIR AND EQUITABLE TREATMENT STANDARD.

60. Claimant alleges Respondent has breached article 3(2) of the Mercuria-Basheera BIT by failing to accord Claimant's investment fair and equitable treatment (FET), as well as full protection and security. Article 3(2) of the BIT provides that "investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection"[32]. In addition to that

> *"neither contracting party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory"*[33].

61. As far as the claims go, **(A)** the legal standard for interpreting the FET provision is that of the minimum standard of treatment due under general international law **(B)** Respondent was transparent and did not breach Claimant's legitimate expectations throughout the proceedings of enactment of Law n. 8458/09, **(C)** did not violate FET when granting the compulsory license to HG-Pharma.

A. FAIR AND EQUITABLE TREATMENT: THE LEGAL STANDARD.

62. This Tribunal must apply the Minimum Standard of Treatment when applying the Fair and Equitable Treatment set forth in article 3(1) of the Mercuria-Basheera BIT. When interpreting the language of any clauses of the BIT, the Tribunal must search for the ordinary meaning of the treaty language in order not to deviate from the intention of the parties when signing it, as provided for in article 31 of the VCLT.

63. There is no indication in the treaty of the real meaning of the expression Fair and Equitable Treatment, especially in the absence of any sign that it is an autonomous standard of treatment, thus the ordinary meaning of the term will naturally lead to the complex system of rights conferred under international law. Therefore, the FET clause

[32] BIT Art. 3(2)

[33] Ibid.

provided for in the BIT is a legal term of art that leads to the minimum standard of treatment standard under general international law.

64. In addition, Mercuria-Basheera BIT was signed in1998. FET clauses of treaties signed at that time reflected the minimum standard of treatment. In *genin,* the tribunal concluded that the FET clause in the US-Estonia BIT of 1994 should be read as the minimum treatment standard of customary international law. Therefore, this is the meaning to be given to the clause in this case.

65. In addition, in *Philip Morris V. Uruguay*, a case that also dealt with allegations of FET denial in sanctioning laws that affected investors' intellectual property, the tribunal held that:

> *"the absence of any reference in article 3(2) of the BIT to 'treatment in accordance with international law or customary international law' or a 'minimum standard of treatment', as provided by some other investment treaties with regard to the FET standard, does not mean that the BIT creates an 'autonomous' FET standard, as contended by Claimants and disputed by the respondent"*[34].

66. Therefore, when assessing the FET standard, the tribunal should use the minimum standard of treatment as a tool for determining if there was a denial of FET in the case. As established in *Neer*, the States conduct need to amount to "an outrage, to bad faith, to willful neglect of duty" so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency[35].

67. As though as new arbitral tribunal have evolved the MST since *Neer*, it has not expanded to include new elements such as legitimate expectations, for example. In *Glamis*, the tribunal defined FET as a violation of the customary international law minimum standard of treatment, and requiring "an act that is sufficiently egregious and shocking": such as "gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process"[36] and thereon.

68. This means that all of the alleged actions claimed by Claimant should meet the MST, which is a quite high threshold. As it will be seen in the next paragraphs, none of the claims on denial of FET are to be accepted.

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[34] Philip Morris Brands Sàrl and Philip Morris Products S.A. V. Oriental Republic of Uruguay, final award on the merits. July 8, 2016. ICSID Case No. ARB/10/7.

[35] L. F. H. Neer and Pauline Neer v. United Mexican States, Opinion, 15 October 1926, 4 RIAA (1926) 60 , para 61-62

[36] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009, para. 627

B. THE ENACTMENT OF LAW 8458/09 DID NOT BREACH CLAIMANT'S LEGITIMATE EXPECTATIONS.

69. In examining the case, especially as it regards the existence or not of a breach of the FET, it is necessary to recall the object in dispute: Valtervite's property, Mercurian Patent No. 0187204. That is, intellectual property subject to the legal framework of the place where it is guaranteed. Unlike physical property, intellectual property is not regarded as a natural right guaranteed by the state, but, in fact, a right created by it[37].

70. For this reason, the mere existence of the intellectual property right has to be interpreted from - and only in this way - the context in which it was created: the legal framework of the host state. Its existence, limits, validity and powers are the consequence of a state's public policy discretion: the state will legally protect an idea of the inventor as long as it, in return, is used for a socially beneficial end[38]. As a consequence, this right is maintained only to the extent that it brings some benefit to the population of the host state.

71. Both Mercuria and Basheera are members of TRIPS, the Paris Convention and Doha Agreement. This means that both states have ratified into their legal frameworks the provisions contained within these agreements. An investor cannot, therefore, argue the lack of transparency nor the breach of their legitimate expectations when one of these states choose to exercise a state right provided by those treaties.

72. The TRIPS agreement itself provides in its article 1 that members shall give effect to the provisions of the agreement, as it had been negotiated back in 1994 in the Uruguay Round[39]. The whole objective behind TRIPS was to "promote effective and adequate protection of intellectual property rights". Members had the duty to review and adequate their internal legal system in order to meet the minimum requirements put forth in the agreement.

73. It is to say that, at least since the date Valtervite patent was granted, investors knew that Mercuria was implementing the changes imposed by TRIPS. It is safe to say that the intellectual property law of Mercuria has undergone several changes to suit the treaty. One of the most recent was the enactment of Law 8458/09, which included the possibility of granting compulsory licenses for the first time in the Mercuria Intellectual

[37] W. GRANTHAM, The Arbitrability of International 129 Intellectual Property Disputes, 14 Berkeley J.Intl. (1996), p. 182

[38] C. S. GIBSON, A Look at the Compulsory License in 129,130,135, Investment Arbitration: The Case of Indirect Expropriation. 198,211,223, American University International Law Review, Vol. 25; 225 Suffolk University Law School Research Paper No. 09-32, p.25

[39] TRIPS, agreement on trade related aspects of intellectual property rights

Property Law. According to the record, before the amendment to the Mercurian IP Law, there was no legal provision in Mercuria's legal system for the granting of compulsory licenses. What Law 8458/09 did was simply to adapt domestic laws to Article 31 of TRIPS.

74. Regarding the FET standard, many tribunals decided that it can incorporate a requirement for transparency. This means that the State must maintain an active and transparent communication with the investor so that investors always know what changes will affect their investment. In theory, information asymmetry can place the investor in a very hard position in terms of financial and market planning[40].

75. The first case to establish this aspect of FET was *Metalclad*. In it, the Mexican government failed to answer queries about a construction license application that ended up being denied only after the investor had already started its operations[41]. Also, in *Tecmed*, the tribunal ruled that the state must act in a transparent manner in its dealings with the foreign investor so that it knows in advance all the rules that will govern its investment[42].

76. In *Waste Management*, the tribunal decided the FET standard involved

> "*a lack of due process leading to an outcome which offends judicial propriety – as may be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of candour in administrative process.*"

77. According to the OEPC Tribunal, stability of the legal framework is, indeed, an essential element of FET[43].

78. The problem, however, is that Mercuria's legal framework has remained stable throughout the duration of the investment. A stable legal system is not immutable, but one whose changes do not escape what is reasonably predictable within previous actions. Mercuria had already signed TRIPS, an international instrument expressly providing that member countries should bring their domestic laws into line with the model provided in it, including Article 31, which provided for compulsory licenses. At least since 1998, the year in which Valtervite patent was granted in Mercuria, it was

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[40] Collins, David. An introduction to international investment law. Cambrige University Press, 2017, p. 132

[41] ICSID case No ARB(AF)/97/1 (30 august 2000).

[42] Técnicas Medioambientales TECMED v. Mexico, ICSID Case No.ARB(AF)/00/02. Award (2003)

[43] Occidental Exploration and Production Company v. Ecuador, 144 LCIA Case No UN 3467, IIC 202. Award (2004), para 183

perfectly foreseeable that at some point Mercuria would sanction changes in its intellectual property law in order to fit it to the mencioned article.

79. There is therefore no inconsistency, lack of transparency, arbitrariness, due process breach or breach of legitimate expectations when the state does what it has already promised to do even before the investment existed. As a consequence, claimant cannot argue that the enactment of Law 8458/09 happened in breach of FET.

80. In addition, if Claimant claims to be a Basheera national, it is prevented from arguing the lack of knowledge on how TRIPS operates inside state members since Basheera also signed the convention. Thus, the existence of compulsory licenses should come as no surprise to Claimant, unless Claimant (***i***) were no national of Basheera, which, in this case, would result in the absence of jurisdiction of this tribunal, or (***ii***) expected Mercuria would never conform its domestic laws to TRIPS. That would be its only possible expectation, although not a legitimate one.

C. THE GRANTING OF THE COMPULSORY LICENSE TO HG-PHARMA DID NOT BREACH FET.

81. While the existence of patents, as discussed above, is a state concession for social good, compulsory licensing is an extraordinary legal instrument used in cases where there is public interest in easing the previously granted monopoly on the patented idea. Via a compulsory license, a legal body allows other entities to legally make use of the patented idea for as long as necessary to meet the reasons for flexibilizing the monopoly[44]. That is, compulsory licenses are not the denial of the right to intellectual property but, in fact, another aspect of its existence. If IP rights exist only insofar as they serve public interest, this should be the parameter used to limit the legal monopoly.

82. Compulsory licensing basically means that the state intervened in the monopoly of an idea to ensure that a third party who wants to use that idea can. This kind of situation usually happens in face of some emergency need. The compulsory license, however, does not revoke the right of the investor to use the patent[45]. The investor can still make use of the patented idea, as in the case, having only its monopoly relaxed.

[44] Robert Bird, "The impact of compulsory licesing on foreign direct investment: a colletive bargaining approach", American Business Law Journal Vol. 45, Issue 2, summer

[45] Carlos M Correa "Bilateral investment agreements: Agents of new global standards for the protection of Intellectual property rights?" August 2004

83. Since article 31 of the TRIPS enables state members to use the patented idea without permission of its owner and, furthermore, even confer use of that idea to third parties in specific circumstances, Valtervite patent, secured under Mercurian Law in 1998, was always subject to compulsory licensing.
84. More than that, the Doha Declaration, to which Mercuria is also submitted, clearly states that "each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which licenses are granted"[46]. In other words, States are absolutely free to determine what are the reasons that may justify the granting of a compulsory licenses. This is a right that each and every state retains to itself due to the state concession nature of IP rights.
85. In the present case, Mercuria had already determined the cases in which it would grant compulsory licenses, that is (a) when the reasonable requirements of the public have not been satisfied; (b) when the patented invention is not available to the public at a reasonable price; and (c) the patented invention is not worked in the territory of Mercuria.
86. None of the above is shockingly unfair, discriminatory or manifestly arbitrary. They're all in line with what is expected of a state member of TRIPS and of the normal use of IP Rights: every monopoly granted idea should serve a public purpose, otherwise there is no reason for maintaining the monopoly.
87. Actually, article 31 of TRIPS itself, which composes part of the legal framework Claimant was subjected to, clearly states that compulsory licenses may be granted in cases of public purpose and anti-competitive practice[47]. Furthermore, Doha Declaration explicitly states that "the TRIPS agreement does not and should not prevent members from taking measures to protect public health[48]".
88. In the case, Mercurian IP Law had recently been amended to permit the issuance of compulsory licenses, conforming national law to what TRIPS and the Doha Declaration required. Only after the enactment of Law 8458/09, HG-Pharma filed an application before Mercuria's High Court under the provision, seeking grant of the compulsory license to produce Valtervite. The Court heard the matter and decided based solely on the facts and applicable law to the case. Moreover, the granting of the compulsory license to the generic manufacturer was time limited to the extent that greyscale was

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[46] Doha Declaration on the TRIPS Agreement and Public Health(2001), para5 (6)
[47] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), article 31(b)(k)
[48] Doha Declaration on the TRIPS Agreement and Public Health(2001)

still a threat to public health in Mercuria. All of those facts are uncontested, as seen in the record.

89. There is no deprivation of fair and equitable treatment in the issuance of the license to HG-Pharma. Claimant knew beforehand that this could happen once Mercuria was a party to TRIPS and submitted to the Doha Declaration. Also, according to PO2, "the Court determined the non-voluntary license terms by interpreting the provisions of section 23C and exercising its residual discretionary powers".

90. Claimant may also argue that there was a breach of due process in the granting of the license. This is simply not true. Despite Claimant being impleaded as a party before the high court in the matter of the license, this is due only to the fact that the matter was heard in a fast-tracked procedure applicable when there is an emergencial public need at stake, as it was the case.

91. Nevertheless, as provided for in PO2, Mercurian procedural law allows the patent-holder to challenge the validity of the non-voluntary license and the royalty after being granted, before a two-judge bench of the High Court. There is no denial of due process here.

92. Claimant was also granted 1% of all the revenue made on the sale of generic Valtervite-based products by HG-Pharma. This was a non-arbitrary and completely reasonable measure taken by the High Court once "royalty rates in Mercuria for drugs to treat incurable, non-fatal diseases ranged from 0.5% to 3% of revenue"[49].

93. Finally, Claimant may also argue that there was no emergencial situation at stake here, which is also not true. The compulsory license was granted to allow the population of Mercuria to have access to greyscale treatment. Greyscale is a chronic disease that causes the cracking of skin, progressively stiffening muscles, swollen limbs and severe joint pain, attacking mainly working-age individuals. It's a very serious disease that was spreading all across Mercuria. According to the 2006 NHA Report, there was an estimated number of 578,390 infected people in Mercuria by then, with a high risk of even more people getting infected by the day.

94. When assessing what may be considered as a urgency matter, the Doha Declaration, to which Respondent is submitted, states that:

> "*each state member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency… including those related to HIV/AIDS, tuberculosis, malaria and other epidemics, can*

[49] PO3, para 1590

> *represent a national emergency or other circumstances of extreme urgency*[50]"

95. Along with other infectious diseases, the continuous spreading of greyscale may be seen as a public emergency that allows for the granting on compulsory licenses as provided for in the Doha Declaration, Trips and Mercurian domestic Law. Therefore, the granting of the non-voluntary license to HG-Pharma did not breach FET.

ISSUE 4: MERCURIA IS NOT LIABLE UNDER ARTICLE 3 OF THE BIT FOR THE CONDUCT OF ITS JUDICIARY IN RELATION TO THE ENFORCEMENT PROCEEDINGS.

96. The conduct of Mercuria's judiciary was not in breach of article 3 of the BIT because Respondent accorded full protection and security to Claimant's investment.

97. Article 3(1) of the BIT establishes the provision that the State should guarantee full protection and security (FPS) to investors. It is clear that this type of international standard suggests that the state has an obligation to take active measures to protect international investment from adverse effects from private parties or from state agencies[51]. Currently, there is no doubt that the FPS standard relates to the physical protection of the investor's assets. As defined in the *Saluka*, FPS "obliges the State to provide certain level of protection to foreign investment from physical damage"[52]. This position is also adopted in *Eastern Sugar v. Czech Republic*[53].

98. The FPS serves not only to protect the investor's assets from third-party attacks, but also from attitudes taken by the host state itself. In *Biwatter,* the Tribunal has expressly established that the concept of FPS "also extends to actions by organs and representatives of the state itself"[54], a position also accepted in *AAPL v. Sri Lankan*[55] and *AMT v. Zaire*[56].

99. Although this case deals with the licensing of non-physical investments – since patents are involved – nowadays FPS is also understood as a protection against intangible attacks, since the idea of legal protection is incorporated into the FPS. In *CME v. Czech*

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[50] Doha Declaration on the TRIPS Agreement and Public Health(2001),

[51] Christoph Schreur.**Full Protection and Security**. Article published by the Journal of International Dispute Settlement, (2010), pp. 1-17, p.1

[52] Saluka, para 483

[53] Eastern Sugar v Czech Republic, Partial Award, 27 March 2007, para 203.

[54] Biwater Gauff v Tanzania, Award, 24 July 2008, para 730.

[55] AAPL v Sri Lanka, Award, 21 June 1990, 4 ICSID Rep 246.

[56] AMT v Zaire, Award, 21 February 1997, 5 ICSID Rep 11.

Republic[57] and *Lauder v. Czech Republic*[58], arbitral tribunals have recognized the possibility of legal security as an element of FPS.

100. Precisely in line the jurisprudential history of investment case law, this case does not concern a breach of Full Protection and Security. At all stages, Respondent provided Claimant Due Process and access to its judiciary system, even in the enforcement proceeding that took place at the High Court of Mercuria.

101. Although Claimant argues that there was an unwarranted delay in the enforcement of its award, there are at least three objective facts not attributable to Respondent that have contributed to this: (i) Mercuria's judiciary is far from supersonic and always works with an absurd amount of parallel proceedings, so much so that for at least eight opportunities the hearing of the Claimant's case had to be postponed due to previous and very lengthy oral submissions; (ii) during the course of the enforcement process the commercial courts act was enacted, what that eventually created dissent jurisprudence on the jurisdiction of the courts for the enforcement of arbitration awards, only being settled by the final decision of the supreme court of Mercuria; (iii) opposition by the NHA alleging non-recognition for reasons of public policy.

102. These reasons alone demonstrate that even though the award enforcement procedure was not the fastest, there are objective reasons for this.

103. The Arbitral Tribunal in *Vannessa Ventures Ltd. V. Bolivarian Republic of Venezuela*[59] considered that the delay in judicial proceedings would only constitute a breach of the FPS if the delay were to be (*a*) excessive and (*b*) deliberate. That is why, in that case, the tribunal decided not to accept the claims regarding a breach of FPS due to the delays in Venezuelan Courts. Therefore, in this case, there was no breach of FPS since (*a*) considering all of the facts abovementioned there was no excessively long delay to the enforcement of the arbitration award and (*b*) there is no evidence whatsoever that this delay was deliberately perpetrated by Respondent.

104. Therefore, the State of Mercuria is not liable for the conduct of its judiciary because there was no breach to the duty to guarantee Full Protection and Security, as provided for in article 3(1) of the BIT.

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[57] CME v The Czech Republic, Partial Award, 13 September 2001, 9 ICSID Rep 121.
[58] Ronald S. Lauder v The Czech Republic, Award, 3 September 2001, 9 ICSID Rep 66
[59] Vanessa Ventures Ltd. V. Bolivarian Republic of Venezuela. ICSID Case No. ARB(AF)04/6 (16 Jan 2013)

ISSUE 5: THE TERMINATION OF LTA DID NOT AMOUNT TO A VIOLATION OF ARTICLE 3(3) OF THE BIT.

105. The termination of the LTA did not amount to a violation of article 3(3) of the BIT because **(A)** the umbrella clause has to be given a narrow interpretation; **(B)** the claims don't fall within the scope of the umbrella clause; **(C)** the LTA has an exclusive arbitration clause; **(D)** the NHA actions are not attributable to Respondent.

A. THE UMBRELLA CLAUSE HAS TO BE GIVEN A NARROW INTERPRETATION.

106. When signing a BIT, the parties' main purpose is to provide legal security to each other's investors that their investments will be legally protected. Hence the creation of parameters such as Fair and Equitable Treatment, Full Protection and Security *et cetera*. The existence of an umbrella clause with generic language, therefore, should be interpreted in the most restrictive way possible, according to the intent of the parties to the treaty, turning into treaty claims only those that in fact constituted an investment claim.

107. The tribunal in *SGS v. Pakistan*[60], for example, considered that the language of the clause contained in the BIT was too generic and, therefore, trying to avoid giving the treaty a meaning that the parties did not actually meant, interpreted the clause restrictively, denying claims that were purely contractual.

108. In this case, clause 3 (3) of the BIT has the following language

> *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.*

109. As in SGS v. Pakistan, the language of the BIT here is generic and makes no reference to the fact that purely contractual demands could be raised to the level of treaty claims. If Parties had so agreed, they would have explicitly said so in the BIT. The umbrella clause should be interpreted restrictively and the claims in relation to the termination of the LTA must not be admitted.

110. Also, to allow every contractual claim to be elevated to the level of a treaty claim would render the BIT useless and undermine its importance as a tool for attracting investment once every small contractual quarrel would be brought under an international treaty arbitration tribunal[61].

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[60] Société Générale de Surveillance SA v. Pakistan, ICSID Case No.ARB/01/13, Decision on Jurisdiction, August 6, 2003

[61] Ibid, ¶ 168.

111. The tribunals in *El Paso* and *Pan American* have decided that when faced with a generic umbrella clause, a broad interpretation of the clause could make the whole treaty senseless[62] because the umbrella clause would ultimately become the only relevant provision[63] for opportunistic investors.

B. THE CLAIMS DON'T FALL WITHIN THE SCOPE OF THE UMBRELLA CLAUSE.

112. Alternatively, even though some contractual claims may also be considered treaty claims, not all are. The problem is that treaty claims are legally different from those that are inherently from purely contractual claims due under private law. Even when coincident, the nature of each type of claim remains distinct. For this reason, the threshold to say that a contract claim can also be a treaty claim is quite high.

113. In other words, according to the arbitration tribunal's understanding at *Joy Mining*[64], contractual breaches cannot automatically be raised to treat breaches by umbrella clause.

114. For these reasons, Article 3(3) of the BIT cannot encompass the claims in relation to the termination of LTA. The umbrella clause will only apply to contracts in which the state acted as sovereign, not as a commercial entity. The tribunal in *Consortium*[65] has ruled that if the host state does not comply with contractual obligations, this does not result in breach of the BIT unless it is proved that the state has exceeded its capacity in the contract as a private party and used its sovereignty as a public authority.

115. There are no facts in the record that suggest that NHA has exceeded its powers as a private party to the LTA. The whole issue discussed here regards the termination of the LTA by NHA arguing unsatisfactory performance of the contract, a purely commercial dispute to be addressed in a purely commercial tribunal

C. THE LTA PROVIDES FOR AN ARBITRATION CLAUSE.

116. It is known that the LTA contained a dispute settlement clause that provided for commercial arbitration as the appropriate method for resolving any disputes. The clause provided for arbitration seated in Reef, pursuant to paragraph 17 of the uncontested facts. Although the exact terms of the arbitration clause in the LTA were not present in

[62] El Paso Energy International Company v. Argentina, ICSID Case No.ARB/03/15, Decision on Jurisdiction, April 27, 2006 , para. 73

[63] Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006 , para. 105

[64] Joy Mining Machinery Limited v. Egypt, ICSID Case No.ARB/03/11, Award on Jurisdiction, 6 August, 2004

[65] Consortium RFCC v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, December 22, 2003 , para 51

the record, it is uncontested that it existed and provided for the appropriate method for the settlement of this particular dispute.

117. The Claimant, at this time, is prevented from arguing anything to the contrary since once the LTA was terminated, claimant sought the installment of an arbitral tribunal in Reef, arguing on the premature termination of the LTA. Still in that tribunal, the entire procedure took place ending up with the issuance of an arbitration award.

118. The arbitration tribunal in *Saluka*[66] ruled that the existence of an arbitration clause in the contract would automatically remove the effects of the treaty on contractual claims.

119. That is, both Claimant and Respondent in this case agree that the appropriate forum to settle the dispute in relation to the termination of the LTA is in a commercial arbitration proceeding seated on Reef, not in an international public investment dispute.

120. The bilateral investment treaty is designed to complement and provide security for investors, not to avoid the incidence of contractual clauses specifically designed by parties, such as the arbitration clause in the LTA. When there is a conflict between the arbitration clause in the present treaty and that one negotiated in the contract, the tribunal must decide in favor of the contractual clause, as held by the annulment committee in *Vivendi Annulment*[67]. Claimant cannot attempt to avoid the appropriate forum of the contractual dispute, already used by it previously, because the enforcement proceedings of his award has encountered mishaps along the way.

D. THE ACTIONS OF NHA ARE NOT ATTRIBUTABLE TO RESPONDENT.

121. Within the Mercuria state structure, the NHA is a separate entity from the Mercurian government, created and regulated by specific legislation, especially the National Health Authorities Act. NHA provides health services to Mercuria's population but has commercial activity with its outfitters, acting only as a merchant.

122. There is absolutely nothing in the record to suggest that NHA's actions can be attributed to Mercuria's government. According to the Draft Articles on Responsibility of States for internationally wrongful acts ("ILC Draft")

> *Article 8. The fact that the state initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the state of the subsequent conduct of that entity*[68].

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[66] Saluka Investments BV (The Netherlands) v. The Czech Republic, UNICTRAL Investor-State Claim, Partial-Award, March 17, 2006 , para 54

[67] Compania de Aguas del Aconquija SA. and Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 , para 98

[68] Articles on Responsibility of States for Internationally Wrongful Acts Draft. 2001. Article 8

123. The tribunals in *Manffezini*[69] and *Salini*[70] have dealt with this issue. The rule here is that an action taken by an entity of the state which is not an organ of the state can only be attributable to it if they are exercising state authority[71].

124. As seen in the ILC Draft, the fact that a state constitutes a state entity does not mean that it accounts for the entity's actions. In this case, the NHA, an entity constituted by specific legislation, although maintained by tax money, operated independently, received donations from private companies and was organized by NHA trusts. Moreover, there is no evidence in the record that Mercuria authorities participated in the negotiation of the LTA or in the events prior to its termination. Everything happened within the commercial scope developed between the entity and Claimant.

125. The actions of NHA cannot therefore be attributed to the state of Mercuria, even because Claimant did not take on the burden of proving that there was some connection between NHA and Respondent.

[69] Maffezini v. Spain, ICSID Case No. ARB/97/7, Award (13 November, 2000).
[70] Salini Construtorri S.P.A. v. Morocco, ICSID Case No. ARB/00/4. Decision on Jurisdiction (23 July, 2001)
[71] Articles on Responsibility of States for Internationally Wrongful Acts Draft. 2001. Article 5

PRAYER FOR RELIEF

In light of the foregoing, Respondent respectfully requests this Tribunal to find that:

(A) The Tribunal does not have jurisdiction to hear the claims in relation to the award;

(B) Claimant can be denied the benefits of the Mercuria-Basheera BIT by virtue of the Respondent's invocation of article 2 of the BIT;

(C) Mercuria did not violate the Fair and Equitable Treatment Standard of article 3(1) of the BIT by enacting Law No. 8458/09 and granting a non-voluntary license for Claimant's invention to HG-Pharma;

(D) Mercuria is not liable under article 3 of the BIT for the conduct of its judiciary by failing to accord Full Protection and Security to Claimant;

(E) The Tribunal does not have jurisdiction to hear claims in relation to the termination of the Long Term Agreement;

(F) The termination of the Long Term Agreement did not amount to a violation of article 3(3) of the BIT.

Respectfully submitted on 25 September 2017

/s/

Team Ago