PERMANENT COURT OF ARBITRATION

In the Proceeding
PCA Case No. 2016-74

between

ATTON BORO LIMITED
(Claimant)

and

THE REPUBLIC OF MERCURIA
(Respondent)

MEMORIAL FOR RESPONDENT

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25 September 2017

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Treaties

CAFTA	Dominican Republic-Central America-United States Free Trade Agreement, entered into force on 1 March 2006.
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, entered into force on 1 January 1995.
ECT	Energy Charter Treaty, entered into force on 16 April 1998.
ICESCR	International Covenant on Economic, Social and Cultural Rights, entered into force on 3 January 1976.
ICJ Statute	Statute of the International Court of Justice, Annex to the 1945 Charter of the United Nations, entered into force on 24 October 1945.
NAFTA	North American Free Trade Agreement, entered into force on 1 January 1994.
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force on 7 June 1959.
Philippines-Switzerland BIT	Agreement Between the Republic of Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, entered into force on 23 Abril 1999.

TRIPS	Trade-Related Aspects of Intellectual Property Rights, Annex 1(C) of the WTO Agreement, entered into force on 1 January 1995.
UDHR	Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948.
VCLT	Vienna Convention on the Law of Treaties, entered into force on 27 January 1980.
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization, entered into force on 1 January 1995.

LIST OF ABBREVIATIONS

BIT	Mercuria-Basheera Bilateral Investment Treaty
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
FDC	Fixed-Dose Combinations
FPS	Full Protection and Security
HIV/AIDS	Human immunodeficiency virus infection and acquired immune deficiency syndrome
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IP	Intellectual Property
ISDS	Investor-State Dispute Settlement
Law 232/76	Mercuria's Intellectual Property Law, No. 232/76
Law 8458/09	National Legislation to Amend Mercuria's Intellectual Property Law, No. 8458/09
LTA	Long-Term Agreement
MFN	Most Favored Nation
NHA	National Health Authority
Notice	Atton Boro's Notice of Arbitration, filed on 7 November 2016.
PCA	Permanent Court of Arbitration
PO	Procedural Order
Response	Mercuria's Response to the Notice of Arbitration, filed on 26 November 2016.
R&D	Research and development
USD	United States Dollar
UN	United Nations
WIPO	World Intellectual Property Organization
WTO	World Trade Orgatization

SUMMARY OF FACTS

1. On 11 January 1998, the Kingdom of Basheera (**Basheera**) and the Republic of Mercuria (**Respondent**) entered into the BIT. Respondent is a country that, according to a WHO study, faces the effects of a disease named greyscale, alongside with 42 countries.

2. On 5 April 1998, Atton Boro Limited (**Claimant**), an investment vehicle under the control of the Atton Boro Group, was incorporated in Basheera. Its shares are controlled by Atton Boro and Company, a holding for Atton Boro Group seated in the People's Republic of Reef (**Reef**). During 1998 to 2016, Claimant employed few staff members – between 2 to 6 permanent employees –, whose activities concerned the management of portfolio patents registered outside Basheera.

3. In 1998, the Atton Boro and Company assigned to Claimant the Mercurian Patent for Valtervite, a compound effective for greyscale treatment. Greyscale is a chronic, non-fatal and incurable sexually transmitted disease. It causes the cracking and flaking of the skin, and also stiffening muscles, swollen limbs and severe joint pain.

4. Since 2002, Respondent observed an increased occurrence of greyscale, a severe and pervasive disease, which greatly affected the working-age individuals in Mercuria. In 2003, Mercuria's National Health Authority (**NHA**) alerted in its annual report that the greyscale epidemic would lead to the settlement of an imminent public health critical situation, which could become a national crisis. That eventually took form, requiring a nationwide campaign in order to raise awareness and procure medicines at discounted rates.

5. In 2004, Claimant and the NHA entered into a Long-Term Agreement (**LTA**), in order to supply greyscale-treatment drug, called Sanior, which started to be produced in 2005. Before that, the NHA and Claimant had partnered with the Mercuria Comprehensive HIV/AIDS Partnership, which integrated a five-year health plan (1999-2004).

6. In 2006, a sharp increase in the number of confirmed greyscale cases was registered. In 2007, the order values for Sanior doubled with each quarter, as the number of persons coming into care grew. Bearing in mind the higher demand, Claimant continued to

manufacture the medicines in early 2008, not attending NHA's request for a further 40% discount rate.

7. On 10 June 2008, the NHA terminated the LTA on grounds of Claimant's unsatisfactory performance. Claimant challenged the termination of the LTA before an arbitral tribunal seated in Reef and obtained a Foreign Award, which ordered the NHA to pay Claimant USD 40,000,000.00 in damages. In 2009, Claimant filed enforcement proceedings before the High Court of Mercuria, to which the NHA objected on grounds of public policy. The case is pending.

8. On 10 October 2009, Mercuria's President promulgated Law 8458/09, inserting Section 23C in Law 232/76. The provision established the procedure for the issuance of compulsory licenses under Respondent's legal framework.

9. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, applied for a license to manufacture Valtervite. The license was granted until greyscale is no longer a threat to public health in Mercuria, with royalties fixed at 1% of earnings. Claimant did not challenge the validity of the decision and the royalty rate before the two-judge bench of the High Court, as allowed in Mercuria's IP law. Mercuria gave the generic greyscale medicine in the form of humanitarian aid to three neighboring States that were facing financial difficulties.

10. On 7 November 2016, Claimant filed a Notice of Arbitration before the Permanent Court of Arbitration (**PCA**) pursuant to Article 8 BIT. On 26 November 2016, Respondent submitted its Response to the Notice of Arbitration.

ARGUMENTS

1. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER CLAIMS RELATED TO THE FOREIGN AWARD.

11. First, the Foreign Award does not fulfill Article 1(c) BIT requirements [1.1.]. Second, the Foreign Award is not an investment in the territory of Mercuria in accordance with its laws, as required in the chapeau of Article 1 BIT [1.2.].

1.1. The Foreign Award does not have the basic characteristics to qualify as an investment under Article 1(c) BIT.

12. "Claims to money" may qualify as investment under Article 1(c) BIT provided that the requirements of regular profits, duration, risk, and economic contribution, inherent to the definition of investment, are fulfilled.

13. Claimant may argue that the ordinary meaning of "claims to money" qualifies the Foreign Award as investment. However, Articles 31 and 32 VCLT – applicable to the present case insofar as its content reflects customary international law[1], which is a source of international law independent from treaty law[2] – provides that ordinary meaning is the *departure* point of treaty interpretation, not the only one.

14. Based on that, the *Romak* tribunal held that a construction based solely on ordinary meaning is inconsistent with the context and ignores the object and purpose of investment treaties[3]. It reasoned that the mechanical application would (i) lead to an outcome manifestly absurd or unreasonable, contrary to Article 32(b) VCLT[4]; (ii) render meaningless the distinction between investments and purely commercial transactions[5]; (iii) create *de facto* a new instance of review of State court decisions concerning the enforcement of arbitral awards[6]; (iv) mean that every contract entered into between an investor and a State entity, as well as "every award or judgment in favor of a […]

[1] *Arab Jamahiriya v. Chad*,¶41; *Botswana v. Namibia*,¶18; *Germany v. U.S.*,¶99; *Iran v. U.S.*,¶23; *Noble Ventures*,¶50; *Mondev*,¶43; *BIVAC*, Decision on Jurisdiction,¶59; *Chevron*,¶159; *WTO US — Carbon Steel*,¶61; Sorel and Eveno,¶31; Weeramantry,¶2.22; Sinclair,p.153.
[2] ICJ Statute, Art. 38(1)(b); Nicaragua v. U.S.,¶177.
[3] *Romak*,¶183.
[4] *Romak*,¶184.
[5] *Romak*,¶185.
[6] *Romak*,¶186.

national (irrespective of the nature of the underlying transaction)" is an investment[7]. As the term investment has an intrinsic meaning[8], Article 1(c) BIT should be constructed in light of legal doctrine and decisions of other arbitral tribunals[9].

15. *Salini v. Morocco* provides the leading definition of investment[10], serving as a landmark for virtually all cases since its edition[11]. An investment has (i) regularity of profit and return, (ii) a certain duration of the economic operation, (iii) the existence of a risk assumed by the investor and (iv) a contribution to the economic development of the host State[12]. Although all requirements are necessary to establish an investment, none of them is found in the Foreign Award.

16. First, the expectation of returns and profits is a fundamental element for the existence of an investment, "as a form of expenditures or transfer of funds for the precise purpose of obtaining a return"[13]. In the present case, such purpose does not exist. The Foreign Award provides damages and only has the purpose of compensation. It does not yield regular profits and returns.

17. Second, considering the host state desire to encourage commitments of capital from abroad on which it can rely for economic development[14], duration is the timespan over which the project is to be implemented[15]. The isolated and immediate issuance of legal instruments tend not to be considered investments and the *Salini v. Morocco* tribunal decided the minimum length "according to doctrine" was between 2 and 5 years[16]. The Foreign Award does not give rise to continuity, it is not related to the implementation of any undertaking and does not reach minimum timespan.

18. Third, the risk criterion must be "other than normal commercial risks" for configuring an investment under a BIT[17]. "All economic activity entails a certain degree of risk"[18],

[7] *Romak*,¶187.
[8] *Romak*,¶188.
[9] *Romak*,¶190.
[10] Grabowski,p.23.
[11] *Jan de Nul*,¶91; *Joy Mining*,¶53; *Pey Casado*,¶232, *Phoenix*,¶39; *LESI*,¶72; *Romak*,¶198; *Quiborax*,¶220-222; Grabowski,p.23.
[12] *Salini v. Morocco*,¶52.
[13] *CME, Brownlie's Separate Opinion*,¶34.
[14] Dugan, Wallace, Rubins and Sabahi,p.265.
[15] *Salini v. Morocco*,¶53.
[16] *Salini v. Morocco*,¶54.
[17] *MHS*,¶112.

but an investment risk carries a special kind of *alea*, associated with the fact that the investor cannot predict the outcome of his investment[19]. The risks associated with the Foreign Award, on the other hand, are circumscribed to a hypothetical non-payment, present in every ordinary commercial relation.

19. Fourth, the Foreign Award does not contribute to Mercuria's economic development[20]. Contribution is the dedication of resources that has economic value[21]. In the present case, all the capital applied for the issuance of the Foreign Award, such as legal and administrative fees, staff and document costs bare no relation whatsoever with Mercuria's economic development and were not reverted, directly or indirectly, to finance State economic activities.

20. In *GEA*, the tribunal understood the award as a mere legal instrument, which provides for the disposition of rights and obligations arising out of a contract[22]. For its analytically distinct nature, an award is limited to the concept of a legal instrument and does not qualify as an investment [23]. That holds true to the present case, for the Foreign Award does not contribute to Respondent's economy or to Claimant's profits.

21. Claimant may argue that the Foreign Award is as much a claim to money as bonds or as promissory notes. However, instruments of credit fulfill the requirements of regular profits, duration, risk and contribution, unlike the Foreign Award.

22. In *Fedax*, relying on these requirements, the tribunal considered promissory notes as protected investments. It held promissory notes yield regular profit and return by payments through a period of several years[24]; are not merely a short-term, occasional financial arrangement, as the issuer enjoys a continuous credit benefit until the notes become due[25]; the dispute as to the payment of the principal and interest shows the risk

[18] *Romak*,¶229.
[19] *Romak*,¶230.
[20] BIT,p.32, lines 980-981.
[21] *Romak*,¶214.
[22] *GEA*,¶¶161-162.
[23] *GEA*,¶162.
[24] *Fedax*,¶43.
[25] *Fedax*, ¶40.

that the holder has taken[26]; and the host State receives a significant amount of credit that is put to work for its financial needs[27].

23. In *Ambiente*, the tribunal also relied on *Salini v. Morocco* to assess whether bonds configured investments[28]. First, it understood that the interest supposed to be paid periodically satisfied the requirement of regularity of profits[29]. Second, that the duration of the bonds were relevant to assess the duration of the investment[30]. Third, that the risk of sovereign intervention was present and manifested in Argentina's default and restructuring[31]. Fourth, that taken as a whole the bonds issued amounted to a substantial contribution on the investors' part[32], as the funds were made available to Argentina and should be deemed as having contributed to its economic development[33].

24. In view of the inherent requirements of any investment, the Foreign Award does not qualify as one under Article 1(c) BIT.

1.2. The Foreign Award is not an investment in the territory of Mercuria in accordance with its laws, as required under Article 1 BIT.

25. Even if the Foreign Award were an investment under Article 1(c) BIT, it does not fulfill the territoriality and legality requirements established in the chapeau of Article 1 BIT, for it was rendered by an arbitral tribunal with legal seat in Reef[34].

26. First, an award is *made* in the country of the legal seat of arbitration[35]. The New York Convention, to which Mercuria and Basheera, as well as Reef, are parties[36], defines foreign awards as rendered in a territory different from where enforcement proceedings are sought[37].

[26] *Fedax*,¶40.
[27] *Fedax*,¶41.
[28] *Ambiente*,¶482.
[29] *Ambiente*,¶486.
[30] *Ambiente*,¶484.
[31] *Ambiente*,¶485.
[32] *Ambiente*,¶483.
[33] *Ambiente*,¶487.
[34] Facts,p.30,¶17.
[35] Born,p.2052; Lew, Mistelis and Kröll,p.699.
[36] PO2,p.48,¶2.
[37] New York Convention, Article I(1).

27. Second, the law of the arbitral seat is rightfully considered a "critical issue in any international arbitration"[38] and has practical and legal consequences[39]. The law of the arbitral seat "can directly govern a number of legal issues affecting any international arbitration"[40], such as the standard for annulment and the scope and extent of judicial review[41].

28. As a tribunal seated in Reef passed the decision, the award rendered in the LTA dispute is a foreign award vis-à-vis Mercuria, where enforcement is sought. Consequently, the High Court cannot entertain actions to annul the award based on mandatory rules of Respondent's domestic legal framework[42]. Furthermore, the High Court has not yet rendered its judgment on the application to set aside the enforcement of the Foreign Award[43], for incompatibility with Respondent's public policy[44]. This Tribunal should not overstep and replace a judgment to be made by the High Court with its own.

29. **IN CONCLUSION**, this Tribunal does not have jurisdiction over claims related to the Foreign Award, for it is not an investment under Article 1(c) BIT and it does not comply with Article 1 BIT territoriality and legality requirements.

2. CLAIMANT HAS BEEN DENIED THE BENEFITS OF THE BIT.

30. First, Claimant falls within the denial of benefits requirements set forth on Article 2(1) BIT [2.1.]. Second, Respondent is not precluded from invoking Article 2 BIT [2.2.].

2.1. Article 2 BIT requirements are fulfilled.

31. Article 2(1) BIT establishes that each Contracting Party reserves the right to deny the advantages of the BIT to a legal entity which (i) is controlled by nationals of a third state and (ii) does not have substantial business activities in the territory where it claims to be national. Claimant falls within both requirements.

[38] Born,p.2050.
[39] Born,p.2051.
[40] Born,p.2052.
[41] Born,p.2057.
[42] Fernández-Armesto,p.133.
[43] PO3, p.50, line 1595.
[44] Facts, p.30, ¶18.

2.1.1. Claimant is not controlled by nationals of Basheera.

32. Claimant's shares are held by the Atton Boro Group affiliates[45]. The Atton Boro and Company, which acts as the primary holding company for the Atton Boro Group, is seated in Reef[46]. Its shares are held by a mix of private entities and private individuals of a wide variety of nationalities[47]. Hence, Claimant falls within the first requirement for application of Article 2(1) BIT.

2.1.2. Claimant does not have substantial business activities in Basheera.

33. First, Article 2(1) BIT, interpreted in light of Article 31(1) VCLT, leads to the conclusion that Claimant is a mailbox company which activities are not substantial [2.1.2.1]. Second, the understanding of related arbitral decisions endorses the conclusion that Claimant does not have substantial business activities in Basheera [2.1.2.2.].

2.1.2.1. Claimant does not have substantial business activities in Basheera under Article 31(1) VCLT.

34. A treaty shall be interpreted in a way that it is simultaneously obvious [2.1.2.1.1.], logical [2.1.2.1.2.], and effective[48] [2.1.2.1.3.]. This constitute one integrated treaty interpretation rule[49], divided into a multi-step inquiry[50], and its application shows that Claimant does not have substantial business activities in Basheera.

2.1.2.1.1. The ordinary meaning of "substantial business activities" does not encompass Claimant's operations in Basheera.

35. Ordinary meaning, as interpretation starting point[51], is the most obvious meaning given to a term[52]. In this sense, *substantial* is something of or related to considerable importance, relevance or significance.

36. English dictionaries, a common source for defining the ordinary meaning of a term[53], define *substantial* as an adjective to something "of considerable importance, size or worth"[54], connected to "something significant"[55].

[45] PO2, p.48,lines 1509-1510.
[46] Facts, p.28,¶2.
[47] PO3, p.50,lines 1570-1575.
[48] Daillier, Forteau, Dinh and Pellet,pp.263-264.
[49] Weeramantry,p.38; ILC Yearbook 1966,p.220,¶8.
[50] *Aguas del Tunari*,¶91.
[51] Newcombe and Paradell,¶2.28; *Yukos*,¶411; Gardiner,pp.161-162.
[52] Sorel and Eveno,p.808.

37. Investment tribunals have also defined the ordinary meaning of *substantial* when applying the *substantial performance* doctrine[56] and the *substantial evidence* standard[57]. The latter is defined as "more than a mere *scintilia*", a relevant evidence that a "reasonable mind might accept as adequate to support a conclusion"[58]. That is, *substantial* relates to something of relevance and considerable importance, size or worth.

38. Claimant's activities in Basheera have neither considerable importance, size or worth, nor can be considered as relevant, especially when analyzing Claimant's activities as a whole.

39. First, Claimant is an investment vehicle incorporated by the Atton Boro Group for carrying its business in South America and Africa[59]. Its activities are restricted to (i) holding patents abroad, (ii) dealings in foreign countries involving public-private collaborations with foreign States to manufacture and supply of drugs, and (iii) internal support services for or its own affiliates in Africa and South America[60]. None of these activities can be deemed as substantial business *in Basheera*.

40. Second, even its activities were in Basheera, they would still not be *substantial*. Claimant has never had more than 6 permanent employees for the last 18 years of operations[61], and such staff only performed activities of irrelevant size and worth, if compared to Claimant's enterprise as a whole. This insignificant contingent, combined with the absence of economic relation to Basheera, demonstrates how insubstantial Claimant's activities are.

41. In *Pac Rim,* the tribunal applied a geographic test to ascertain the economic relevance of the activities undertaken by Pac Rim in the territory of the United States, its place of nationality. It inquired which would be the possible consequences if the investor moved

[53] *Anderson*,¶¶48,57*; Saluka*,¶462; *MTD*,¶113; *Tokios*,¶¶28,75; *ADF*,¶23; *Pope & Talbot*,¶65; *SD Myers*,¶285; *Aguas del Tunari*,¶¶227,229,231,232.
[54] Oxford Dictionary, entry: substantial.
[55] Cambridge Dictionary, entry: substantial.
[56] *SGS v. Philippines*,¶58; *Biwater*,¶320.
[57] *Lao Holdings*,¶46; *Wena Hotels*,¶¶82,84; *Niko Resources*,¶56; *Quiborax*,¶¶88,140; *Soufrakis*,¶31; *Tokio*,¶76; *Belokon*,¶158; *United Parcel*,¶200; *Canfor*,¶245.
[58] *Universal Camera v. NLRB*.
[59] Facts,p.28.¶4.
[60] Facts,p.28,¶¶4-5.
[61] PO2,p.48, lines 1510-1515.

all its operations abroad[62]. Applied to the present case, the test shows that all of Claimant's activities could be undertaken anywhere else and that would virtually make no political or economic difference for Basheera. In *Rurelec*, the tribunal endorsed that approach. It held that a company with a reduced number of employees and without any commercial activity inside the territory where it was incorporated was a mere vehicle and did not have substantial activities[63].

42. Therefore, in view of the ordinary meaning of *substantial*, Claimant does not have substantial business activities in Basheera.

2.1.2.1.2. The context, object and purpose of the BIT endorse the ordinary meaning of substantial business activities.

43. The second interpretative step also shows that Claimant has no substantial business activities in Basheera[64]. To be consistent with the treaty context, a provision must be interpreted in relation to its whole structure[65], considering the location of the term in the treaty[66]. Article 2(1) BIT, as any denial of benefits provision, has the purpose of keeping companies that do not have relevant economic connection with a contracting party out of the scope of the BIT[67]. Hence, *substantial business activities* shall be interpreted under this context.

44. Furthermore, the BIT establishes the promotion of greater economic cooperation, stimulation of private capital, and economic development between the *contracting parties* as an underlying object and purpose[68]. Claimant's activities are not compatible with such goals and finding otherwise would benefit a free-rider multinational group with no economic ties to the contracting parties, which is taking advantage of an investment vehicle.

45. In summary, an interpretation of *substantial business activities* that contradicts its ordinary meaning would lead to a result inconsistent with the BIT context and purpose.

[62] *Pac Rim*,¶4.73.
[63] *Rurelec*,¶370.
[64] Weeramantry,p.62.
[65] *ADF*,¶149.
[66] *ADF*,¶149.
[67] Dolzer and Schreuer,p.55.
[68] Annex 1,p.32.

2.1.2.1.3. A loose interpretation of substantial would make it meaningless for the purposes of Article 2(1) BIT.

46. The principle of effectiveness (*effet utile*) establishes that a treaty provision shall not be interpreted in a way that renders the provision superfluous or meaningless[69]. It is widely applied by investment tribunals[70] as a decisive factor – in *Tecmed*[71], *Maffezini*[72], *CSOB*[73], *SGS v. Pakistan*[74], *Pan American*[75], *El Paso*[76], *Noble Ventures*[77] – and plays a fundamental interpretative role in the present case, in the sense that *any* interpretation of *substantial* other than the provided in section 2.1.2.1.1. would render Article 2(1) BIT useless.

47. Understanding *substantial* as of "mere substance", as if *any* kind of real business activity fulfilled Article 2(1) BIT requirement, would be the same as depriving the provision of its use. Investors with any kind of business activities (regardless of its relevance, size or worth), as long as not a fraud or simulation, would be given investment protection. Consequently, it would be a virtual removal of Article 2(1) from the BIT, which cannot be done in light of the *effet utile* principle.

48. Therefore, Claimant does not have substantial business activities within Basheera, since any interpretation of *substantial* capable of keeping Claimant within the scope of the BIT would be the same as *ignoring the effet utile of Article 2(1) BIT.*

2.1.2.2. The understanding of previous decisions shows that Claimant does not have substantial business activities.

49. Claimant may try to present the 2008 *Amto* decision to support a claim that is has substantial business activities. In *Amto,* the tribunal understood that the meaning of *substantial business activities* was to "exclude from ECT protection investors which have adopted a nationality of convenience"[78] and that *substantial business activities*

[69] Fauchald,p.317.
[70] Fauchald,p.318.
[71] *Tecmed*,¶156.
[72] *Maffezini*,¶36.
[73] *CSOB*,¶67.
[74] *SGS v. Pakistan*,¶172.
[75] *Pan American*,¶132.
[76] *El Paso, Award*,¶110.
[77] *Noble Ventures*,¶¶50-54.
[78] *Amto*,¶69.

meant "materiality, not the magnitude of the business activity". However, the facts underlying the *Amto* decision are different and cannot be disregarded.

50. *Amto* was a small but real entity, which was clearly not incorporated for the sole convenience of nationality[79]. *Amto* was incorporated in Latvia, by a Latvian citizen with regular business activities within the country. After seven years of operations carrying its *own* business, its shares were transferred to a foreign legal entity[80]. Unlike *Amto*, Claimant was incorporated for nationality convenience, 3 months after the BIT had been concluded, as a vehicle for business in South America and Africa[81].

51. Furthermore, the 2014 *Rurelec* decision, whose facts are similar to the present case, supports Respondent's submission. The *Rurelec* tribunal understood the investor had no substantial business activities in the U.S., as it was a single purpose vehicle with accessorial nature created only for attending a capitalization plan of another entity of the economic group[82]. The fact that Rurelec maintained office and held shareholders and directors' meetings within the U.S. little mattered, for its activities existed only for the interests of the economic group. Alike Rurelec, Claimant's activities are of accessorial nature and exist for the interest of its controlling economic group[83].

52. In summary, the ordinary meaning of substantial business activities, the BIT context and purpose, the principle of effectiveness, and previous decisions all support Respondent's submission that Claimant does not have substantial business activities in Basheera.

2.2. Respondent is not precluded from invoking Article 2(1) BIT.

53. First, the BIT does not preclude Respondent from invoking Article 2(1) BIT after the beginning of arbitral proceedings [2.2.1.]. Second, Article 21(3) PCA is applicable [2.2.2.]. Third, the offer to arbitrate was accepted upon the Article 2(1) BIT conditions [2.2.3.]. Fourth, although there are decisions providing that preclusion operates, such decisions are not applicable in the present case [2.2.4.].

[79] *Amto*,¶69.
[80] *Amto*,¶66.
[81] Facts,p.28,¶4.
[82] *Rurelec*,¶211.
[83] PO2,p.48,¶3.

2.2.1. The BIT does not establish a time limit for application of Article 2(1) BIT.

54. The BIT does not subject the exercise of the denial of benefits right to prior notice before the arbitral proceedings. Therefore, Respondent is not precluded from invoking Article 2(1) BIT in its Response to the Notice of Arbitration.

55. First, a treaty disposition shall be interpreted within its context[84]. While the BIT makes no reference to prior notice to the exercise of denial of benefits, Article 14(2) BIT subjects early termination to a prior "one year's written notice to the other contracting party". This contextual interpretation approach shows that the parties did not intend to impose a time condition to the exercise of Article 2(1) BIT.

56. Second, when the parties intend to establish notice requirements, they expressly include that on the treaty. Canada Model BIT[85], NAFTA[86], CAFTA[87], all establish prior notice requirements. Therefore, prior notice is not an *implied* requirement of denial of benefits, but rather a choice to be made by the contracting parties when drafting a BIT.

57. Third, prior notice requirement would be against the object and purposes of the BIT, as it could undermine investors-state relation. In *Rurelec*, the tribunal held that "it would be odd for a State to examine whether the requirements (…) had been fulfilled in relation to an investor whom it had no dispute whatsoever", and that "the notification of the denial of benefits would – *per se* – be seen as unfriendly and groundless act, contrary to the promotion of foreign investments"[88].

58. Overall, Respondent was not required to send a prior notification to invoke Article 2(1) BIT.

2.2.2. Under Article 21(3) PCA Rules, the statement of defense is the appropriate time to present objections to jurisdiction.

59. Investment tribunals traditionally deal with denial of benefits as jurisdictional issues[89]. Under Article 21(3) PCA Rules, the statement of defense is the appropriate moment to

[84] *Banro*,¶19.
[85] Canada Model BIT, Article 18(2).
[86] NAFTA, Article 1005(1).
[87] CAFTA, Article 10.12.
[88] *Rurelec*,¶379.
[89] *Ulysseas*,¶172; *Rurelec*,¶382.

present objections to the jurisdiction of the tribunal. Therefore, Respondent invoked Article 2(1) BIT timely.

60. In *Ulysseas,* the tribunal held that Ecuador had complied with the time limit when "exercising the right to deny Claimant the BIT's advantages in the Answer"[90], as UNCITRAL Rules, like PCA Rules, establish that a "jurisdictional objection must be raised not later than the statement of defense"[91].

61. Therefore, in view of Article 21(3) PCA, Respondent may raise objections under Article 2(1) BIT no later than the statement of defense.

2.2.3. Claimant accepted the offer to arbitrate under the conditions set forth on Article 2(1) BIT.

62. Article 2(1) BIT is a condition to the offer to arbitrate made on Article 8 BIT. In that sense, a company may have access to ISDS only if it is not considered a mailbox company under Article 2(1) BIT. Claimant took the risk of establishing a mailbox in Basheera nonetheless[92]. As stated in *Rurelec*, "[a]ll investors are aware of the possibility of such denial, such that no legitimate expectations are frustrated by that denial of benefits"[93].

63. Overall, Respondent submits the offer to arbitrate is conditioned to the denial of benefits provision. Therefore, Claimant might not argue preclusion or breach of legitimate expectations regarding Article 2(1) BIT.

2.2.4. Decisions that might be brought by Claimant are not applicable to the case.

64. There is an isolated group of ECT cases, which have understood the State was precluded from invoking denial of benefits, which by its peculiarities should not be considered by this Tribunal[94].

65. While there are two parties for each BIT, ECT currently has 55 signatories[95]. This could have contributed to a different perception on the purpose of denial of benefits under

[90] *Ulysseas*,¶172.
[91] UNCITRAL Rules, Article 21(3).
[92] Facts,p.28,¶4.
[93] *Rurelec*,¶370.
[94] *Plama*; *Liman*; *Ascom*.

ECT[96]. In fact, the restrictive interpretation under ECT fits the idea of accommodating different general state policies[97]. That goal is not present in the BIT.

66. Furthermore, ECT is limited to investments in the usually high-regulated energy sector[98]. That contributes to the presumption that States will have more available information regarding foreign investors and, therefore, will be more prepared to investigate and inspect investors before the arising of claims[99].

67. The BIT, on the other hand, has a broad scope. It applies to many different sectors, including those where the State has little regulatory action, if any. Therefore, the application of Article 2(1) BIT should follow the general global trend application previously stated.

68. **IN CONCLUSION**, Claimant is a mailbox company controlled by an economic group from the Republic of Reef and Respondent is not precluded from denying it the benefits of the BIT. Therefore, Claimant has been denied the benefits of the BIT by virtue of Article 2(1) BIT.

3. RESPONDENT HAS ACCORDED FET TO CLAIMANT'S PATENT.

69. Neither the enactment of Law 8458/09 [3.1.], nor the issuance of the compulsory license [3.2.] breached Article 3(2) BIT.

3.1. Law 8458/09 is in accordance with Article 3(2) BIT.

70. First, Mercuria has regulatory power to change its legal framework [3.1.1.] Second, Claimant did not receive assurances regarding Mercuria's IP regime [3.1.2.]. Third, Law 8458/09 was enacted to attend the socioeconomic situation prevailing in Mercuria [3.1.3.]. Fourth, TRIPS provisions are not applicable to investor-state arbitration; even if they were, the IP law is TRIPS-compliant [3.1.4.].

[95] Gastrell and Le Cannu,p.95.
[96] Gastrell and Le Cannu,p.95.
[97] Gastrell and Le Cannu,p.96.
[98] Gastrell and Le Cannu,p.96.
[99] Gastrell and Le Cannu,p.96.

3.1.1. Respondent has regulatory power to change its legal framework.

71. FET is not designed to ensure the immutability of the legal order[100], for States do not promise not to change their legislation, as time and needs change, when entering into investment treaties[101].

72. It has been "consistently held that it is not legitimate for investors to expect that a regulatory regime or laws will never change and that a State has the right to change its laws"[102]. Various decisions acknowledging that States have right to regulate, and that legitimate expectations of legal framework stability are not absolute, support that conclusion[103].

73. In summary, since Mercuria holds sovereign authority to regulate its domestic affairs in light of public interest, it would be unreasonable for Claimant to expect the legal framework to be frozen.

3.1.2. Claimant did not receive representations that could give rise to the legitimate expectation that Mercuria's IP law would not change.

74. First, the President of Mercuria's *tweet*[104] and the Minister for Health's press statement[105] were not directed at Claimant's investment [3.1.2.1.]. Second, the declarations were not specific as to their content [3.1.2.2.]. Third, in the event the declarations are considered as representations, they did not create legitimate expectations, for they were made after Claimant had already invested in Mercuria [3.1.2.3.].

3.1.2.1. The President's tweet and the Minister for Health's press statement were not directed at Claimant's investment.

75. Legitimate expectations of protection against changes in legal framework depend on specific representations in that sense, made by the host State to induce investors to make an investment[106]. The President of Mercuria's *tweet* and the Minister for Health's press statement did not give rise to legitimate expectations under the BIT. Respondent submits

[100] *Parkerings*,¶332; *El Paso, Award*,¶368; *Continental*,¶261; *EDF*,¶219; *Philip Morris*,¶426.
[101] *El Paso, Award*,¶367; *Continental*,¶258; *Total*,¶117; *CME, Brownlie's Separate Opinion*,¶78.
[102] *Teinver*,¶668.
[103] *Saluka*,¶305; *Parkerings*,¶332; *EDF*,¶217; *Toto*,¶165; *Total*,¶¶111,123,164; *Lauder*,¶¶300-4; *Philip Morris*, ¶422; *Continental*,¶¶258-61; *Total*,¶¶123,164; *El Paso*, Award,¶¶344-352.
[104] Facts,p.29,¶8.
[105] Annex 2,p.39.
[106] *Philip Morris*,¶426; *Crystallex*,¶547.

that representations must be specific in the sense of *addressed to the individual investor*[107].

76. The *El Paso* tribunal found that specific commitments *directly made to the investor*, such as a letter of intent or a specific promise in a person-to-person business meeting, could give rise to legitimate expectations[108]. In the present case, neither of the declarations were directed at Claimant. The President's Twitter account is an online platform available to everyone[109] and the Minister for Health's press statement did not have a specific addressee. In sum, they are political statements that create no legal expectations[110] towards Mercuria's IP law.

3.1.2.2. The government official's declarations did not have the level of specificity required to create legitimate expectations.

77. Even if specificity as to the addressee of the declaration were not needed, specificity regarding object and content is always required[111]. As the *tweet* and the press statement fall short of being specific, they do not create legitimate expectations.

78. In *Frontier*, the claimant contended it was owed assistance from the State, as two letters it had received from the Ministry of Industry and Trade characterized an implied undertaking to assist[112]. However, the tribunal concluded the Ministry had signaled that "there was a possibility that the state could negotiate"[113] but found that the relevant statements did not "exhibit the level of specificity necessary to generate legitimate expectations"[114].

79. Likewise, in *Crystallex*, the investor was not granted the issuance of a permit to exploit gold deposits[115]. Crystallex alleged that assurances provided by high-level Venezuelan officials had given rise to the expectation that it would be permitted to develop Las Cristinas Project. However, the tribunal found that no legitimate expectation could be said to arise out of (i) the generic statement by the Ministry of Mines that the permit was

[107] *Crystallex*,¶547.
[108] *El Paso, Award*,¶376.
[109] PO3,p.50, lines 1565-1570.
[110] *Continental*,¶261; *El Paso, Award*,¶378.
[111] *Total*,¶121; *Continental*,¶261; *Frontier*,¶468; *Crystallex*,¶547.
[112] *Frontier*,¶465.
[113] *Frontier*,¶465.
[114] *Frontier*,¶468.
[115] *Crystallex*,¶552.

"well on track"; (ii) joint support for the commencement of the Las Cristinas project from the mayor of the municipality where the gold deposit was located and a Congressman; (iii) statements as reported in the minutes of a National Assembly meeting[116]. The tribunal held that these vague statements did not meet "the level of specificity required to create legitimate expectations which, if later frustrated, are relevant for a finding of a FET breach"[117].

80. *Crystallex* also offers an example of what would be a statement with sufficient specificity. Crystallex had received a letter from the Ministry of Environment, stating that environmental impact evaluation for the project had been analyzed and approved by the Office of Permissions and that "once the Bond has been posted, checked, and found to be compliant by this Office, […] the [Permit] […] will be handed over"[118]. The tribunal considered that the language made clear that once the bond formality was cleared, the permission was ready to be handed over. Therefore, it held the letter was a positive representation made specifically to Crystallex in clear and precise terms, susceptible of creating legitimate expectations[119].

81. There is a stark contrast between, on the one hand, the specific statement directed at Crystallex in the letter and, on the other hand, the vagueness of the President's *tweet*[120] and Minister's press statement[121]. Neither the figurative language of the tweet, nor the Minister's acknowledgment that Mercuria considered a stable and progressive IP regime essential configure assurances that Respondent would not introduce a provision expressly allowing for the issuance of compulsory licenses.

82. Therefore, the vague statements did not give rise to legitimate expectations for Claimant under the BIT.

3.1.2.3. The statements were made after Claimant had invested in Mercuria.

83. Claimant's investment in Mercuria was made in a single step, when the Atton Boro Group assigned the Mercurian Patent No. 0187204 to Claimant in 1998. In view of that,

[116] *Crystallex,*¶¶553-555.
[117] *Crystallex,*¶555.
[118] *Crystallex,*¶562.
[119] *Crystallex,*¶563.
[120] Facts,p.29,¶8.
[121] Annex 2,p.39.

Respondent submits that, even if this Tribunal considers the 2004 *tweet* and press statement as representations, they were made after Claimant had invested and could not have generated legitimate expectation vis-à-vis Respondent's IP regulation, for representations are "temporally tied to the date of making the investment" and "must have been in place at the time Claimant's original investment was made"[122].

84. In summary, Claimant did not receive any representation that Mercuria's IP regime would not change. Even if the statements could qualify as representations, they were made after Claimant had invested in Mercuria and do not give rise to legitimate expectations. Consequently, Law 8458/09 does not breach FET.

3.1.3. Law 8458/09 was enacted within the acceptable margin of change to attend Respondent's socioeconomic situation.

85. Changes in the legal framework made in the normal exercise of regulatory power, in the pursuance of public interest and within the host State acceptable margin of change, do not breach FET[123].

86. The introduction of a provision expressly allowing for compulsory license has a rational basis and did not bring a total or drastic change to the legal framework relied upon by Claimant when obtaining the Mercurian Patent. A WIPO survey revealed that 87 of its Member States have provisions in their national legislations allowing the issuance of compulsory licenses – Austria, Brazil, Canada, Germany, the United Kingdom, and the United States, to name a few[124]. It is generally accepted that the provision strikes a balance between the interest of patentees, public interest and society[125]. In view of that, Law 8458/09 did not change the pillars of Mercuria's IP law, but provided for a flexibility to the patent system.

87. Likewise, interpretation based on the *a maiori, ad minus* rule shows that Law 8458/09 may have introduced a new provision in Respondent's legal framework, but did not create a novel possibility in the realm of State action. Compulsory license (the *minus*, in this case) falls short of expropriation (the *maiori*) in terms of effects over property, as the patent rights remain valid and in force, and as its owner can continue to exclude all

[122] *Frontier*,¶468.
[123] *Philip Morris*,¶423; *El Paso, Award*,¶402.
[124] WIPO Report on Compulsory Licenses,p.2,¶5-6.
[125] WIPO Report on Compulsory Licenses,p.2,¶7.

others besides the government-authorized licensee from the patented invention[126]. Consistent with the classical rule of international law that right to expropriate is a fundamental right of the State[127], "universally recognized as within the inherent power of a state over property located in its territory"[128], so should be compulsory license, "a historically recognized exception to patent rights"[129].

88. Furthermore, Respondent's duty to legislate on issues of interest to public health is reflected in Article 12 ICESCR, to which it is a party[130]. Under ICESCR, Respondent recognized the right of everyone to the highest attainable standard of physical and mental health, and committed itself to take the necessary steps for the fulfillment of this right, including the prevention, treatment and control of epidemic diseases.

89. Even if Law 8458/09 were breaking new ground, as Uruguay's tobacco control regulations did, it should be considered that the FET "do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory"[131]. Considering that compulsory licenses are a traditional exception to patent rights[132], associated with the pursuance of balancing of interests, preventing abuse of rights, and promoting the public interest at large[133], Law 8458/09 does not breach FET, for it is rooted in reasonable public policy motives.

90. In summary, reasons of public interest underlie Law 8458/09, which enactment is within the State acceptable margin of change. Consequently, it does not breach FET.

3.1.4. TRIPS is not applicable to investor-state arbitration and, even if it were, Mercuria's IP law is TRIPS-compliant.

91. Claimant has attempted to re-package a claim of violation of WTO law as breach of the BIT, alleging that Law 8458/09 violates FET because it is inconsistent with TRIPS[134]. In

[126] Ho,p.127.
[127] Dolzer and Schreuer,p.98.
[128] Dugan, Wallace, Rubins and Sabahi,p.429.
[129] Ho,p.70.
[130] PO3,p.50, lines 1565-1566.
[131] *Philip Morris*,¶430.
[132] Ho,p.70.
[133] WIPO Report on Compulsory Licenses, pp.2-3,¶¶7-9.
[134] Notice,p.5,¶13.

view of that, Respondent submits that TRIPS is not applicable law to the present dispute.

92. First, investment arbitration is not the proper forum to discuss alleged breaches of TRIPS. Claimant's position assumes that FET incorporates WTO law and that an eventual violation of WTO law would automatically result in a breach of Article 3(2) BIT. However, "investment protection standards such as fair and equitable treatment, […] should not and have not been construed to allow invoking breaches of international IP norms in ISDS"[135]. In fact, transforming the BIT into a vehicle to redress alleged violations of WTO law is contrary to Article 23(1) WTO DSU[136]. WTO law is a *self-contained regime* with its own institution to administer the relevant rules[137]. Disputes in respect of TRIPS obligations may only be brought pursuant to the WTO DSU, whose Article 23(1) prohibits the enforcement of WTO law outside the WTO dispute mechanism where only Members States have standing[138].

93. Second, investor's legitimate expectations under Article 3(2) BIT do not cover obligations arising under other treaties. Invoking the systemic interpretation rule of Article 31(3)(c) VCLT, Claimant may allege it had legitimate expectations that Mercuria would have a TRIPS-compliant legislative framework. However, that ignores (i) that Mercuria's treaty obligations under TRIPS are *owed to other states* and do not work as a basis for investor expectations[139]; and (ii) that Article 23(1) WTO DSU is an equal part of the interpretative context under Article 31(3)(c) VCLT.

94. Third, TRIPS itself does not offer basis for legitimate expectations. Even if FET were construed in such a wide-ranging manner, so as to incorporate other treaty obligations in the scope of the BIT – which Respondent will assume for mere sake of argument –, yet Claimant would not have legitimate expectations based on TRIPS.

95. The WTO Appellate Body has plainly rejected the idea of legitimate expectations based on TRIPS[140]; in other words, "the concept of legitimate expectations cannot guide the

[135] Ruse-Khan,p.242.
[136] Klopschinski,p.234.
[137] ILC, Report on Fragmentation,¶11.
[138] WTO US — Section 301 Trade Act,¶7.43.
[139] Ruse Khan,p.252.
[140] WTO India — Patents (US),¶¶33–42.

interpretation of TRIPS"[141]. If not even WTO Members as principal addressees of the treaty can derive legitimate expectations from TRIPS, let alone private investors such as Claimant.

96. Even if TRIPS were applicable, the fact is Respondent's IP law is TRIPS-compliant. TRIPS neither prohibits compulsory licenses nor dictates what subject-matter may be licensed[142], it merely provides for procedural requirements for their issuance. Article 31 TRIPS authorizes the waiver of previous negotiations between the applicant and the patentee in situations of national emergency and public non-commercial use; and requires the decision relating to the authorization and to the remuneration to be subject to judicial review *or* to other independent review by a distinct higher authority. Respondent's IP law gives the patent-holder the opportunity to challenge both the validity of the license and the royalty rate before a two-judge bench of the High Court of Mercuria[143].

97. In summary, Law 8458/09 does not breach FET.

3.2. The compulsory license for Valtervite is in accordance with Article 3(2) BIT.

98. The compulsory license was not arbitrary, for it is a reasonable measure issued under provisions of Mercuria's domestic law. First, Sanior was not available at a reasonably affordable price [3.2.1.]. Second, the compulsory license was issued for reasons of national emergency [3.2.2.]. Third, subsidiarily, the compulsory license was issued for public non-commercial use [3.2.3.]. Fourth, reasonable royalties were awarded [3.2.4.].

3.2.1. Sanior was not available at a reasonably affordable price.

99. Section 23C(1) Law 8458/09 states *alternative* grounds for the issuance of compulsory licenses. One of them is when the invention is not available at a reasonably affordable price to the public (Section 23C(1)(b)). That was the case with Sanior.

100. When Claimant was the only supplier of Valtervite, a single FDC pill costed USD 27.00 for government purchase at a 25% discounted rate[144]. As Respondent has still not

[141] Ruse-Khan,p.254.
[142] Ho,pp.70-71.
[143] PO3,p.50, lines 1575-1580.
[144] Annex 3,p.42.

achieved its goal of universal free healthcare[145], Claimant could market Sanior at even higher price in business-to-consumer sales. Whether this Tribunal considers the impact on government budget, given the surge in greyscale cases, or on the income of citizens that do not receive procured medicines from the State and had to buy it from the market, Sanior cost was unreasonable.

101. Even at discounted price, the cost per person per year with Sanior amounted to nearly USD 10,000.00[146]. Although there is no official data regarding Mercuria's average income, the adjusted net national income per capita of upper middle income countries ranged from USD 2,156.79 to USD 5,151.183 between 2004 and 2010[147]. Even if the Mercurian citizen in need of greyscale medicine were to spend all their income to buy Sanior, it would still not be enough. In terms of government budget, as the number of greyscale patients depending solely on Mercuria's public health system had grew approximately 998% (from 10,012 cases to 100,000 cases)[148], it would consume 500% of the greyscale program budget to provide drugs for a single year[149].

102. After HG-Pharma started producing Valtervite, the price was reduced by as much as 80%, while the first generic competitor's product is sold on average by only 6% less than the brand-name drug[150]. That led to a USD 1,200,000,000.00 annual government saving[151] and shows that Valtervite could be (and later was indeed) offered by a significantly lower price.

103. Since the Court decision is rooted on Mercuria's domestic law and not on mere preference, the issuance of the compulsory license is not arbitrary. The ordinary meaning of *arbitrary* emphasizes the element of "willful disregard of the law"[152] and considers as arbitrary acts which "shock, or at least surprise, a sense of judicial

[145] Annex 3,p.43.
[146] Annex 3,p.42.
[147] World Bank Data.
[148] Annex 3,p.43.
[149] Annex 3,p.43.
[150] FDA Data.
[151] Facts,p.30,¶22.
[152] *Azurix*, Award,¶392.

propriety"[153]. Observing an internal statute, of public acknowledgement, is the opposite of that definition.

104. Since Sanior was not available at a reasonably affordable price, the High Court could grant the compulsory license under Section 23C(1)(b) Mercuria's IP law. Therefore, the decision was not arbitrary.

3.2.2. The compulsory license was issued for reasons of national emergency.

105. Claimant may argue that the compulsory license should not have been granted, as HG-Pharma did not try to obtain a voluntary license from Claimant. However, Mercuria's domestic law waives that requirement in situations of national emergency as the greyscale epidemic[154]. That is needed to ensure adequate and timely response.

106. Greyscale is a viral chronic STD, non-fatal and incurable, causing the cracking and flaking of the patient's skin, stiffening muscles, swollen limbs and severe joint pain[155]. Successful awareness campaigns focused on prevention and mitigation of greyscale were made in Mercuria, increasing the percentage of working age individuals getting themselves tested at least once every 6 months. Nevertheless, in 3 years the number of confirmed greyscale cases increased by almost 1200% (from 20,485 cases to 266,298 cases)[156], showing that more aggressive measures were needed. By 2010, without effective greyscale treatment available for its citizens, Respondent was facing a national emergency, understood as "a serious, unexpected, and potential dangerous situation requiring immediate action"[157].

107. The dictionary meaning of national emergency, as every emergency, is a state that requires immediate attention and remedial action[158]. A common usage of the term reveals that national emergency is associated with danger to health, life and safety in large scale. The U.K. Civil Contingencies Act states that emergency means an event or situation which threatens serious damage to human welfare as it involves, causes or may

[153] *U.S. v. Italy*,p.76,¶128.
[154] Annex 4,p.45.
[155] Annex 3,p.41.
[156] Annex 3,p.42.
[157] Gopalakrishnan and Anand,p.28.
[158] Black's Law.

cause, inter alia, human illness or injury[159]. Canada's Emergencies Act states that a national emergency is an urgent and critical situation of a temporary nature that seriously endangers the lives, health or safety of its nationals[160].

108. Facing a situation that threatened the health of Mercuria's nationals, and in the exercise of its residual discretionary powers[161], the High Court could have interpreted Mercuria's IP law and found a situation of national emergency. Furthermore, this Tribunal should apply a deferential standard of review, as it does not have an open-ended mandate to second-guess State decision making[162].

109. Overall, the threat to Mercuria's nationals health caused by greyscale supports the conclusion that the license was issued for reasons of national emergency.

3.2.3. The compulsory license was issued for public non-commercial use.

110. In the event this Tribunal finds Respondent was not facing a situation of national emergency, Respondent submits that the compulsory license was granted for public non-commercial use, which also waives the requirement of previous negotiations between the applicant and the patent holder[163].

111. Public non-commercial use is associated with the purpose of public interest, in this case, public health[164]. For instance, in 2007 the Brazilian Ministry of Health issued a compulsory license for the treatment of HIV/AIDS patients based on public non-commercial use[165]. As health protection is a basic human right[166], Mercuria's efforts were not only supported by Law 8458/09, but also by international human rights obligations under Article 12 ICESCR.

112. Valtervite is indispensable for the treatment of greyscale. With the previously mentioned growth of Mercurian citizens infected by greyscale, the Sanior price compromised Respondent's health policy. After failed negotiations for lower prices[167], it was only fit

[159] U.K. Civil Contingencies Act.
[160] Canada's Emergencies Act.
[161] PO2,p.48,¶5.
[162] *Chemtura*,¶134; *Glamis*,¶¶779, 805; *SD Myers*,¶261; *Lemire*,¶283.
[163] Annex 4,p.45.
[164] Xiong,p.201.
[165] Rodrigues and Soler,p.555.
[166] UDHR, art. 25.
[167] Facts,p.30,¶15.

for Mercuria to issue the compulsory license to guarantee an effective treatment for its citizens[168].

113. In addition, the medicines were granted only to supply Respondent's inner market. HG-Pharma does not export Valtervite[169]. Respondent once donated the medicine to three neighboring States, as they faced financial crisis[170], in the form of humanitarian aid[171].

114. Overall, Respondent submits the compulsory license was issued for public non-commercial use, in the event this Tribunal finds Respondent was not facing a situation of national emergency.

3.2.4. Reasonable royalties were awarded to Claimant.

115. Claimant has been awarded reasonable remuneration for the compulsory license, as the High Court fixed royalties at 1% of HG-Pharma's total earnings[172]. Not receiving the royalty payment was a choice of Claimant[173]. Furthermore, adequate remuneration does not mean that Claimant should have been awarded a remuneration comparable to what it would have obtained in a voluntary arm's-length transaction, for that would undermine the key goal of expanding access to the medicine[174].

116. As adequate remuneration is very much like FET – a standard whose assessment requires this Arbitral Tribunal to take a case-by-case analysis – there is no overall answer when it comes to adequate royalties setting. For instance, remuneration is typically low, and frequently zero, in U.S. compulsory license cases to remedy anti-competitive practices[175]. In Mercuria, royalty rates for drugs to treat non-fatal but incurable diseases ranged from 0.5% to 3% of revenue in the period 2009-2010[176].

117. In sum, the (i) circumstances of the case and of Mercuria; (ii) need to respond to a public health threat; (iii) degree to which Claimant's development costs had been

[168] Rodrigues and Soler,p.555.
[169] PO3,p.50, lines 1581-1582.
[170] PO3,p.50, lines 1581-1582.
[171] MPI Studies on Intellectual Property and Competitional Law,p.210.
[172] Facts,p.30,¶21.
[173] PO3,p.50, lines 1595-1600.
[174] WHO UNDP Remuneration Guidelines,p.39.
[175] WHO UNDP Remuneration Guidelines,p.15.
[176] PO3,p.50, lines 1585-1590.

amortized; and (iv) purpose of the license play a significant role in the amount of royalties[177].

118. In the present case, greyscale is a critical epidemic disease that threatens the population in developing countries (i). Mercuria had 266,298 confirmed cases of greyscale and the population needed access to an effective and affordable greyscale treatment (ii). Claimant had twelve years of exclusive use of Valtervite to recover its R&D costs; even if Sanior R&D cost is of USD 1,000,000,000.00, as the Atton Boro Group CFO was quoted saying[178], at an annual cost per person of USD 9.720, calculated based on the 25% discounted rate cost of USD 27.00 per pill, Claimant would have recovered all of it by supplying Sanior to less than 9,000 persons per year during this timespan. Data is scarce, but as the occurrence of greyscale is confirmed in 43 countries[179] and in Mercuria only, prior to the surge, there was 20,485 persons living with greyscale[180], Claimant likely recovered all the R&D cost in a much shorter period (iii). The license serves a purpose of public interest (iv). Considered altogether, these circumstances show the adequacy of royalties fixed at 1%.

119. **IN CONCLUSION**, Respondent enacted Law 8458/09 in accordance with Article 3(2) BIT, since it has with regulatory powers to adjust its legal framework to attend the country's socioeconomic situations. Equally, the compulsory license was duly granted, once, in the absence of reasonably affordable prices, Respondent was led to issue it for reasons of national emergency or public non-commercial use, paying adequate royalties to Claimant.

4. RESPONDENT IS NOT LIABLE FOR ANY CONDUCT OF ITS JUDICIARY IN THE ENFORCEMENT PROCEEDINGS.

120. The duration of the Foreign Award enforcement proceedings is not a violation of the BIT or of international customary law. First, the mere length of the proceedings does not constitute denial of justice [4.1.]. Second, the effective means standard is not applicable; and, even if it were, the threshold for its application is not met [4.2.].

[177] TRIPS Commentary, ch. 9,p.322.
[178] PO3,p.50, lines 1600-1605.
[179] Annex 3,p.41.
[180] Annex 3,p.42.

4.1. The mere length of the proceedings does not constitute denial of justice.

121. The threshold for recognition of denial of justice under international law, as stated by many tribunals, is not easily achieved[181], as for its recognition there must be a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety[182]. Claimant failed to demonstrate any such conduct by Respondent in the enforcement proceedings.

122. In *White Industries*, the tribunal took into account the following factors to determine if there was a denial of justice: the (i) complexity and sensitivity of the proceedings; (ii) need for swiftness in the resolution of the case, including whether the claimant may be compensated for loss by any delays; (iii) conduct of the litigants involved, including the diligence of the claimant in prosecuting the proceedings; (iv) behavior of the courts themselves and the circumstances of the host State[183]. By the analysis of each of those factors, it becomes clear that Respondent did not deny justice to Claimant.

123. With relation to (i), the Foreign Award concerns the considerable amount of USD 40.000.000,00 in damages to be paid by the NHA, which is responsible for the Mercurian healthcare system that provides support to a population of 67 million with the overall health budget of USD 3 billion[184]. Such data show the sensitiveness of the issue under discussion, as an imprudent enforcement of a multimillionaire Foreign Award against the entity responsible for the healthcare system of a developing nation, could represent incalculable social costs.

124. With relation to (ii), there was no need for swiftness in the enforcement proceedings. The Foreign Award was of monetary value only, and in no moment has Claimant mentioned any urgent need for the money. Also, Claimant did not demonstrate any damage that it was suffering due to delay in the enforcement, which was its burden of proving[185].

125. With relation to (iii), Claimant is responsible in great part for the delay. It was Claimant who applied for the transfer of the proceedings to the Commercial Bench, on 30 April

[181] *White Industries*,¶10.4.5; *Mondev*,¶127.
[182] *Chevron*,¶244.
[183] *White Industries*,¶10.4.10
[184] Annex 3,p.43.
[185] *Pey Casado*,¶205.

2012, which occasioned an additional delay of almost 2 years, which represented an increase of nearly 40% of the procedure time.

126. With relation to (iv), the analysis of the conduct of Mercurian courts and Respondent's social context highlights the non-incurrence of denial of justice. In *White Industries*, the arbitral tribunal concluded that the respondent's domestic courts dealt with the applications and petitions within months, not years, until it was granted stays in the proceeding concerned. In the present case, the court of Mercuria did not take, in any moment, more than a few months to deal with applications or petitions[186].

127. Thus, considering these factors altogether, Respondent did not deny justice to Claimant.

4.2. The effective means standard is not applicable under the BIT.

128. There was no obligation under the BIT for Respondent to provide effective means to assert claims and to enforce rights to Claimant. The presence of the term in the preamble does not constitute an obligation, being inadequate to draw an obligation from a non-binding textual disposition[187]. It is also not possible to draw the effective means standard from Article 3(2) BIT.

129. The effective means standard is a *lex specialis*[188] not to be confused with denial of justice, FET or FPS. Cases that applied the effective means standard did so based on specific treaty obligation containing said standard, which was unrelated to FET and FPS.

130. Thus, the effective means standard is not contained in the BIT and is not applicable to the present case.

4.3. Even if applicable, the effective means standard was not breached.

131. In *White Industries*, it was ruled that the 9-year duration of an enforcement proceeding did not breach the effective means standard. By analyzing the two cases in which the issue under discussion was the application of the effective means standard against a host state (*Chevron* and *White Industries*), it becomes clear that the circumstances in the case at hand do not amount to a breach of the effective means standard.

[186] Exhibit C1, pp.7-12.
[187] Gardiner,p.186.
[188] *Chevron*,¶242.

132. In *Chevron*, the case concerned the delay of 7 different disputes that had been pending for at least 13 years, without a proper justification of complexity or of claimant's behavior[189]. In the present case, the alleged breach was caused due to the 7-year duration of the enforcement proceedings[190]. However, a considerable share of such time is attributable to Claimant's behavior, as it decided to apply for the transfer of the proceedings to the Commercial Bench[191].

133. In *Chevron*, the tribunal also considered that Ecuadorian courts failed to act with reasonable dispatch due to prolonged periods of complete inactivity, which sometimes lasted for more than 10 years[192], and found that the existence of such long delays, even after official acknowledgements by the courts that they were ready to decide the cases, to be a decisive factor demonstrating the failure to provide effective means[193]. In *White Industries* the tribunal acknowledged that inability to hear an appeal for more than 5 years was a decisive factor[194].

134. In the present case, there was no period of inactivity by the courts of Mercuria that lasted more than a few months[195] and there was no acknowledgement by the courts that they were ready to decide the application for enforcement.

135. Further, in *White Industries*, the tribunal analyzed a delay of more than 9 years on an enforcement proceeding, including 3.5 years in Delhi's Court and a subsequent 6 years delay due to a stay order. By analyzing separately the first 3 years and 6 months delay and the further 6 years period, the tribunal found there was no breach of the effective means standard. Initially, it found that the first period, although not ideal, was due to necessities of a busy court docket and the availability of counsel, having both sides seeking and granting adjournments to accommodate. In the present case, similar reasons contributed to the length of the proceedings, as there were several adjournments due to a busy court docket[196] and both parties also sought and were granted adjournments[197].

[189] *Chevron*,¶¶253-254.
[190] Notice,¶13.
[191] Exhibit C1,p.8,¶17.
[192] *Chevron*,¶¶256-257.
[193] *Chevron*,¶262.
[194] *White Industries*,¶11.4.19.
[195] Exhibit C1, pp.7-12.
[196] Exhibit C1,¶¶9, 15, 17, 24, 40.

136. Moreover, the tribunal decided that the additional 6 years length were attributable to the claimant, who failed to appeal an order of staying the proceedings[198]. In the present case, the most significant delays were caused by back-and-forth transfers of the proceedings from the regular to the Commercial Bench[199], which arose from an application by Claimant.

137. Therefore, by analyzing the cases that applied the effective means standard, it becomes clear that the length of the enforcement proceedings do not configure a failure to provide effective means.

138. **IN CONCLUSION**, Respondent is not liable for the length of the enforcement proceedings, which does not configure as a denial of justice or a breach of the effective means standard, which is not even applicable to the present case.

5. RESPONDENT DID NOT VIOLATE ARTICLE 3(3) BIT.

139. The termination of the LTA by the NHA does not amount to a violation of Article 3(3) BIT because that is not attributable to Respondent [5.1.]. In the alternative, Respondent submits that the termination of the LTA does not breach the BIT [5.2.].

5.1. The termination of the LTA is not attributable to Respondent.

140. Claimant alleges that "Mercuria breached its obligations towards Atton Boro by unilaterally terminating the LTA"[200], as if the NHA's acts were attributable to the State in which it is established. However, Mercuria is not responsible under international law for NHA's business decisions. The NHA is not a State organ pursuant to Article 4 ILC Articles [5.1.1.] and the acts of NHA when terminating the LTA were merely commercial, under the grounds of Articles 5 and 8 ILC Articles [5.1.2.].

[197] Exhibit C1,¶¶10, 17, 43.
[198] *White Industries*,¶11.4.14.
[199] Exhibit C1,¶¶18, 28.
[200] Notice,p.5,¶13.

5.1.1. The NHA is not a State organ.

141. ILC Articles have been considered by the tribunals as one of the main statements of customary international law on the question of attribution for State responsibility[201]. Under its Article 4, an authority with separate legal status should not be considered a State organ, since "an organ [of a State] includes any person or entity which has that status in accordance with the internal law of the State"[202].

142. Claimant entered Respondent's market by concluding agreements with the government *and* with entities such as the NHA[203], which shows the difference between commitments with the State itself, through its organs, and commitments with independent entities like the NHA. The NHA has its own legal personality and it operates independently[204].

143. In *Bayindir*, the tribunal held that Pakistan's National Highway Authority was not a State organ, as it had a distinct legal personality under Pakistani law. The tribunal highlighted that the fact that there may be links between the Highway Authority and the government "does not mean that the two are not distinct"[205]. Likewise, in *Jan de Nul*, the tribunal stated that the Suez Canal Authority (SCA) was not a State organ, due to its independent juristic personality under the domestic law[206]. It stated that even though the SCA "was created to take over the management and utilization of a nationalized activity"[207], it was not part of the Egyptian State in terms of structure, what led to the conclusion that its acts could not be attributed to the State.

144. In the present case, the NHA has the same status as Pakistan's NHA and Egypt's SCA – they all have separate legal status under internal law and *are not* State organs pursuant to Article 4 ILC Articles.

145. Claimant may suggest that the NHA is a *de facto* State organ, but the requirements for that are not fulfilled either. Attribution on that basis "must be exceptional, for it requires

[201] *Jan de Nul*,¶156; *Hamester*,¶171.
[202] Article 4(2) ILC Articles.
[203] Facts,p.28,¶5.
[204] PO3,p.50.
[205] *Bayindir*,¶119.
[206] *Jan de Nul*,¶160.
[207] *Jan de Nul*,¶161.

proof of a particularly great degree of State control"[208], which was not the case in the commercial ties between the NHA and Claimant.

146. The tribunal in *Hamester* explicitly discussed whether an entity was a *de facto* State organ. Ghanaian's Cocobod was a commercial corporation whose principal purpose was to trade cocoa beans and generate profits for the government[209]. The tribunal decided that Cocobod was not a State organ, in any of its classifications, because (i) Cocobod did not have that characterization under the Ghanaian law[210], (ii) Cocobod signed the contract directly with the claimant, without the endorsement of any members of Ghanaian's State[211], and that (iii) even though it is specified in the internal law that the Government can give "directions of a general character" to Cocobod, those do not prevail over its commitments, as general policy directions do not overshadow Cocobod's board member decisions[212].

147. Applying that reasoning to the present case, the NHA is not a State organ as well. The NHA (i) is not defined as State organ under Mercuria's law, (ii) the LTA between the NHA and Claimant was only signed by those parties[213], and (iii) there is no evidence that there has been any kind of specific instruction given by Respondent to the NHA concerning the negotiation[214] and development of its commercial relation with Claimant.

148. In sum, the conduct of the NHA is not attributable to Respondent because the NHA is neither a *de jure* nor *de facto* State organ.

5.1.2. The NHA was acting as an independent contracting party when it terminated the LTA.

149. Respondent is not liable for the termination of the LTA because the NHA (i) was not exercising any form of governmental authority and (ii) was merely engaged in its commercial activities.

[208] *Bosnia and Herzegovina v. Serbia and Montenegro*,¶393.
[209] *Hamester*,¶184.
[210] *Hamester*,¶184.
[211] *Hamester*,¶186.
[212] *Hamester*,¶187.
[213] Facts,p.29,¶9.
[214] PO3,p.50, lines 1594-1595.

150. Article 5 ILC Articles refers to attribution on the basis of function, not structure[215]. It provides that only the exact conduct of the entity that concerns governmental activity could be attributed to the State[216]. Thus, Article 5 ILC Articles does not provide for attribution of private or commercial activities held by the NHA, which was the case when it terminated the LTA.

151. In *Almas*, the tribunal decided that the ANR, a Polish entity supervised by the Minister for Rural Development, was neither engaged in governmental authority nor acting under instructions of the Polish Government when it terminated its lease agreement with the claimants[217]. It held the termination of the contract was not an exercise of public power, but of a contractual right that derives from general law. Consequently, the action was not attributable to Poland on the basis of Article 5 ILC Articles[218]. The similarity with the present case is manifest, as the act that Claimant attributes to Respondent is exactly the termination of a contract by the NHA, a commercial activity that should not be attributed to the State.

152. That understanding is seen in *Jan de Nul*, *Hamester*, and *Almas*. Relying on Article 5 ILC Articles, these tribunals all reasoned that an act could only be considered as an exercise of governmental authority if two *cumulative* conditions are satisfied: (a) an entity being empowered with government authority and (b) a specific act being performed through the exercise of that authority[219]. For that reason, even if the NHA could engage in governmental authority on common grounds, still that does not attribute the specific act of the LTA termination to Respondent.

153. Finally, Claimant may suggest that the NHA was acting under the instructions of Respondent. Nevertheless, under Article 8 ILC Articles effective control test[220], an act may be attributed to the State only when it is proven that the State has given specific directions to a group or exercised control over a group[221]. This criterion was developed in the *Nicaragua v. United States*, when the ICJ held that for the conduct to be attributed

[215] Dolzer and Schreuer,p.221.
[216] ILC Articles,p.43,¶5.
[217] *Almas*,¶¶219,272.
[218] *Almas*,¶219.
[219] *Jan de Nul*,¶163; *Hamester*,¶176; *Almas*,¶215.
[220] *Jan de Nul*,¶173.
[221] ILC Articles,p.46,¶7.

to the State "it would in principle have to be proved that the State had effective control […] in the course of which the alleged violations were committed"[222]. The strict requirements for attribution based on effective control are not fulfilled.

154. The NHA started the LTA the same way it terminated: exercising its commercial activities as a contracting party. The termination was an ordinary business decision for the NHA. In that regard, both parties agreed to the terms of the LTA, approving on Clause 6 that it should be valid for a certain period subject to the supplier's satisfactory performance[223]. NHA's report of 2006 shows that even with the discount rate, the then-current prices were still significantly high and the demand had risen in almost 1.000%[224]. Because of that, the NHA started renegotiating the rates, and unsuccessful negotiations led to the termination of the LTA[225].

155. By analyzing the steps that led to the termination of the LTA, this Tribunal would not be applying the contract, or exercising jurisdiction over the contract, but only "taking the contractual background into account"[226]. Respondent is not willing to reopen the matter – mainly because it does not answer for the commercial activities of the NHA. It simply intends to demonstrate that by stating that the NHA had "breached the LTA by terminating it prematurely"[227], the decision on the Foreign Award shows that the termination was a business decision, albeit a compensable one.

156. The only intersection between the NHA and Respondent would be a meeting with two members of the State[228]. However, a meeting *per se* is not a direct control of the State in regard of Article 8 ILC Articles, since "being informed and discussing the case with the parties" does not mean that the government is exercising effective control over the entity[229]. Consequently, Respondent cannot be liable, once "there is no record of direct participation by Mercurian officials in the negotiation of the LTA"[230].

157. Therefore, the termination of the LTA is not attributable to Respondent.

[222] *Nicaragua v. U.S.*,p.64,¶115.
[223] Facts,p.29,¶10.
[224] Annex 3,p.43.
[225] Facts,p.30,¶¶15, 17.
[226] *Vivendi*,¶7.3.9.
[227] Facts,p.30,¶17.
[228] Facts,p.30,¶16.
[229] *Hamester*,¶199.
[230] PO3,p.50.

5.2. The termination of the LTA does not amount to a violation of the BIT.

158. Even if NHA's acts were attributable to Respondent, the termination of the LTA itself does not amount to a violation of the BIT. First, Article 3(3) BIT does not cover all contract claims [5.2.1.]. Second, the termination of the LTA has already been decided on the Foreign Award [5.2.2.].

5.2.1. Article 3(3) BIT does not cover all contract claims.

159. Article 3(3) BIT fits the definition of an *umbrella clause*, as it provides that contracting parties will observe their obligations related to investments made by investors of the other contracting party[231]. Since the notorious decision in *SGS v. Pakistan*[232], many tribunals have debated the scope and effect of umbrella clauses. Tribunals in *Salini v. Jordan*, *Pan American* and *El Paso* made it clear that umbrella clauses do not have the effect of transforming all contract disputes into investment disputes under the BIT[233].

160. In *SGS v. Pakistan*, the tribunal decided that the umbrella clause in the Pakistan-Switzerland BIT did not have the effect of elevating the claims grounded solely in contracts to claims grounded on the treaty[234]. It reasoned that accepting the widest interpretation of the umbrella clause would imply the incorporation of an unlimited number of State contracts under the treaty, and there would be no real need to demonstrate a violation of substantive treaty standards to constitute a treaty violation[235]. The tribunal also highlighted that if contracting parties intended that all breaches of each State's contracts were to be converted into treaty breaches, there would have to be a "necessary level of specificity and explicitness of [its] text"[236].

161. The tribunal in *Salini v. Jordan* stated that the umbrella clause does not have the effect of incorporating the commitments it mentions into the treaty[237] and that both parties

[231] Antony,p.608.
[232] *SGS v. Pakistan*,¶¶163-173.
[233] *Salini v. Jordan*,¶¶120-130; *Pan American*,¶¶96-116; *El Paso, Jurisdiction*,¶¶70-86.
[234] *SGS v. Pakistan*,¶165.
[235] *SGS v. Pakistan*,¶168.
[236] *SGS v. Pakistan*,¶173.
[237] *Salini v. Jordan*,¶130.

would still be liable under their treaty obligations as well as their contract obligations, "but the dispute settlement procedures in each case are different" [238].

162. In *Pan American*, the tribunal decided that the umbrella clause in the Argentine-US BIT, according to which "[e]ach Party shall observe any obligation it may have entered into with regard to investments"[239], does not elevate contract claims that are not made by the State as a Sovereign into treaty claims. The tribunal accentuated how strange it would be if the acceptance of a treaty rendered the State liable "for any violation of any commitment in national or international law 'with regard to investments'"[240].

163. In *El Paso*, the tribunal endorsed the decisions mentioned above. It stressed it was necessary to distinguish the State as a merchant from the State as a sovereign, once only in the latter the contract claims are elevated to treaty claims[241].

164. Accordingly, Article 3(3) BIT does not make Respondent liable for the already settled termination of the LTA.

165. First, if Basheera and Respondent intended to expand the scope of umbrella clauses at its widest form, there would be no need to establish clauses of substantive treaty standards in the BIT, since any violation of contracts and other instruments by the State would represent a breach of the treaty[242]. In the present case, both parties agreed on the terms of the BIT, setting several substantive treaty standards, such as FET[243], MFN treatment[244], and the right to compensation for expropriation[245]. Since the umbrella clause is also understood as a *pacta sunt servanda* clause[246], the widest interpretation does not seem to suit the present case, as it deprives most of other BIT provisions of their *effet utile*.

166. Second, even if NHA's acts were to be attributed to the Respondent, the mere termination of a contract falls short of a sovereign act. When terminating the LTA, the

[238] *Salini v. Jordan*,¶127.
[239] *Pan American*,¶109.
[240] *Pan American*,¶110.
[241] *El Paso, Jurisdiction*,¶79-80.
[242] *SGS v. Pakistan*,¶168.
[243] Article 3(2) BIT.
[244] Article 4(1)(2) BIT.
[245] Article 6 BIT.
[246] Wälde,p.6.

NHA was engaging a commercial activity. Hence, the interpretation of the umbrella clause "will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity"[247].

167. Claimant may rely on *SGS v. Philippines*, which states that the umbrella clause "means what it says"[248] and covers any kind of obligations assumed by the contracting parties. However, that understanding has been particularly criticized for its wideness and for rendering "the whole Treaty completely useless"[249]. Moreover, umbrella clauses have been drafted in a variety of forms[250]. In *SGS v. Philippines*, the wording of the umbrella clause is different from Article 3(3) BIT. Article X(2) Switzerland-Philippines BIT states that "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party"[251]. The terms *has assumed* and *specific investments*, considered as categorical, were taken into account by that tribunal when comparing its umbrella clause with the one in *SGS v. Pakistan*[252].

168. Therefore, the termination of the LTA, even if attributed to Respondent, does not amount to a violation of the BIT, since "the breach by a State of a contract does not as such entail a breach of international law"[253].

5.2.2. The termination of the LTA has already been settled in the Foreign Award.

169. In any case, the LTA termination was decided in the Foreign Award, whose enforcement is still pending. In *Pan American*, the tribunal ascertained that there are two scenarios for State-investor contracts. First, the investor has a commercial contract with an autonomous State entity, in which the dispute settlement mechanism is either a commercial arbitration or the national courts. Second, the investor has an investment agreement with the State, when inserted certain *clauses exorbitantes du droit commun*,

[247] *El Paso, Jurisdiction*,¶81.
[248] *SGS v. Philippines*,¶119.
[249] *Pan American*,¶105.
[250] Dugan, Wallace, Rubins and Sabahi,p.543.
[251] Philippines-Switzerland BIT, Article X(2).
[252] *SGS v. Philippines*,¶119.
[253] ILC Articles,p.41,¶6.

and the dispute settlement mechanism is an international arbitration. Only in the latter it would be reasonable to set an "internationally secured legal remedy"[254].

170. In the present case, Claimant and the NHA, after a protracted negotiation process over the LTA, elected the first scenario above, as there is no form of "internationally secured legal remedy" on the LTA[255]. Moreover, they chose commercial arbitration as the dispute resolution for LTA-related issues[256].

171. Even in the *SGS v. Philippines* widest conception of umbrella clauses, the tribunal should not exercise its international jurisdiction over a contractual claim "when the parties have already agreed on how such a claim is to be resolved". Until the question is solved on the grounds agreed by the parties, the matter is still premature for any dispute under international commitments[257]. Despite expressing that reasonable ground, the tribunal declared its jurisdiction on the case for deciding contract claims/treaty claims, which is why the decision was considered as "contradictory"[258].

172. Nevertheless, the first understanding prevailed. In *BIVAC*, the tribunal stayed the investment arbitration proceeding until the contract dispute was resolved according to the contract forum selection clause, before Paraguayan courts. For the umbrella clause to be admissible on the grounds of attribution for international responsibility, (i) the national court has to ascertain claimant's claim and (ii) the respondent has to disregard that decision. The tribunal stated that even in this case, the umbrella clause would still not automatically fit, as it might only become admissible (iii) "depending on the circumstances"[259].

173. In the present case, Claimant has filed enforcement proceedings before the High Court[260]. The NHA objected to the enforcement, as it was contrary to public policy[261]. However, Claimant filed the Notice of Arbitration before the High Court could come to

[254] *Pan American*,¶106.
[255] Facts,p.29,¶9.
[256] Facts,p.30,¶17.
[257] *SGS v. Philippines*,¶155.
[258] *Pan American*,¶105.
[259] *BIVAC*, Further Decision,¶290.
[260] Notice,p.7,¶1.
[261] Facts,p.30,¶18.

any decision on the matter[262]. In this sense, the internal decision is pending. For that, declining admissibility to Claimant's umbrella clause claim would be the appropriate solution, in the event this Tribunal finds the termination is attributable to Respondent.

174. **IN CONCLUSION**, Respondent is not liable for the termination of the LTA, since a commercial act is not attributable to the State under international law. Even if it were, it would not breach Article 3(3) BIT.

[262] Notice,p.13.

PRAYER FOR RELIEF

175. For all the above mentioned reasons, Respondent requests this Tribunal to declare that:

a) The Tribunal does not have jurisdiction over the Foreign Award claim;

b) Claimant has been denied the benefits of the BIT;

c) Respondent has accorded fair and equitable treatment to Claimant's investments;

d) Respondent is not liable for any conduct of its judiciary in the enforcement proceedings;

e) Respondent did not violate Article 3(3) BIT.

Respectfully submitted on 25 September 2017 by

Team Fabela

On behalf of The Republic of Mercuria