Team ALFARO

THE 2017 FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

ARBITRATION PURSUANT TO THE PCA ARBITRATION RULES 2012

BETWEEN

ATTON BORO LIMITED

(Claimant)

AND

THE REPUBLIC OF MERCURIA

(Respondent)

PCA CASE NO. 2016-74

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25 September 2017

STATEMENT OF DEFENSE

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Total	*Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010

Toto	*Toto Costruzioni Generali SpA v Lebanon, Decision on Jurisdiction*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 8 September 2009
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Vivendi	*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 Novembre 2000
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Yukos	*Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL*, PCA Case No. AA 227, Final Award, 18 July 2014

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ASEAN Framework Agreement on Services 1995	1995 ASEAN Framework Agreement on Services signed on 15 December 1995 in Bangkok, Thailand by the Economic Ministers, 35 I.L.M. 1072
ECT	Energy Charter Treaty, 17 December 1994, 2080 UNTS 100
ICESCR	UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965, 575 UNTS 159
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299, 33 I.L.M. 1197
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

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ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts, 2 Yearbook of the International Law Commission, 2001
Commentary to ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2 Yearbook of the International Law Commission, 2001
Guiding Principles on Unilateral Declarations	Guiding Principles applicable to unilateral declarations of States capable of creating

	legal obligations, 2 Yearbook of the International Law Commission, 2006
IBRR Report	Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, 18 March 1965
UNCTAD Report	UNCTAD, *Series on Issues in International Investment Agreements (Second series): Fair and Equitable Treatment*, 31 December 2010

LIST OF ABBREVIATIONS

¶/¶¶/para.	Paragraph(s)
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments
ECT	Energy Charter Treaty
FET	Fair and equitable treatment
ICSID	International Center for Settlement of Investment Disputes
LTA	Long-Term Agreement
NHA	National Health Authority
p./pp.	Page(s)
PCA	Permanent Court of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

1. Atton Boro Limited ("**Claimant**" or "**Atton Boro**") is a wholly-owned investment vehicle of Atton Boro and Company[1] incorporated in the People's Republic of Reef and acting as the holding company for Atton Boro Group, a multi-million worldwide drug discovery business.[2] Claimant was established on **5 April 1998**,[3] shortly after conclusion of the Agreement for the Promotion and Reciprocal Protection of Investments (the "**BIT**") between the Kingdom of Basheera ("**Basheera**") and the Republic of Mercuria on **11 January 1998**[4] ("**Respondent**" or "**Mercuria**").

2. Claimant's primary occupation and purpose in Basheera was to act as a base for Atton Boro Group's affiliates' activities in South American and African countries,[5] handling legal issues and managing Atton Boro Group's numerous patents,[6] thus, its presence in Basheera was confined to a one-man office maintained by a manager and a handful of transient[7] legal personnel.[8] Financed by its parent company, Atton Boro and Company, [8] Claimant entered into multiple supply agreements in Respondent [9] along a rapid expansion into different spheres of Respondent's pharmaceutical market.[10]

3. In **2003**, Respondent found itself face to face with an onslaught of greyscale,[11] a chronic incurable infectious disease,[12] which was progressively decimating its working-age population and threatening to snowball into a full-fledged national crisis.[13]

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[1] Statement of Uncontested Facts, ¶ 4, p. 28.

[2] Statement of Uncontested Facts, ¶ 2, p. 28.

[3] Procedural Order No. 2, ¶ 6, p. 48.

[4] Annex No. 1, line 1239, p. 38.

[5] Statement of Uncontested Facts, ¶ 4, p. 28.

[6] Procedural Order No. 2, ¶ 3, p. 48.

[7] Procedural Order No. 2, ¶ 3, p. 48

[8] Statement of Uncontested Facts, ¶ 4, p. 28.

[8] Procedural Order No. 3, line 1570-1574, p. 50.

[9] Statement of Uncontested Facts, ¶ 5, p. 28.

[10] Statement of Uncontested Facts, ¶ 5, p. 28.

[11] Statement of Uncontested Facts, ¶ 6, p. 28.

[12] Annex No. 3, lines 1300, 1306, p. 41.

[13] Statement of Uncontested Facts, ¶ 6, p. 28.

4. In order to combat the impending epidemic, Respondent was forced to seek contractors for supply of fixed-dose medicines for greyscale ("**FDC**"), which would replace the obsolete treatment Respondent provided for the ailing citizens.[14] In **May 2004**, the NHA expressed its interest to procure from Claimant its patented medicine for grayscale patients, Valtervite,[15] and entered into the Long-Term Agreement ("**LTA**") with Claimant allowing it to periodically place orders for Valtervite-based drug, Sanior. [16] The LTA provided for a minimum order-value guaranteed by Respondent and was valid for ten years subject to Claimant's satisfactory performance. [17]

5. Despite the NHA's extensive campaign against greyscale, which included preventive measures like awareness education and implementation of regular testing,[18] the disease continued spreading, forcing the NHA to double its orders quarterly in **2007**. As the result, the NHA was forced to request Claimant for a price renegotiation in a desperate effort to assist its citizens and meet the budgetary constraints. [19] This emergency adjustment, however, was insufficiently lucrative for Claimant,[20] who refused to budge an inch, [21]compelling the NHA on **10 June 2008** to terminate the LTA which it could no longer afford.[22]

6. In response to this, Claimant initiated arbitration in Reef pursuant to the LTA, obtained an award ("**Award**") in its favor[23] and filed for enforcement in Respondent on **3 March 2009**.[24] However, due to complex jurisdictional issues [25] and court congestion, [26] exacerbated by

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[14] Statement of Uncontested Facts, ¶¶ 6-7, pp. 28-29.

[15] Statement of Uncontested Facts, ¶ 9, p. 29.

[16] Statement of Uncontested Facts, ¶ 9, p. 29.

[17] Statement of Uncontested Facts, ¶ 9, p. 29.

[18] Statement of Uncontested Facts, ¶¶ 12-13, p. 29.

[19] Statement of Uncontested Facts, ¶ 15, pp. 29-30.

[20] Procedural Order No. 3, p. 50, line 1602.

[21] Statement of Uncontested Facts, ¶ 15, p. 30.

[22] Statement of Uncontested Facts, ¶ 17, p. 30.

[23] Statement of Uncontested Facts, ¶ 17, p. 30.

[24] Statement of Uncontested Facts, ¶ 18, p. 30.

[25] Statement of Uncontested Facts, ¶ 22, p. 30.

[26] Exhibit No. 1, p. 10, ¶ 15, p. 8.

Claimant's own requests for transfer of the case back and forth,[27] the enforcement proceedings currently remain pending.

7. As the grayscale epidemic raged across the country, on **10 October 2009** Respondent was forced to resort to extraordinary measures to secure treatment for its citizens and introduced the mechanism of compulsory license into its legislation. In **November 2009**, HG-Pharma, a Mercurian manufacturer, was granted a license to manufacture Valtervite until the grayscale-induced public health crisis ceases, with an obligation to pay Claimant a royalty from the total earnings,[28] which Claimant refused to accept in protest of its reduced profits.[29] Claimant also did not avail itself of the right to challenge in court the validity of the compulsory license and the royalty itself, envisioned by Respondent's legislation.[30]

[27] Exhibit No. 1, p. 10, ¶ 17, pp. 8-9, ¶ 28, p. 10.

[28] Statement of Uncontested Facts, ¶ 21, p. 30.

[29] Procedural Order No. 3, p. 50, line 1597.

[30] Procedural Order No. 3, p. 50, line 1580.

SUMMARY OF ARGUMENTS

Jurisdiction

8. The present Tribunal does not have jurisdiction over the case at hand. *First*, the award enforcement related claims do not fall within the Tribunal's jurisdiction, since the Award is not an investment in its own right and, alternatively, it cannot be considered a continuation of the presumed investment in the form of the LTA. *Second*, Respondent does not impinge on Claimant's expectations by retroactively depriving it of benefits under the BIT, since Claimant is clearly owned by third-party nationals and does not have any substantial business on Basheeran soil.

Merits

9. By introducing Section 23C in its Intellectual Property Act 1976 and by allowing HG-Pharma to produce Valtervite Respondent did not deny fair and equitable treatment to Claimant. Claimant could not legitimately expect that its patent remains immune from Respondent's regulation since such regulation is expressly permissible by Article 31 of the TRIPS Agreement and Respondent never guaranteed otherwise. In any case, Respondent reasonably and proportionately resorted to its police powers while combating an incurable disease. Moreover, Respondent did not deny justice to Claimant. Even though Claimant's enforcement proceedings were quite lengthy, they do not bespeak of serious shortcomings that "shock the sense of judicial propriety". Claimant's possible allegations that it was deprived of effective means of enforcing its rights do not hold water, since there is no just guarantee in the BIT. Finally, Respondent cannot be held responsible for the termination of the LTA by the NHA. First, Respondent was never a party to the LTA and never intended to become one, hence, was not bound by its provisions. Second, alternatively, Respondent is not liable for the termination of the LTA, since the NHA's actions are not attributable to Respondent. Third, the umbrella clause of Article 3(3) of the BIT does not apply to commercial contracts, hence, the breach of the LTA does not trigger its application.

ARGUMENTS

PART ONE: JURISDICTION

10. Respondent respectfully submits that the present Tribunal does not have jurisdiction over the case at hand. First and foremost, the claims relating to enforcement of the Award do not fall within this Tribunal's jurisdiction, as the Award is not an investment, either on its own right or as a continuation of the LTA (**I**). Second, Respondent is fully entitled to retroactively withdraw the benefits of the BIT, since Claimant is owned by third State nationals and has no substantial business in the territory of its State of incorporation (**II**).

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE AWARD-ENFORCEMENT RELATED CLAIMS

11. Claimant's plea should be dismissed on jurisdictional grounds, since the Award fails to satisfy the criteria of investment set forth in the BIT and espoused as a customary standard (**A**). In the alternative, the LTA *per se* is a mere one-off supply arrangement, and therefore is not an investment, either (**B**).

A. THE AWARD IS NOT AN INVESTMENT UNDER EITHER THE BIT OR CUSTOMARY INTERNATIONAL LAW

12. The first question the Tribunal has to analyze in light of Claimant's jurisdictional allegations is the legal nature of the Award, and specifically, whether it can be considered an investment under (**1**) the BIT and (**2**) the customary notion of investment, predominantly derived from the *Salini* criteria.[31]

1. The Award is not an investment under Article 1 of the BIT

13. Article 1 of the Mercuria-Basheera BIT defines investment as an "asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party".[32]

14. To draw a very close analogy, in the recent case of *GEA*, the tribunal was crystal clear in ruling that the definition enshrined in the Germany-Ukraine BIT (fully mirroring the wording of

[31] Annacker, p. 1.

[32] Mercuria-Basheera BIT, Article 1.

Article 1 of the BIT and equally broad and non-exhaustive)[33] did not encompass arbitral awards.[34] As explained by the *GEA* tribunal, arbitral awards are not "assets", and they cannot be understood to involve "contribution to, or relevant economic activity within" a State.[35]

15. *Ergo*, taking into account the wording deliberately elected by the parties to the BIT, and construing it in accordance with its ordinary meaning,[36] the Tribunal has sufficient grounds to refuse to treat the Award as an investment under the BIT.

2. The Award is not an investment under the applicable customary standard

16. Furthermore, the BIT's definition is not the sole applicable standard. As follows from the *travaux preparatoires* to the ICSID Convention, the parties' failure to elaborate a hard-and-fast notion of investment was an *intentional* omission.[37] As such, the tests further devised in ICSID arbitration for ascertaining the existence of investment should not be construed narrowly and are most certainly not confined to disputes decided under the ICSID Convention. Rather, they contribute to the general objective understanding of investment, applicable in various types of proceedings.[38]

17. Tribunals constituted under BITs, for instance, in the *Romak*[39] and *Alps Finance*[40] cases, have applied the *Salini* test as a general objective meaning of an investment from which a BIT cannot derogate.[41] The *Salini* test (rooted in the earlier and equally authoritative *Fedax* decision[42]) is not confined to ICSID arbitration. Rather, it expresses the common approach to objective meaning of the notion of investment.[43] Thus, in order to fall within the Tribunal's jurisdiction, the Award shall also qualify as an investment under the customary criteria espoused by investment arbitration practice.

18. Application of the *Salini* test is even more justified in the present case, where Article

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[33] Germany-Ukraine BIT, Article 1.

[34] *GEA*, ¶161.

[35] *Ibid.*, ¶¶161-162.

[36] VCLT, Article 31(1).

[37] Mortenson, pp. 280-281.

[38] *Ibid*.

[39] *Romak*, ¶194.

[40] *Ibid*., ¶239.

[41] *Ibid*., ¶239.

[42] *Fedax*, ¶1378; *Salini*, ¶609.

[43] *Alps Finance*, ¶239.

8(2)(a) expressly envisions the possibility of ICSID arbitration.[44] In the apt expression of the *Romak* tribunal, which for the same reasons applied the *Salini* test in UNCITRAL proceedings, to exclude the application of the *Salini* test would lead to "unreasonable" results, allowing the investor to cherry-pick between the criteria of an investment by choosing between dispute resolution mechanisms.[45] The Award decidedly fails the *Salini* test, as it lacks any of its characteristics, which include contribution of assets,[46] duration of at least two years,[47] risk,[48] contribution to Respondent's development,[49] and even territorial link with Respondent,[50] as it was rendered by a tribunal seated in a third country, Reef.[51]

19. In *GEA*, the Tribunal found that arbitral awards did not fall within the scope of the customary definition of investment, even if, *arguendo*, such award had been granted in connection with an existing and valid investment.[52] In *Saipem*, the tribunal likewise refused to find that an arbitral award amounted to an "investment" under the customary test.[53]

20. Claimant may attempt to clutch at the straws of the *Saipem*[54] or *Chevron*[55] jurisprudence, suggesting that an arbitral award could morph into an investment by virtue of crystallizing the original investment made, even if such an award *per se* does not satisfy the criteria for investment.

21. Nonetheless, in 2011, the *GEA* tribunal persuasively overruled this approach, stating that the award and the underlying investment shall remain "analytically distinct", and, as such, refusing to construe the legal nature of awards under the terminal proviso of the BIT.[56]

22. By the same token, the Award is not covered by the caveat of Article 1 of the BIT, stating that "any change in the form of an investment does not affect its character as an investment".

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[44] Mercuria-Basheera BIT, Article 8(2)(a).

[45] *Romak*, ¶194.

[46] See, *e.g.*, *Toto*, ¶86(a); *PeyCasado*, ¶233(a); *Salini*, ¶52, *Bayindir*, ¶53; *Pantechniki*, ¶48; *Saipem,* ¶100; DOLZER, SCHREUER, p. 68.

[47] *Salini*, ¶54; *Jan de Nul*, ¶¶93-96; *Bayindir*, ¶132; RUBINS, p. 297.

[48] *Toto*, ¶¶78, 86.

[49] *L.E.S.I.*, ¶72(iv); *Pey Casado*, ¶232.

[50] Annex No. 1, p. 32, line 996; DOUGLAS, p. 171, ¶¶349-350.

[51] Statement of Uncontested Facts, ¶17, p. 30.

[52] *GEA,* ¶163.

[53] *Saipem*, ¶113.

[54] *Saipem*, ¶127.

[55] *Chevron*, ¶181.

[56] *GEA*, ¶162.

Theoretically, this clause might be triggered only if an *investment* existed in the first place. Yet *investment* is not a label one can attach to the LTA, and consequently, to the Award. [57]

3. Recognizing the Award as an investment would amount to indirect enforcement

23. On top of the above, the Tribunal should bear in mind the far-reaching (and potentially pernicious) signals it would send by recognizing the Award as an investment. Granting investment status to the Award would effectively amount to indirect enforcement in circumvention of the most basic precepts of the New York Convention, which never envisaged it.[58]

24. In view of the foregoing, the Award cannot be considered an investment, and it is anything but a valid podium for the Tribunal's jurisdiction.

B. THE LTA IS NOT AN INVESTMENT UNDER EITHER THE BIT OR CUSTOMARY INTERNATIONAL LAW

25. In the alternative, if the Tribunal were to accept *Saipem* as regards the possible "investment" nature of the Award, it must also follow *Saipem*'s analysis in establishing the Award's relation to an existing investment.

26. The *Saipem* tribunal suggested that for the purposes of finding jurisdiction, one is bound to analyze the investment *as a whole*.[59] In this light, the Award and the LTA are not analytically distinct as per the analysis of the *GEA* tribunal;[60] rather, they need to be scrutinized as a single phenomenon.

27. Following this line of reasoning, the *Romak* tribunal straightforwardly indicated that an award cannot "crystallize" what is, in essence, a non-existent investment.[61] In this context, the tribunal insisted that a one-off sales contract could be recognized as an investment solely if the States have unambiguously agreed on a provision to the same effect in their BIT,[62] and no express agreement to that effect is present in the Mercuria-Basheera BIT.

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[57] See this Statement of Defense, Part I(B).

[58] Mansinghka, Srikumar, pp. 19-20.

[59] *Saipem*, ¶114.

[60] See this Statement of Defense, Part I(A)(2).

[61] *Romak*, ¶211.

[62] *Romak*, ¶205.

28. Under the above test, the LTA most certainly fails. *Prima facie*, the LTA is a typical oneoff supply arrangement, similar to those dismissed and denied the status of investment by the tribunals in the *Romak* and *Joy Mining* cases.

29. In particular, the *Joy Mining* tribunal stated that a complex and sophisticated procurement contract involving numerous incidental services [63] did not amount to an investment (notwithstanding the otherwise sufficient duration of the contract and regardless of the regularity of profit derived from the arrangement[64]), since performance under the contract fell squarely within the normal business activity of the Claimant.[65]

30. Further, the *Nova Scotia* tribunal, which dealt with contractual rights under a coal supply arrangement, said that even if a supply agreement is complicated in genesis and composition, it still cannot be recognized as an investment. [66]

31. Atton Boro has consistently engaged in the manufacture and sale of pharmaceutical products (including Valtervite) since 1998, and did not alter its operations even after entering into the LTA.[67] Although Atton Boro ramped up production in Mercuria,[68] there is no evidence that it did so in order to solidify its ties with this state, or specifically to ensure performance under the LTA. In fact, since Claimant lost only a part of its market share for Valtervite in Mercuria after termination of the LTA,[69] opening new production lines could be part of its general business expansion strategy, making the LTA hardly distinguishable from a plain-vanilla supply contract.

32. However, even assuming Claimant went the extra mile to supply Sanior to Mercuria, the LTA still cannot be stretched to the point of becoming an investment. By way of illustration, the *ad hoc* tribunal in the *Italy v. Cuba* arbitration, relating to the supply of pharmaceuticals by the *Menarini* corporation, refused to recognize the arrangement in question as an investment, despite the long duration of the contract, considerable cost of performance and recurrent transactions thereunder.[70] There are no grounds for treating the LTA differently.

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[63] *Joy Mining*, ¶55.

[64] *Ibid*., ¶57.

[65] *Ibid*., ¶56.

[66] *Nova Scotia*, ¶113.

[67] Notice of Arbitration, ¶¶5-6.

[68] Statement of Uncontested Facts, para. 15, pp. 29-30.

[69] *Ibid*., para. 24, p. 31.

[70] *Italy-Cuba*, ¶¶212-221.

33. Plain application of customary standard criteria would also lead to the same result. Out of the characteristics of an investment including contribution of assets, [71] duration of at least two years,[72] risk,[73] contribution to the host State's development, [74] and territorial link with the host State, [75] those of contribution of assets and undertaking risk are deemed most important.[76] The LTA, being an ordinary supply, lacks both. As regards contribution of assets to Respondent's territory, it is uncertain that such contribution was substantial, as required by the customary standard.[77] As discussed *supra*, the manufacturing base in Mercuria was not particularly connected with performance of the LTA, whereas in fact the only contribution connected with production of Valtervite was a manufacturing unit.[78] More importantly, the LTA, like any contract, entailed only contractual risks for Claimant. The only risk Claimant undertook was that of the NHA's nonperformance or contractual breach, which happened in the case at hand. Even these risks were mitigated, considering that Claimant was guaranteed a minimum order-value of orders by Respondent,[79] securing itself minimum profits regardless of circumstances. *Ergo*, since the Award neither on its own, nor as an extension of the LTA can be considered an investment, the Tribunal should relinquish jurisdiction in the present case.

II. RESPONDENT CAN RETROACTIVELY DENY THE BIT'S BENEFITS TO CLAIMANT

34. Claimant is obstinately trying to avail itself of the benefits attached to investors under the BIT. Yet allowing it to do so would deprive Respondent of the right vested in it by BIT Article 2, and would essentially condone Claimant's creation of an entity in Basheera for no purposes other than enjoying the protections of the BIT. In this light, Respondent's exercise of denial of benefits at the jurisdictional stage in no way impinges on the expectations of investors under the BIT (**A**) and is fully justified since Claimant is owned and controlled by third-State nationals and does not engage in any substantial business in Basheera (**B**).

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[71] See, *e.g.*, *Toto*, ¶86(a); *PeyCasado*, ¶233(a); *Salini*, ¶52, *Bayindir*, ¶53; *Pantechniki*, ¶48; *Saipem,* ¶100; DOLZER, SCHREUER, p. 68.

[72] *Salini*, ¶54;*Jan de Nul*, ¶¶93-96; *Bayindir*, ¶132; RUBINS, p. 297.

[73] *Toto*, ¶¶78, 86.

[74] *L.E.S.I.*, ¶72(iv); *Pey Casado*, ¶232.

[75] Annex No. 1, p. 32, line 996; DOUGLAS, p. 171, ¶¶349-350.

[76] *Alps Finance,* ¶231.

[77] *Helnan,* ¶77.

[78] Statement of Uncontested Facts, ¶11, p. 29.

[79] Statement of Uncontested Facts, ¶10, p. 29.

A. RESPONDENT CAN EXERCISE ITS RIGHT TO DENY BENEFITS AFTER THE COMMENCEMENT OF ARBITRATION

35. Claimant may argue that, as a matter of customary practice, denial of benefits clauses have no retroactive effect. Here, Claimant is most likely to be guided by the policy considerations expressed in the *Plama* and *AMTO* decisions, limiting a State's right to deny benefits with a view for ostensibly shielding the legitimate expectations of investor.[80]

36. Yet the logic behind comparing these decisions (as well as the reasoning of the *Liman*[81] and *Yukos*[82] tribunals, which similarly negated the retroactive effect of denial of benefits clauses) to this dispute is seriously flawed. The entirety of the enumerated cases related to the interpretation of a single denial of benefits clause, *i.e.* the one enshrined in Article 17 of the ECT. As such, the respective tribunals relied heavily on the turns of phrase employed in this instrument. In particular, the *Plama* tribunal based its reasoning on the specific wording of Article 2 of the ECT and its focus on the promotion of "long-term cooperation in the energy field".[83] The Mercuria-Basheera BIT does not contain any comparable caveats, and it would be counterintuitive and erroneous to apply the *ad hoc* reasoning reserved for ECT-related disputes to this case, since each treaty should be interpreted in light of *its own* object and purpose.[84]

37. If applied outside the limited ECT jurisprudence framework, the interpretation advanced by Claimant is misguided and overlooks the general object and purpose of denial of benefits clauses.[85] For instance, the *Guaracachi* tribunal clearly stated that, by merely invoking claims under the BIT, putative investors fully assume the risk of the host State exercising its right to deny benefits under the respective clause of the BIT.[86] Further, the *Guaracachi* tribunal suggested that the invocation of denial of benefits at a stage where such benefits are claimed (that is, at the time where Claimant raises objections to jurisdiction) is proper and to be expected.[87] An analogous approach was weaved into the *EMELEC* decision.[88] In the same vein, the *Siemens v. Argentina*

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[80] Badini, p. 298.

[81] *Liman*, ¶¶225, 227.

[82] *Yukos*, ¶457.

[83] ECT, Article 2; *Plama*, ¶¶162-164.

[84] VCLT, Article 31(1).

[85] Behlman, p. 414.

[86] *Guaracachi*, ¶380.

[87] *Guaracachi*, ¶376.

[88] *EMELEC*, ¶71.

tribunal also opted for treating denial of benefits as part of the dispute resolution mechanism of BITs.[89]

38. The *Ulysseas* tribunal heavily advocated for a similar approach, stating that invocation of denial of benefits is common at the jurisdictional stage.[90] As per *Ulysseas*, a State pulling the denial of benefits trigger will hardly confound a reasonable investor. [91] Rather, the possible invocation of denial of benefits is an inherent quality of a BIT, a natural circumstance of its existence, which is unlikely to torment investors with legal ambiguity.[92]

39. Investors are thus expected to foresee the possible invocation of denial of benefits when they engage, with various degrees of sophistication, in calculated nationality planning.[93] States, in turn, have a right to maintain the balance of reciprocity they bore in mind while entering into a BIT.[94] Most importantly, the exercise of denial of benefits is anything but an instance of on-thewhim State discretion. The final say on the matter rests with the Tribunal, which should closely assess the criteria specifically agreed by Basheera and Mercuria and solidified in Article 2 of the BIT.[95]

40. Consequently, in the absence of any tangible hurdles, this Tribunal should allow Respondent to proceed with its jurisdictional objection.

B. CLAIMANT SHOULD BE DENIED BENEFITS UNDER THE SUBSTANTIVE CRITERIA OF ARTICLE 2 OF THE BIT

1. Claimant is owned by third-State nationals

41. Under Article 2 of the BIT, a company may be denied benefits if it is "owned or controlled" by nationals of a State other than Mercuria and Basheera.[96] Interpretation of the wording in line with the ordinary meaning suggests disjunctive nature of the requirement, *i.e.* either ownership or

[89] *Siemens*, ¶102.

[90] *Ulysseas*, ¶172.

[91] *Ibid*., ¶173.

[92] *Ibid*.

[93] DOLZER, SCHREUER, 55.

[94] Mistelis, pp. 1302-1303; Sinclair, 388.

[95] See this Statement of Defense, Part II(B).

[96] Annex No. 1, p. 33, line 1030.

control by third-state nationals is sufficient to deny the benefits. [97] The same approach to construction of denial of benefits clauses is upheld in doctrine.[98]

42. As a preliminary matter, the burden of demonstrating Claimant's ownership structure and its investor status rests squarely on Claimant's shoulders. Here, the Tribunal may find a source of reference in both of the *Plama*[99] and *AMTO*[100] decisions, vesting the *onus probandi* with respect to ownership and control of the claimant in the claimant *itself*. The respondent disproportionately lacks access to information as to the claimant's structure and business, and the claimant's failure or reluctance to supply the respective information can (and should) give rise to negative inferences.[101]

43. In order to establish ownership, only the direct ownership needs to be examined. For instance, the tribunal in *Pac Rim* did not look beyond the direct 100 per cent. ownership of the investor by a third State company, deeming it sufficient to determine presence of "ownership or control".[102]

44. In turn, the *Generation Ukraine* tribunal rejected respondent's invocation of denial of benefits because a United States national (with United states being a party to the applicable BIT) held a 100 per cent. equity stake in the claimant.[103] Yet this is clearly not the case in the present dispute.

45. On the face of it, Atton Boro is a wholly owned subsidiary of Atton Boro Company, a Reefdomiciled entity.[104] Moreover, Claimant's shares are held by a mix of private entities and private individuals from various jurisdictions, with no evidence of predominant (let alone absolute) Basheeran ownership. [105]

46. As such, Respondent's invocation of Article 2 of the BIT and the resulting denial of the BIT's benefits to Claimant are well-founded and should be upheld by the Tribunal.

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[97] *Pac Rim*, ¶4.82; Badini, p. 296

[98] DOLZER, SCHREUER, 55.

[99] *Plama*, ¶89.

[100] *AMTO*, ¶64.

[101] *Ibid*., ¶65; Sinclair, pp. 380-381.

[102] *Pac Rim*, ¶4.82.

[103] *Generation Ukraine*, Award, ¶15.9.

[104] Statement of Uncontested Facts, paras. 2-4, p. 28.

[105] Procedural Order No. 3, line 1570.

2. Claimant has no substantial business in its state of incorporation

47. Without prejudice to the above, the principal hurdle for granting Claimant investor protection dwells in the very nature of its operations. For all intents and purposes, Claimant is nothing but a mere *vehicle*[106] for the business of Atton Boro and Company, a Reef-incorporated entity.

48. Pursuant to Article 2 of the BIT, to be an investor, Claimant must have substantial business activity in the country where it is organized, *i.e.* Basheera. Although Claimant does have business (production facilities) in Mercuria,[107] it has none of the kind in Basheera, which is an unequivocal red flag and should urge the Tribunal to question Claimant's putative Basheeran identity.

49. In the *AMTO* decision, the tribunal found an investment company to be involved in "substantial" business activity in the territory of Latvia,[108] and thus refused to apply denial of benefits.[109] In its analysis, it defined "substantial" business activities as those "of substance, not merely of form".[110] Along the same lines, the *Pac Rim* tribunal stated that the existence of a rented office space and a certain number of employees are not enough *per se* for determining the "substantial" nature of a company's business in the State-party.[111] Although such indicia may point to the existence of "business" in the narrow sense, viewed in isolation, they do not go so far as to demonstrate the substantiality of such business; and substantiality is of the essence for triggering the denial of benefits clause.[112]

50. Here, the devil is in the details. Respondent agrees that Claimant rented out an office space and employed a certain number of people[113] (and these criteria were indeed taken into account by the *AMTO* tribunal[114]). However, its manufacturing was ultimately controlled by (and performed on behalf of) the Reef-domiciled Atton Boro and Company, which developed the formula for Valtervite in 1998, and initially obtained patents thereto in 50 jurisdictions.[115] Most critically,

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[106] Statement of Uncontested Facts, para. 4, p. 28; Response to the Notice of Arbitration, para. 5, pp. 16-17.

[107] Notice of Arbitration, para. 7., p. 4.

[108] *AMTO*, ¶¶68-69.

[109] *Ibid*., ¶70.

[110] *Ibid*., ¶69.

[111] *Pac Rim*, ¶¶4.67-4.73.

[112] *Ibid*.

[113] Statement of Uncontested Facts, para. 4, p. 28.

[114] *AMTO*, ¶68.

[115] Statement of Uncontested Facts, para. 3, p. 28.

since the primary purpose of Atton Boro is production of medicine, [116] to satisfy the "substantiality" requirement, its Basheeran business should be immediately related to research, development and production of pharmaceuticals, *i.e.* constitute *actual* economic activity and not only serve as a corporate shell.

51. Since, as demonstrated above, Claimant never acted as a fully-fledged operational unit, it appears that the incorporation of Claimant was a matter of expediency, a way to streamline Atton Boro Group's involvement with the Mercurian patent, tax and registration authorities[117] and to find a roundabout for enjoying the protection attaching to Basheeran investors under the BIT.

52. Consequently, this Tribunal should deny Claimant the advantages of the Mercuria-Basheera BIT. By doing so, it will rein in Claimant's free-riding and preserve the level playing investment and cooperation field envisaged by the BIT.

[116] *Ibid*., para. 2, p. 28.

[117] Procedural Order No. 3, para. 1574.

PART TWO: MERITS

III. BY ENACTING LAW NO. 8458/09 AND GRANTING A LICENSE TO HGPHARMA RESPONDENT DID NOT DENY FAIR AND EQUITABLE TREATMENT TO CLAIMANT

53. In 2009 Respondent implemented the regime of Article 31 of the TRIPS Agreement by entitling its courts to issue licenses on patents if patented inventions were unaffordable at a reasonable price. [118] Claimant's patented-drug fell within this definition, hence, in 2010 Respondent's High Court granted the relevant license to HG-Pharma.[119] Respondent intended to secure a reasonable access of its nationals to the only drug capable of preventing an incurable disease from spreading,[120] which was fully in line with international practice.[121]

54. Even though the measure may have curbed Claimant's profits, it does not breach FET standard in Article 3(2) of the BIT, as it is advanced by Claimant. By introducing Section 23C in its Intellectual Property Act Respondent exercised its sovereign power to update its obsolete legislation (**A**). By granting HG-Pharma a license on production of Claimant's patented drug Respondent did not upset Claimant's legitimate expectations (**B**). In any event, Respondent reasonably and proportionally resorted to its regulatory powers to protect its nationals from a fatal disease (**C**).

A. RESPONDENT EXERCISED ITS SOVEREIGN POWER TO UPDATE ITS OBSOLETE IP LEGISLATION

55. A State denies FET to foreign investors if it radically transforms the legislation which existed at the moment the investment was made. [122] Such radical transformation shall be accompanied by a withdrawal of certain rights and guarantees,[123] which had been introduced in order to attract investments and upon which investors relied while planning their projects.[124]

56. In *CMS*, *LG&E* and *Enron* Argentina was found to have breached the FET standard by abolishing the guarantees which existed when the US companies invested in the State's

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[118] Statement of Uncontested Facts, para. 20, p. 30; Annex No. 4, pp. 44-45.

[119] Statement of Uncontested Facts, para. 21, p. 30.

[120] Procedural Order No. 3, para. 7, p. 50.

[121] Statement of Uncontested Facts, para. 24, p. 30.

[122] Jacob, Schill, p. 727.

[123] Potesta, p. 111-112.

[124] *Ibid*.

economy.[125] Back in 1997 Argentina's legislation provided for application of a fixed exchange rate pegging the peso to the USD, which encouraged the investors to buy shares in the country's gas sector. [126] In 2002 Argentina amended its legislation, abolishing the fixed rate, which significantly reduced the profitability of the investments.[127] The tribunals ruled that Argentina "completely dismantle[ed] the very legal framework constructed to attract investors", thereby breaching the FET standard.[128]

57. Conversely, if a State introduces legal regulation of the issues that were not addressed by the legislation at the time of the investment's making, the FET is not denied.[129] States are not required to keep lacunae in their legislation only to maintain illusory stability for foreign investors' benefit.

58. This proposition is supported by *Parkerings*, where the Norwegian company concluded an investment contract with Vilnius City Council, which was not prohibited from entering into agreements with private companies. [130] Years later Lithuania expressly outlawed such agreements.[131] Even though the Lithuania's amendment negatively affected Parkerings' business, the State was deemed to have complied with the FET standard.[132] According to the *Parkerings* tribunal, composed of, *inter alia*, Laurent Levy and Marc Lalonde, Lithuania has exercised its undeniable right and privilege to fulfil a loophole in its legislation.[133]

59. In the present case, by introducing Section 23C to its 1976 Intellectual Property Act Respondent did not deny FET, as it did not give any guarantees that Claimant could have relied upon while concluding the LTA. [134] Respondent exercised its sovereign right to update its relatively obsolete IP legislation, which used to be silent on the matter of compulsory licenses. Even more so, Section 23C implements the regime of Article 31 of the TRIPS Agreement, which expressly permits States to issue compulsory licenses.[135]

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[125] *CMS,* ¶¶266-284; *LG&E*, ¶¶132-139; *Enron*, ¶¶251-268.

[126] *LGE*, ¶36.

[127] *Ibid*., ¶64.

[128] *Ibid*., ¶139.

[129] Potesta, p. 101.

[130] *Parkerings*, ¶80-86.

[131] *Ibid.*

[132] *Ibid.,* ¶346.

[133] *Ibid.*, ¶322.

[134] Statement of Uncontested Facts, para. 9, p. 29.

[135] TRIPS Agreement, Article 31.

60. *Ergo*, by introducing the mechanism of compulsory licenses Respondent did not deny FET to Claimant, as it exercised its sovereign legislative power, which did not deprive Claimant of its rights and complied with the international standard enshrined in the TRIPS Agreement.

B. RESPONDENT DID NOT UPSET CLAIMANT'S LEGITIMATE EXPECTATIONS

61. A foreign investor can legitimately expect its investment to be accorded a special treatment if certain cumulative criteria are met.[136] Before anything else, a State shall guarantee a *specific* treatment to a *particular* investor.[137] Then, the investor shall *reasonably* rely on such guarantee while making its investment.[138]

62. This never happened in the case at hand. Respondent never made any specific guarantees regarding Claimant's patent (**1**). Moreover, Claimant's self-induced belief that its patent could not ever be used without its authorization was unreasonable (**2**).

1. Respondent made no specific guarantees regarding Claimant's patent

63. Neither the statement of the Minister for Health[139] nor the President' twitter post[140] even remotely suggests that Respondent guaranteed to keep Claimant's patent intact.

64. The essence of Respondent's public statements was purely political; hence, they shall not be considered as guarantees (***a***). Alternatively, Respondent's guarantees were not sufficiently specific (***b***). In any case, Respondent never pledged the guarantees specifically to Claimant (***c***).

65. Thus, Claimant had no reasonable grounds to believe that its patent could not be used without its consent.

a. Respondent's statements were merely political

66. As accurately articulated by *Continental Casualty* tribunal, "political statements have the least legal value, regrettably and notoriously so".[141]

67. Indeed, in that case Argentine's Minister of Finance guaranteed to keep USD-ARS rate in force, however, the statement was found to lack any value while establishing the existence of

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[136] UNCTAD Report, p. 68; *Allard*, ¶183.

[137] *Ibid*.

[138] *Ibid*.

[139] Annex No. 2, p. 39.

[140] Statement of Uncontested Facts, para. 8, p. 29.

[141] *Continental Casualty*, ¶261.

legitimate expectations.[142] The same conclusion was reached in *El Paso*, where governmental assurances to protect foreign investments were not taken into account due to their political character.[143]

68. A closer analysis of the statements of the Minister for Health [144] and Respondent's President[145] manifests their political nature and leaves no room for other interpretation.

69. Mr. Joseph Bell used such emotionally tinged words and expressions as "forefront of our strategy", "cornerstone", "myopic measures", "pave the way forward",[146] which are all about politics and in no way represent any precise substantial promises.

70. The tweet of Respondent's President is no different. Tellingly, it contained nothing but two metaphors (i.e. "to do away with red tape" and "roll out the red carpet to investors"),[147] which cannot be interpreted so as to have any legal dimension.

71. Thus, Respondent's statements were purely political and Claimant cannot rely on them to demonstrate the existence of legitimate expectations.

b. Alternatively, Respondent gave no specific guarantees

72. States often make general investment-encouraging statements, upon which investors cannot legitimately rely while planning their business activities.[148] Broad political declarations shall not be interpreted in a way accommodating the needs of foreign investors, which were never intended to be addressed by States.

73. Indeed, in *PSEG* Turkey's statement that foreign investments were "needed, encouraged and welcome" was deemed unable to create any legitimate expectations due to its infinitely broad meaning.[149] Likewise, in *El Paso* the informal promise of the Argentinian President to ensure legal certainty of investment framework was considered insufficiently specific.

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[142] *Ibid*., ¶252.

[143] *El Paso*, ¶395.

[144] Annex No. 2, p. 39.

[145] Statement of Uncontested Facts, para. 8, p. 29.

[146] Annex No. 2, para. 4, p. 39.

[147] Statement of Uncontested Facts, para. 8, p. 29.

[148] Potesta, p. 107.

[149] *PSEG*, ¶248.

[136] Annex No. 2, p.39

[137] *Ibid*.

74. The Minister for Health's statement[136] upon which Claimant might rely in order to prove the presence of legitimate expectations, anything but specific. Minister for Health mentions neither how nor to what extent nor against what patents shall be protected.[137] Such important details were most likely omitted on purpose, so that the statement could not be interpreted as legally binding.

75. Thus, Respondent's authorities never gave any specific promises regarding patents generally or Claimant's patent particularly.

c. In any case, Respondent never addressed Claimant

76. A State's guarantees create legitimate expectations only if they are granted to a foreign investor in an individualized way.[150] Otherwise, the investor would be allowed to benefit from practically *any* guarantees, even if the State never intended to accord them to the investor.

77. In *Metalclad* a U.S. investor's expectation that it needed no license to perform its investment was found legitimate, since the relevant assurance was officially issued in the investor's name.[151]

78. In the case at hand, Respondent never mentioned its intention to accord any special guarantees to Claimant. Absent an unambiguous manifestation, Claimant cannot be presumed to be the addressee of the Minister for Health's statement.[152]

79. Thus, supposing Respondent accorded some extra guarantees to patent-holders, Claimant could not rely on them, as they were never directly addressed to it.

2. Claimant unreasonably believed that the patent could not be used without its consent

80. The scope of a host State's guarantees shall be interpreted in accordance with its domestic law, policies and international obligations.[153] If investors ignore such framework while relying on the guarantees, they act unreasonably.[154]

81. For example, in *MTD* while assessing the legality of its real estate project the investor unreasonably relied on the fact that Chili contracted with it, since construction in a reserved area

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[150] Potesta, p. 106.

[151] *Metalclad*, ¶89.

[152] Annex No. 2, p. 39.

[153] Potesta, p. 120.

[154] *MTD*, ¶¶242-246.

was explicitly prohibited by the Chilean law.[155] The *MTD* tribunal ruled that reasonable investors shall view States' guarantees in light of the applicable domestic legislation as well as international undertakings.[156]

82. Here, Respondent's guarantee to protect Claimant's patent (if it ever existed) shall be assessed in accordance with the TRIPS Agreement, which Claimant itself finds highly relevant,[157] and International Covenant for Economic, Social and Political Rights (ICESPR), to which Respondent is a party.[158]

i. TRIPS Agreement

83. As for the TRIPS Agreement, in the Notice for Arbitration Claimant misinterpreted its role.[159] Contrary to Claimant's misleading allegations, the Agreement does not provide patentholders with unlimited protection. Quite the opposite, it expressly entitles States to issue nonvoluntary licenses under Article 31.[160] Article 31 reflects the concept of a "patent bargain",[161] where States undertake to protect an invention from third parties' interference through patents, reserving a right to regulate such protection in the pursuit of legitimate public policy objectives.[162] For example, such States as Brazil, Thailand, India, Rwanda, Indonesia, Malaysia, Zambia, Mozambique and Zimbabwe have already introduced the regime described in Article 31 and issued compulsory licensing affecting such major pharmaceutical actors as Bayer, Roche, Merck, etc., for the sake of public health.[163]

84. Thus, the TRIPS Agreement and overall IP system allows States to interfere with the rights of patent-holders.[164] Therefore, a highly vague statement of Respondent's Minister for Health,[165]

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[155] *Ibid*.

[156] *Ibid*.

[157] Notice of Arbitration, para. 13, p. 5.

[158] Procedural Order No. 2, para. 2, p. 48.

[159] Notice for Arbitration, para. 13, p. 5.

[160] TRIPS Agreement, Article 31.

[161] Vadi, p. 171.

[162] *Ibid*.

[163] Reichman, pp. 3-4.

[164] Vadi, p. 171.

[165] Annex No. 2, p. 39.

where he highlighted the importance of patens, cannot be interpreted by Claimant as if Respondent renounced its right to regulate IP sector.

ii. International Covenant for Economic, Social and Cultural Rights

85. Article 12 of the ICESCR, which requires States to ensure that its nationals enjoy "the highest attainable standard of physical and mental health", is also relevant for the purposes of establishing Claimant's legitimate expectations.

86. As a part of its ICESCR obligation, of which Claimant should be aware, Respondent is supposed to prevent, treat and control the spread of diseases.[166] Moreover, the Minister for Health expressly stated that Respondent's goal was not only to protect IP rights of foreign investors, but also to "secure access to healthcare for all".[167]

87. Thus, Claimant was given enough indications that if the health of Respondent's nationals worsened as a result of the existing disease, Respondent would do anything to provide them with an adequate treatment.

88. *Ergo*, Claimant concluded the LTA under an unreasonable assumption that its patent was totally immune. Claimant stroke while the iron was hot, conveniently disregarding Article 31 of the TRIPS Agreement, Article 12 of ICESCR and Respondent's declared aim[168] to protect its nationals. Claimant's failure to take into account such legal considerations amounts to assuming the relevant business risk, which far from possessing legitimate expectations. Consequently, Claimant's allegations that its legitimate expectations were upset do no hold water.

C. ALTERNATIVELY, RESPONDENT LAWFULLY EXERCISED ITS POLICE POWERS FOR THE SAKE OF PUBLIC HEALTH

89. Shall this Tribunal find that Respondent guaranteed that only Claimant could sanction the use of its patent, Respondent's grant of a license to HG-Pharma was still permissible.

90. Under customary international law [169] States may resort to their "police powers", *i.e.* introduce measures derogating from treaty standards in the exercise of their sovereign functions.[170] States are particularly allowed to resort to such measures if the health of their nationals is under a

[166] ICESCR, Article 12 (c).

[167] Annex No. 2, p. 39.

[168] *Ibid*.

[169] *Phillip Morris*, ¶290.

[170] Kriebaum, pp. 725-729.

severe threat.[171] Even though such measures shall be reasonable[172] and proportionate,[173] States are given a large margin of appreciation while defining the scope of such notions.[174]

91. In the case at hand, allowing HG-Pharma to produce Claimant's patented drug was justified, since Valtervite was the only drug capable of efficiently preventing the disease from spreading.[175] Moreover, Claimant was entitled to regular payments at a reasonable royalty rates. Thus, Respondent's grant of the license to HG-Pharma was reasonable (**1**) and proportionate (**2**).

1. Respondent's measure was reasonable

92. States' measures pursuing public health objectives are reasonable if they are potentially efficient.[176]

93. In *Philip Morris*, while fighting against tobacco addiction, Uruguay reasonably prohibited sales of various cigarettes brands belonging to the claimant, permitting the investor to sell only one variant of each family brand – for instance, only Marlboro Red out of all versions of this brand.[177] That measure was ruled to be justified,[178] since it was proved to have some deterrent effect on smokers and efficiently "addressed the false perception created by use of colors that some brand variants were healthier than others".[179]

94. In the present case, granting HG-Pharma a license to produce Valtervite was more than reasonable. It was scientifically proven that Valtervite prevented the virus from spreading,[180] hence, the measure indeed contributed to the public health aims pursued by Respondent.

95. Thus, even though granting a license to HG-Pharma may have involved a certain limitation on Claimant's IP rights, the measure was indispensable for protecting Respondent's nationals from the greyscale disease.

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[171] *Phillip Morris*, ¶291.

[172] *Ibid*, ¶306.

[173] *Ibid*.; Kriebaum, pp. 731-742.

[174] *Phillip Morris*, ¶291.

[175] Procedural Order No. 3, para. 9, p. 50.

[176] *Phillip Morris*, ¶306.

[177] *Ibid*., ¶¶9-10.

[178] *Ibid*., ¶417.

[179] *Ibid*., ¶404.

[180] Procedural Order No. 3, para. 9, p. 50.

2. Respondent's measure was proportionate

96. The measure adopted in violation of a foreign investor's rights is proportionate, if there are no other efficient measures available to the State and if the investor receives certain compensation.[181]

97. While combating against a disease, production of generic drugs is deemed the only efficient measure, hence, proportionate.[182] This follows from widespread practice of such states as Brazil, Thailand, India, Rwanda, Indonesia, Malaysia, Zambia, Mozambique and Zimbabwe, which introduced compulsory licenses without being internationally liable for this.[183]

98. As for the compensation, it is considered reasonable, if a patent holder receives certain royalty payments, ranging from 0,5% of total sales (usually applicable in least developing countries) to 4% of total sales (usually applicable in developed countries).[184]

99. For example, in 2006 while fighting against heart diseases and stroke Thailand introduced a compulsory license on production of a clopigodgrel bisulfate (Plavix) with 0,5% of royalty payments.[185] In 2007 Brazil issued a license on production of efavirinez (Sustiva) used to treat HIV in violation of rights of the large pharmaceutical company Merck and set 1,5% of royalty payments.[186] None of these States were held liable as such measures had been undertaken for the sake of public health.

100. In the case at hand, neither shall be Respondent. Being a developing country[187] Respondent set 1% as a royalty rate payable by HG-Pharma to Claimant for being allowed to produce Valtervite,[188] which is in line with international standards.[189] Moreover, Claimant is given the opportunity to ask for a revision of the rate, hence, the rate might be subsequently increased. Furthermore, the license granted to HG-Pharma was temporary, hence, Respondent could withdraw it once its public health aims were achieved.

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[181] Kriebaum, p. 732.

[182] Reichman, pp. 3-4.

[183] *Ibid*.

[184] Reichman, p. 1.

[185] *Ibid*., p.2.

[186] *Ibid*., p. 3.

[187] Response to the Notice of Arbitration, para. 9, p.17.

[188] Statement of Uncontested Facts, para. 21, p. 30.

[189] Response to the Notice of Arbitration, para. 9, p.17.

101. Thus, Respondent's measure was proportionate as it took into account not only the vital interests of public, but also Claimant's economic interests.

102. Overall, it is a bitter pill for foreign investors to swallow, but public health legally (let alone ethically) is considered more important than their will to capitalize on ordinary people's misfortune, which was expressed in unequivocal words of Claimant's CFO.[190] Therefore, by permitting HG-Pharma to produce Valtervite at a lower price Respondent reasonably and proportionately secured an adequate access of its people to the only drug that could lessen their pain. Thus, Respondent's actions were justified and no breach of Article 3(2) occurred. 103. *Ergo*, by introducing Section 23C into its Intellectual Property Act and by allowing HG-Pharma to produce Claimant's patented drug Respondent complied with the FET standard of Article 3(2) of the BIT. Claimant could not legitimately expect its patent to remain immune from Respondent's regulation, since such regulation not only was in line with international practice, but also was warranted to prevent the spread of the incurable disease.

IV. CLAIMANT'S ENFORCEMENT PROCEEDINGS IN RESPONDENT'S HIGH COURT DO NOT GIVE RISE TO A VIOLATION OF ARTICLE 3 OF THE BIT

104. Even though Claimant's proceedings in Respondent's High Court are still pending, Claimant is neither denied justice (**A**) nor deprived of effective means of enforcing its rights (**B**).

A. CLAIMANT IS NOT DENIED JUSTICE

105. States' obligation to accord FET encompasses an obligation to ensure justice in their courts.[191] However, denial of justice arises only if the entire judicial system operates inadequately.[192] Indeed, justice is deemed denied, if foreign investors do not have access to state courts or if justice is administered with a serious interference from a State.[193]

106. For example, in *Loewen* a foreign investor was denied justice in the US Courts, since the jury was influenced by persistent appeals to local favoritism as against the investor.[194] The

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[190] Procedural Order No. 3, para. 11, p. 50.

[191] Haeri, Dagli, p. 6 citing *Loewen*, ¶132; *Vivendi*, ¶7.4.11; *Rumeli*, ¶651; *Jan de Nul*, ¶188; *Ruper Binder*, ¶448; *Siag*, ¶¶451-461.

[192] *Azinian*, ¶¶102,103.

[193] Sattorova, p. 225.

[194] *Loewen*, ¶136.

Loewen tribunal ruled that such unfavorable treatment resulted in a clearly improper and discreditable verdict,[195] hence, Loewen Group was denied justice.

107. By contrast a mere delay in proceedings - which might occur for various reasons depending on a case - does not amount to breach of the FET standard, since it does not prove that a judicial system is entirely corrupted.[196]

108. Indeed, in *Chevron* the investor was not denied justice, even though Ecuadorian courts failed to render judgments in dozens of the proceedings involving investor for 7 years[197] after having publicly announced their readiness to do so.[198] The *Chevron* tribunal ruled that the delay was regrettable, however, it neither demonstrated a "particularly serious shortcoming" nor egregious conduct that "shocks, or at least surprises, a sense of judicial propriety".[199]

109. No serious shortcomings were likewise found in *White Industries* where enforcement proceedings in Indian state courts lasted 9 years[200] without justice being denied to the foreign investor.

110. In the present case, even though Claimant's enforcement proceedings in Respondent's High Court lasted 8 years, it does not shock the sense of judicial propriety. Such lengthy proceeding, according to *White Industries* tribunal, might be regrettable, however do not amount to denial of justice.[201]

111. Therefore, in light of *Chevron* and *White Industries*, in the present case Claimant does not satisfy the applicable threshold to prove the denial of justice in breach of Article 3(3) of the BIT.

B. CLAIMANT WAS NOT DEPRIVED OF EFFECTIVE MEANS OF ENFORCING ITS RIGHTS

112. Delay in the proceedings might violate a so-called "effective means" standard which obliges States to provide foreign investors with effective means of asserting their claims and

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[195] *Ibid*.

[196] Sattorova, p. 228.

[197] *Chevron*, ¶166.

[198] *Ibid*., ¶262.

[199] *Ibid*., ¶244.

[200] *White Industries*, ¶10.4.22.

[201] *Ibid*.

enforcing their rights.[202] However, this standard does not have a customary force,[203] therefore, it can be violated only if expressly included in a BIT.[204]

113. In the present case, the BIT does provide for such standard, therefore, violation of such standard is impossible. Thus, Claimant's arguments that it was deprived of effective means to enforce its rights shall be dismissed.

114. However, should the tribunal find the "effective means" standard applicable by virtue of the preamble of the BIT, Claimant's submission still fails since Respondent's High Court acted reasonably (**1**) and the case involved sensitive issues of public policy (**2**), hence, required careful examination. Moreover, Respondent is a developing country, therefore, certain delay in the proceedings conducted by its overloaded courts is justifiable (**3**).

1. Respondent's High Court acted reasonably

115. Where States' courts are manifestly unwilling to decide cases of foreign investors by delaying proceedings for the sake of delay, they act unreasonably.[205]

116. In *Chevron*, Ecuadorian courts delayed rendering judgments for 7 years,[206] even though they had officially declared themselves ready to do so.[207] The *Chevron* considered this behaviour as unreasonable.

117. In the case at hand, Respondent's High Court was than willing to decide the case. Conversely, it carefully examined the arguments presented by both Parties, ensuring that they fully presented their positions.

118. Therefore, Respondent's Hight Court's behavior was reasonable.

2. The case involved sensitive issues of public policy

119. A certain delay in State courts' proceedings is permissible if the contested issues are particularly complex.[208]

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[202] *Ibid*., ¶¶11.3-11.4; *Chevron*, ¶¶241- 275.

[203] *Chevron*, ¶242.

[204] *Ibid*.

[205] *Chevron*, ¶¶166, 262.

[206] *Chevron*, ¶166.

[207] *Ibid*., ¶262.

[208] *Chevron*, ¶250; *White Industries*, ¶10.4.13.

120. In *FPS*, a delay in the enforcement proceedings was justified since public policy issues involving insolvency and creditors' rights, which the courts analyzed with the utmost caution, were at stake.[209] Thus, the FPS's allegations that the Czech courts failed to provide effective means of enforcing the investor's rights were not sustained.[210]

121. In the present case, enforcement proceedings also involved the issues of public policy.[211] Public policy is a highly controversial issue especially in developing countries; therefore, it is not striking that Respondent's High Court was willing to examine the positions of the parties in a greater detail, which prolonged proceedings as a side effect.

122. Thus, as the case involved sensitive issues, Respondent's High Court justifiably delayed the proceedings when the NHA was absent or applied for extensions in order to present its position in full.

3. Moreover, the delay is justified due to Respondent's developing status

123. Court congestion and backlogs in developing countries excuse a certain delay in the proceedings, especially if the contested issue does not require a swift resolution.[212]

124. In *White Industries* the tribunal highlighted that India was a developing country with a seriously overstretched judiciary, therefore, certain delay in commercial matters was justified since they did not require a prompt resolution, unlike criminal matters.[213]

125. Thus, the delay in Respondent's High Court proceedings up to a certain extent was justified since Respondent was a developing country with an overloaded judiciary.

126. *Ergo*, no denial of justice occurred in the present case, since Claimant failed to demonstrate that the High Court's delay in the enforcement proceedings involving Claimant "shocks judicial propriety". Therefore, Article 3 of the BIT which guarantees FET to foreign investors was not violated.

127. Moreover, Claimant cannot rely on an "effective means" standard since it is not set forth in the BIT and does not have any customary force. In any case, in the remote event this Tribunal

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[209] *FPS*, ¶¶527-528.

[210] *Ibid*., ¶528.

[211] Statement of Uncontested Facts, para. 18, p.30.

[212] *Chevron*, ¶263; *White Industries*, ¶10.4.18.

[213] *White Industries*, ¶¶10.4.14, 10.4.17.

finds the standard applicable, the delay was justified due to the complexity of the case and Respondent's developing status.

V. RESPONDENT IS NOT LIABLE FOR THE NHA'S BREACH OF THE LTA

128. By invoking Respondent's liability for the breach of the LTA pursuant to the umbrella clause of Article 3(3) of the BIT Claimant not only mixes apple and oranges but also seeks more than its fair share. Indeed, the breach of the LTA was committed by the NHA, an independent legal entity,[214] and has nothing to do with Respondent. Moreover, Claimant has already been awarded the damages for the premature termination of the LTA,[215] so one can only guess why it puts all blame on Respondent now.

129. Apparently, Claimant follows the recent trend of foreign investors, who sued States to pursue claims against their primary contractors.[216]

130. However, this approach is totally erroneous, since international responsibility of a State may only be established when the following conditions are cumulatively present: 1) there shall be a State's international obligation; 2) the obligation shall be breached and 3) such a breach is attributable to the State. [217]

131. Elements 1 and 3 are manifestly absent in the present case, since obligations under the LTA are not Respondent's obligations (**A**) and alternatively, the NHA's termination of the LTA is not attributable to Respondent (**B**). In any case, the umbrella clause of Article 3(3) of the BIT does not cover purely commercial arrangements (**C**), hence, the LTA falls outside its scope of application.

A. OBLIGATIONS UNDER THE LTA ARE NOT RESPONDENT'S OBLIGATIONS

132. States are held responsible only for breaching their obligations, rather than the ones they never undertook.[218]

133. In the present case, this proposition is reinforced by Article 3(3) of the BIT, which obliges States to "respect any obligation it may have entered into with regards to foreign investors or investments".[219] These words expressly limit the scope of the umbrella clause to obligations of the

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[214] *Ibid*., para. 9.

[215] Statement of Uncontested Facts, para. 17, p. 30.

[216] Feit, p. 14.

[217] ARSIWA, Article 2.

[218] Badia, p. 4.

[219] Annex No.1, p. 34, Article 3(3).

State, but not those of the State's separate entities.

134. In the recent practice, however, contractual obligations of separate entities were deemed obligations of a State under exceptional circumstances: 1) if the State intended to become party to the contract;[220] or 2) if the entity *de facto* represented the State.[221] 135. None of these exceptions is relevant for the present case.

1. Respondent never intended to become party to the LTA

136. If a State intends to adhere to a contract between an investor and a separate entity, it might hypothetically be bound by the contract's provisions.[222] The State's intention might follow from its participation in negotiations of the contract or from its involvement in the conclusion of the contract.[223]

137. Thus, in *Hamester* Ghana was not liable for a contractual breach committed by Cocobod, a separate legal entity, since the contract between Hamester and Cocobod was concluded with no implication of Ghana.[224] The tribunal ruled that Ghana was never named as a party and never signed the contract.[225] Moreover, there have been no suggestions that Ghana ever intended to become a party to the contract, hence, it could in no way be liable for its breach.[226]

138. The present case is essentially the same. Respondent never participated in the conclusion of the LTA and never demonstrated its intention to become its party, consequently, it cannot be responsible for the breach.

139. Thus, there are no grounds to involve Respondent in the contractual dispute between Claimant and the NHA.

2. The NHA has no authority to represent Respondent in contractual obligations

140. Contractual obligations undertaken by a separate entity bind States only if the entity is expressly vested with a governmental power to conclude contracts on behalf of the State. [227]

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[220] Olleson, p. 483.

[221] *Ibid*.

[222] Feit 1, p. 35.

[223] *Ibid*.

[224] *Hamester*, ¶347.

[225] *Ibid*.

[226] *Ibid*.

[227] Article 5 of ARSIWA; Olleson, p. 472-473; *Clayton*, ¶308; *Maffezini*, ¶52.

Otherwise, the State might be deemed bound by the contracts of which it was never aware. 141. In this vein, in *Noble Ventures* obligations of State Ownership Fund (SOF) and Authority for Privatization and Management of the State Ownership (APAPS) were deemed to be Romania's obligations, since the entities were officially vested with representing Romania in privatization process.[228]

142. In contrast, in *AMTO*, investor unsuccessfully pursued a claim against Ukraine for the breach of a contract by two Ukrainian legal entities, Energoatom/ZAES and EYUM-10. The tribunal did not find any proof that these entities were representing Ukraine. Thus, Ukraine was not held liable.[229]

143. In the present case, there is no indication that the NHA was entitled to conclude contracts on behalf of Respondent. If the NHA possessed this right, it would most likely be headed by a person appointed by the Government, so that its contract-making was under Respondent's control. By contrast, the NHA operates independently without any interference from Respondent's part,[230] hence, it cannot be considered as Respondent's representative.

144. Apart from that, Claimant itself distinguish Respondent from the NHA. Claimant has already obtained an arbitral award against the NHA for the breach of the LTA.[231] Shall Claimant view the NHA as a representative of Respondent, it would have sued Respondent in first place.

145. Thus, the NHA cannot be considered as Respondent's representative due to the lack of any governmental authority, and by initiating arbitration against the NHA Claimant itself admitted that the acts of the NHA shall be distinguished from the acts of Respondent.

146. *Ergo*, the LTA applies only to the NHA, since Respondent never contemplated being its party. Moreover, the NHA acted in its own interests and on its own behalf while concluding the contract, hence, Respondent is responsible for nothing related to it.

B. NHA'S TERMINATION OF THE LTA IS NOT ATTRIBUTABLE TO RESPONDENT

147. Shall the Tribunal find that Respondent undertook the LTA obligations, Claimant's submission still fails since the termination of the contract is not attributable to Respondent.

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[228] *Noble Ventures*, ¶86.

[229] *AMTO*, ¶110.

[230] Procedural Order No. 3, para. 9, p. 50.

[231] Statement of Uncontested Facts, para 17, p. 30

148. Under customary international law enshrined in Articles 5-8 of ARSIWA, a breach is attributable to a State if committed either by the State's organs, [232] or by persons exercising elements of governmental authority[233] or by persons that are directed or controlled by a State.[234]

149. Neither of these indicia is present in the case at hand. The NHA is not Respondent's state organ **(1)**, it exercised no governmental authority while terminating the LTA (**2**) and it did not act under Respondent's control **(3)**.

1. The NHA is not Respondent's state organ

150. An entity is deemed a State organ if it forms a part of the State's organizational system and acts on behalf of the State in accordance with its domestic law.[235]

151. For example, in *Generation Ukraine* the Kyiv City State Administration was deemed Ukraine's state organ, whose actions were attributable to Ukraine for the purposes of treaty-based arbitration, since Ukrainian Constitution lists municipal authorities as a part of the State.[236] Thus, Ukraine was held liable for the acts of the Kyiv Administration.[237]

152. In the present case, the acts of the NHA are not attributable to Respondent, since the NHA is not defined as Respondent's state organ under Respondent's domestic law.[238] By contrast, in accordance with Respondent's legislation the NHA is essentially a public-sector corporation.[226] It operates independently and has various sources of funding including private contributions.[239]

153. Thus, the NHA is anything but Respondent's organ and its actions cannot be attributed to Respondent.

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[232] ARSIWA, Article 4.

[233] *Ibid.,* Article 5.

[234] *Ibid.,* Article 8.

[235] Commentary to ARSIWA, pp. 40-42.

[236] *Generation Ukraine*, ¶10.1.

[237] *Ibid*., ¶¶10.2-10.7.

[238] Procedural Order No. 3, para 9, p. 50

[226] *Ibid.*

[239] *Ibid*.

2. The NHA never exercised governmental authority while terminating the LTA

154. The conduct of an entity vested with a certain governmental power is attributable to a State if such conduct involves an exercise of this power.[240] By contrast, if the entity acts outside its governmental mandate, these actions are not attributable.[241]

155. Indeed, in *Maffezini* the faulty advice [242] regarding the cost of the investment project provided to Mr. Maffezini by SODIGA, a state-owned entity, was found to be attributable to Spain. The *Maffezini* tribunal carefully analyzed the functions of SODIGA under the applicable governmental act and decided that estimating costs fell within SODIGA's mission of promoting regional industrial development.[243]

156. In the present case, the NHA was charged with *assisting* Respondent in securing universal healthcare for its nationals.[244]

157. For this purpose, the NHA prepared reports analysing the dynamics of the greyscale disease, its potential treatment and highlighting the key concerns.[245] Moreover, the NHA organised various workshops and educational projects to increase awareness of Respondent's nationals about the disease.[246]

158. Thus, the NHA's *assisting* functions were limited to certain political and social activities, rather that contract-making. Therefore, since Respondent never expressly vested the NHA with a power to conclude contracts on its behalf, termination of the LTA is not attributable to Respondent.

3. The NHA never acted under Respondent's control

159. Conduct of an entity is attributable to a State if the former operates under the "effective control" of the latter.[247] Effective control implies both general control of the State over the entity and specific control of the State over the particular act in question.[248]

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[240] Commentary to ARSIWA, pp. 42-43.

[241] *Ibid*.

[242] *Maffezini*, ¶58.

[243] *Ibid*, ¶62.

[244] Annex No. 2, para. 2, p. 39.

[245] Annex No. 3, pp. 40-43.

[246] Statement of Uncontested Facts, para. 12, p. 29.

[247] *Nicaragua*, ¶¶113, 115.

[248] Olleson, pp. 472-473.

160. In the present case, Respondent does not effectively control the NHA.

a. Respondent does not have general control over the NHA

161. A State is deemed to have general control over a separate public entity if the latter is directed and financed by the former.[249]

162. In *L.E.S.I.*[250] even though *Agence Nationale des Barrages* (ANB) was an independent agency and possessed its own legal personality, [251] the *L.E.S.I.* tribunal found that Algeria controlled the agency since its activities were financed from state budget and its board of directors was comprised of individuals appointed by the Algerian Government.[252]

163. Here the NHA's status is totally different, since it operates independently[253] and is partially funded by private companies.[242]

164. Thus, Respondent does not have any mechanisms of influencing the NHA's decisions, hence, no general control is present.

b. Moreover, NHA terminated the LTA upon its own discretion

165. If a separate legal entity acts upon its own initiative without any directions from the State, such conduct is not attributable to the latter.[254]

166. In *Tulip*, for example, the termination of a contract by the state-owned company TOKI was not attributable to Turkey, since there was no proof that Turkey used its control over the company "to achieve a particular result in its sovereign interests".[255]

167. In the present case, likewise, there is absolutely no evidence that the NHA was directed by Respondent to terminate the LTA.[256] The only fact that Claimant could use for the purposes of proving the existence of control – the meeting between the director of the NHA and Respondent's

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[249] *Ibid.*; Badia, pp. 189-191.

[250] *L.E.S.I.*, ¶19.

[251] *Ibid.*, ¶19 (iii).

[252] *Ibid.*, ¶18 (iii).

[253] Procedural Order No. 3, para. 9, p. 50

[242] *Ibid*.

[254] Olleson, pp. 472-473.

[255] *Tulip*, ¶326.

[256] Procedural Order No. 3, para.9, p. 50

President and the Minister for Health. However, due to absence of any other details about the meeting, the presumption that States and its authorities act in good faith[257] cannot be rebutted in the present case.

168. Thus, Claimant has no grounds to believe that the NHA was directed to terminate the LTA by Respondent, hence, the NHA's actions are not attributable to the Respondent.

169. *Ergo*, none of the tests for attribution under ARSIWA is satisfied in the present case, therefore, Claimant's attempts to shift the blame for termination of the LTA from the NHA to Respondent are groundless.

C. IN ANY CASE, THE UMBRELLA CLAUSE OF ARTICLE 3(3) OF THE BIT DOES NOT COVER PURELY COMMERCIAL ARRANGEMENTS

170. Umbrella clauses may transform the breach of a contract into the breach of a BIT only if the contract relates to an investment.[258] Otherwise, responsibility of States would be expansive and almost indefinite,[259] notwithstanding the limits defined by contracts.[260]

171. This idea was supported by, for example, the tribunals in *El Paso,*[261] *Pan American*[262] and *SGS v. Philippines* that affirmed that umbrella clauses only apply to investment agreements.[263] The rationale of the tribunals was to avoid the interpretations that would allow even the most minor contract claims to be transformed into treaty claims.[264]

172. Furthermore, in *Joy Machinery*[265] the tribunal highlighted that an umbrella clause cannot transform any contract breach into a BIT breach unless there is a clear violation of the treaty rights and obligations or a violation of contract rights is of such magnitude as to trigger the treaty protection[266].

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[257] CHENG, p. 305.

[258] Sinclair, pp. 922-928; *SGS*, ¶166.

[259] *Ibid*.

[260] Sinclair, p. 893.

[261] *El Paso*, ¶¶26,29.

[262] *Pan American*, ¶¶96-116.

[263] *El Paso*, ¶528; *Pan American*, ¶105.

[264] *Pan American*, ¶110; *El Paso*, ¶538.

[265] *Joy Machinery*, ¶72.

[266] *Ibid*, ¶81.

173. In the present case, the alleged violation of the LTA is of no such character. As it has already been described,[267] the LTA is a typical contractual arrangement, which was concluded and later on terminated by the NHA acting as a purchaser.[268] Moreover, Claimant has already been awarded damages for the breach of the LTA as a result of commercial arbitration against the NHA.

174. Thus, the umbrella clause of Article 3(3) shall not be used to allow Claimant to seek both contractual and treaty remedies at the same time. Therefore, the application of the umbrella clause cannot be triggered in the present case.

175. *Ergo*, Respondent is not liable for the breach of the LTA under the BIT since Respondent never undertook any obligations under the LTA. Alternatively, it never breached the LTA, as the contract was prematurely terminated by the NHA, which is not attributable to Respondent. Finally, in any case, the breach of the LTA does not meet the threshold of the breach of the BIT.

[267] See this Statement of Defense, Part I(A)(2).

[268] Procedural Order No. 3, para. 9, p. 50.

PRAYER FOR RELIEF

1. Respondent respectfully requests this Tribunal to find that it lacks jurisdiction, since:
    a. Claimant has been validly denied the benefits of arbitration by Respondent;
    b. the award-enforcement related claims are outside the scope of the BIT;
2. Should the Tribunal find that it has and should exercise jurisdiction, Respondent urges it to recognize that:
    a. Respondent did not breach fair and equitable treatment standard;
    b. By terminating Long-Term Agreement Respondent did not violate Article 3(3) of the BIT.

Respectfully submitted on September 25, 2017

by

Team Alfaro

On behalf of Respondent

The Republic of Mercuria