TARASSOV TEAM

PERMANENT COURT OF ARBITRATION

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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2 STATEMENT OF FACTS

1. On 11 January 1998, the Republic of Mercuria ("Mercuria") and the Kingdom of Basheera ("Basheera") concluded an Agreement for the Promotion and Reciprocal Protection of Investments (the "BIT").4 The BIT was one of several international agreements concluded by Basheera, a trend that was attributed to the government's new outward-looking economic policy.

2. In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited ("Atton Boro"), as a vehicle for carrying on business in South American and African countries. For this purpose, a number of patents were assigned to Atton Boro, including the Mercurian patent for Valtervite. Atton Boro Group had an established presence in Basheera's pharmaceutical market. Atton Boro rented out an office space, opened a bank account, hired a manager and an accountant, and commenced business.

3. Atton Boro's principal dealings involved long-term public-private collaborations with States and State agencies for the manufacture and supply of essential medicines at competitive rates. It entered the Mercurian market by concluding several such agreements with its government and with Mercuria's newly set up National Health Authority (the "NHA"). Atton Boro set up a robust manufacturing base in Mercuria, and eventually expanded into other verticals in the pharmaceutical sector in Mercuria.

4. In 2003, the NHA's annual report to the Ministry of Health of Mercuria highlighted that the imminent public health concern was the increasing incidence of greyscale among working-age individuals across the country, and cautioned that the situation could spiral into a national crisis within a decade unless aggressive measures were taken to combat it. The report observed that the treatment currently available in Mercuria was only effective if the infection was detected at very early stages, and even then, it required taking 5 to 7 pills every day. This fell far short of global standards of treatment for greyscale, since many parts of the world had moved to the novel fixed- dose combinations ("FDC") contained in a single pill.

5. Acting on the recommendations in the report, the Ministry of Health directed the NHA to estimate the requirement in Mercuria and invited offers from pharmaceutical companies for long-term strategic supply of FDC greyscale medicines at discounted rates.

6. In a press statement issued on 19 January 20045 , the Minister for Health of Mercuria lauded the success of the Mercuria Comprehensive HIV/AIDS Partnership, a Product Development Partnership between Atton Boro and NHA as a part of its five-year health plan (1999-2004). The following day, the President of Mercuria shared this statement on the micro-blogging platform Twitter with the words "Mercuria will doaway with red tape and roll out the red carpet for investors."

7. In May 2004, the NHA wrote an invitation to Atton Boro to make an offer for supplying its FDC drug, which it marketed under the brand name of Sanior. Following a protracted negotiation process and evaluation of competing offers, the NHA and Atton Boro entered into a Long-Term Agreement ("LTA").

8. On 10 June 2008, the NHA terminated the LTA, because of unsatisfactory performance by Atton Boro. Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed an award (the "Award") in favour of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.

9. On 10 January 2012, the Parliament of Mercuria passed the Commercial Courts Act directing the High Court to constitute special benches that could expeditiously dispose of commercial matters. In September 2013, a ruling by the Supreme Court of Mercuria clarified that benches constituted under the Commercial Courts Act had jurisdiction only to hear original commercial suits and not enforcement proceedings. All enforcement matters were returned to be heard before regular benches of the Court.

10. On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law (Law No. 8458/09) , which introduced a provision allowing for the use of patented inventions without the authorization of the owner.

11. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the High Court under the new provision, seeking grant of a licence to manufacture Valtervite. The Court heard the matter through a fast-tracked process and

granted HG-Pharma a licence on 17 April of 2010 to manufacture Valtervite until greyscale was no longer a threat to public health in Mercuria. The Court fixed the royalty to be paid to Atton Boro.

3 ARGUMENTS

3.1 Issue 1: whether the Arbitral Tribunal has jurisdiction over the claims in relation to the Award.

1. Mercuria objects the jurisdiction of the Tribunal over the claims related to the enforcement of the Award dated 20 January 2009. The respondent submits that the Award does not qualify as an "investment" within the meaning of the Mercuria-Basheera BIT.

3.1.1 Scope of the tribunal jurisdiction.

2. The conditionality of the jurisdiction of the tribunal upon the proper characterization of the award as an investment within the meaning of the Mercuria-Basheera BIT, responds to Articles 8 and 13 of the Mercuria-Basheera BIT.

3. Article 8 of the Mercuria-Basheera BIT is entitled "Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party" and proscribes that arbitral tribunals have jurisdiction over "Any dispute between an investor of one Contracting Party and the other Contracting Party *arising out of or in relation to this Agreement*, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall, failing settlement through amicable negotiations …" (emphasis added).

4. Furthermore, Article 13 delimits the scope of application of the Mercuria-Basheera BIT to "…any investment made by an investor of one Contracting Party in the territory of the other Contracting Party on or after the date of its entry into force."

5. Therefore, in order to determine the applicability of the treaty and therefore the jurisdiction of the tribunal is necessary to verify the existence of an "investment" by an "invertor" within the meaning of the Mercuria-Basheera BIT.

3.1.2 The arbitral award does not qualify as an "investment" within the meaning of Mercuria-Basheera BIT.

6. Article 1.1 of the Mercuria-Basheera BIT provides the basis for defining the term "investment" in its paragraph 1, and furtherly includes an illustrative list of what kind of assets may constitute an

investment. Nevertheless, Article 1.1 should not be read mechanically and in isolation to rest of the treaty.

7. The arbitral tribunal is faced with the task of interpreting the term "investment" in Article 1.1. In doing so, it should resort to the interpretative rules set forth in the Vienna Convention on the Law of Treaties (VCLT), which constitute a customary international law instrument generally applicable to the interpretation of treaties.

8. Article 31.1 of the VCLT indicated that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms of the treaty* in their *context* and in the light of its *object and purpose*." (emphasis added) This confirms that an interpretation of a treaty rule done solely based on the terms of the treaty, as the claimant is aiming to do by characterizing the award as an investment due to a plain reading of Article 1.1, is contrary to the principles set forth in the VCLT and does not reflect the full meaning of the treaty rules.

9. A proper treaty interpretation based on the principles of the VCLT requires to take into account additional elements that give meaning to the provision under interpretation, namely, its context and object and purpose.

a. The arbitral award does not fulfil the element of economic development reflected in the preamble.

10. In light of the former, the respondent submits that the first and second recital of the preamble of the Mercuria- Basheera BIT enshrined the object and purpose of the treaty and are relevant in giving meaning to Article 1.1, these recitals state:

> *Desiring* to *promote greater economic cooperation* between them with respect to investment by nationals and enterprises of one Contracting Party in the territory of the other Contracting Party;
>
> *Recognizing* that agreement on the treatment to be accorded *to such investment will stimulate* the flow of private capital and the *economic development* of the Contracting Parties; (Emphasis added).

11. Part of the object and purpose of the treaty reflected in the cited recitals of the preamble, indicating the intention of the parties to include some minimum features for characterizing an asset as an investment and this is the promotion of economic cooperation and the stimulation of economic development.

12. Other disputes with similar statements in the preamble of the applicable BIT have sustained a similar reading of them. For instance, in *Romak v Uzbekistan* the tribunal stated that "…by referring to "*economic cooperation to the mutual benefit of both States*" and to the "*aim to foster the economic prosperity of both States*," suggests an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions…".[1](emphasis original) Also, the tribunal in *CSOB v. The Slovak* Republic expresses in relation to the meaning of a preamble with a similar text[2] : *"This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention"* (emphasis added).[3]

13. The requirement of a contribution element to determine the existence of an investment apart from being established in the preamble has been considered as one of the inherent features of the term "investment". This was highlighted by the tribunal in GEA v Ukraine when it stated that "However, it is not so much the term "investment" in the ICSID Convention than the term "investment" *per se* that is often considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT"[4]

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[1] Final Award, *Romak S.A. (Switzerland) v The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA28, November 26, 2009, para. 194.

[2] The preamble of the Czech Republic - Slovakia BIT (1992) states "*'the Contracting States* [are] *considering the need for international cooperation for economic development, and the role of private international investment therein".*

[3] Decision on Jurisdiction, *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999, para. 64.

[4] Final Award, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, 31 March 2011, para. 141.

14. The tribunal in *Romak v Uzbekistan* defined in broad terms the term contribution, indicating that it is "Any dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance, can be a "contribution." In other words, a "contribution" can be made in cash, kind or labor."[5]

15. Even considering a very broad definition of contribution, in no manner an arbitral award can comply with the contribution requirement. The award is a legal instrument, resulted from an arbitration that was based on an arbitration clause contained in the LTA, with exclusive effects over the parties, and that entitles the claimant to enforce its findings and be accredited with the amount for compensation. None of this provide any sort of contribution into Mercuria's territory. Neither does the LTA comply with the contribution requirement, as would be specified bellow.

16. Based on the foregoing, the respondent submits that the award does not comply with the contribution element reflected in the preamble of the Mercuria-Basheera BIT.

b. The arbitral award does not fulfill the territoriality requirement of the Mercuria-Basheera BIT

17. Article 1.1 which defines the term investment, contains explicitly the requirement that an investment must be "held or invested … *in the territory* of the other Contracting Party" (emphasis added). Furthermore, Article 13 limits the application of the the Mercuria-Basheera BIT "… to any investment made by an investor of one Contracting Party *in the territory* of the other Contracting Party on or after the date of its entry into force" (emphasis and underlined added).

18. Given the importance of this term for the application of the treaty, parties included a definition of territory for each contracting party in Article 1.4. The definition of territory for Mercuria is contained in Article 1.4(a) as follows "… 4. The term "territory" shall mean: (a) in

[5] Final Award, *Romak S.A. (Switzerland) v . The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, November 26, 2009, para. 214.

respect of the Republic of Mercuria, the territory of the Republic of Mercuria over which it exercises sovereignty, sovereign rights and jurisdiction in accordance with international law."

19. The territoriality element is also present throughout different provisions of the Mercuria-Basheera BIT. The first recital of the preamble cited above expresses that the parties entered in the agreement "desiring to promote greater economic cooperation ... *in the territory* of the other Contracting Party" (emphasis added). Other provision specify that the scope of certain standards of protection or obligations of the contracting parties is limited to investments in the territory of one of them. For instance, Article 3.2 states that:

> 2. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security *in the territory* of the other Contracting Party. Neither Contracting Party shall, without prejudice to its laws, in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments *in its territory* of investors of the other Contracting Party. (emphasis added)

20. Other provisions in the Mercuria-Basheera BIT that make reference to the territoriality element are Articles 2.1, 3.1, 4.1, 4.2 and 6.2.

21. The respondent submits that the notion of "investment" in the BIT necessarily involves an element of territoriality. Since the proceedings resulting in the Award were carried out entirely outside the territory of Mercuria, the Mercuria-Basheera BIT are not applicable to the award and it cannot constitute an investment under Article 1.1.

c. The arbitral award does not comply with the duration requirement reflected in Article 1.1 of the Mercuria-Basheera BIT.

22. Article 1.1 in defining the term investment requires that the assets that are considered investments are "*invested*". The use of this participle denotes the intention of the parties to add a component to the definition that requires not sudden occurrence, but rather a relative duration. It

implies that there must have been prior activity in the respective territory. This activity typically involves a certain amount of risk and contribution.[6]

23. More liberal or broad definition of investment in other treaties does not make specific use of this participle, which show that the intended inclusion is intended to limit the term to operations that have certain duration in time. This and the factors described above, reflect the intention of the parties to preserve a similar standard for defining the term investment regardless of their preference to use PCA rules of arbitration or the ICSID Convention, considering that Article Article 8(2) of the BIT enables parties both alternatives.

24. Based on the above stated, the respondent submits that the award does not comply with the temporal requirement under Article 1.1 of the Mercuria-Basheera BIT. The award is a legal instrument that enables the wining party to claim the compensation set forth in its findings, this implies no duration by itself. The duration of the legal proceedings carried out outside Mercuria, cannot be attributed as the duration of the award, this would be equal as affirming that the negotiations prior to the issuing of a financial instrument imply a certain duration element in portfolio investment.

3.1.3 The LTA is not an investment under the Mercuria-Basheera BIT

25. The respondent submits that Long Term agreement between Mercuria's National Health Authority (NHA) and Atton Boro Limited concluded on 20 July 20047 is not an investment under the Mercuria-Basheera BIT.

26. Under the LTA, the NHA would purchase its FDC drug marketed under the brand name of Sanior from Atton Boro at a 25% discounted rate by periodically placing purchase orders for a

[6] M. Clasmeier (2016), *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law*, Kluwer Law International, p. 35.

[7] Procedural Order No. 3, 28 August 2017, p.2.

period of ten years.[8] The agreement was the result of an offer of supply made by Atton Boro following a protracted negotiation process and evaluation of competing offers by the NHA.[9]

27. The LTA was negotiated in the framework of an imminent public health concern, namely, the increasing incidence of greyscale among working-age individuals across the country.[10] Therefore, the agreement was intended to cover a potential major demand of the FDC drug, which continuously grew. By 2007 the order value for Sanior doubled with each quarter.[11]

28. The LTA is therefore a supply contract, commercial by nature due to the commitment of one party to supply FDC drug, and the commitment of the other to make regular order in large quantities for a large period of time and duly pay those orders.

29. In *Romak v. Uzbekistan*, the tribunal in determining whether a supply contract between the investor and three Uzbek companies provided contribution to the economic development of the host country concluded that "…With respect to the supply of wheat itself, this can hardly be considered a contribution, given that immediate payment at a market rate was envisaged under the Romak Supply Contract."[12]

30. Based on the described characteristics of the LTA, the respondent submits that it does not fulfil with the contribution requirement reflected on the preamble of the Mercuria-Basheera BIT, because it is a commercial transaction negotiated under the market conditions and that provides counter obligations and commercial benefits to each party, on the one hand, the receipt and payment of an order of a product, and on the other, the supply of a product and the receipt of a price.

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[8] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 10.

[9] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 9.

[10] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 6.

[11] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 15.

[12] Final Award, *Romak S.A. (Switzerland) v The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA28, November 26, 2009, para. 215.

3.1.4 The award cannot be considered a "change in the form of an investment"

31. To the extent that the claimant argues that the arbitral award is a "change in the form of an investment", the respondent submits that the award cannot be considered a "change in the form of an investment".

32. Having explained above that the award does not constitute by itself an investment, and that the award is a legal instrument that resulted from a controversy based on an arbitration clause provided in the LTA, and that the former does not constitute an investment, it is consequential to conclude that the arbitral award cannot be a "change in the form of an investment". First, because the underlying operation is not an investment so there cannot exist any change of something that was not originally an investment; and second, even assuming hypothetically that the LTA is an investment the right to arbitration is a distinct and separate right from a contract

33. In *GEA v Ukraine* the characterization of an arbitral award as an investment was also being disputed. The tribunal determined that the contractual agreement which originated the arbitration and resulted in the award, in that case, was not an investment. Nevertheless, the tribunal carried out its analysis of the characterization of the arbitral award as if the contract that originated the correspondent dispute were an investment, deciding that the arbitral award did not constituted an investment because it did not involve contribution to economic development:

> Even if – *arguendo* – the Settlement Agreement and Repayment Agreement could somehow be characterised as "investments," or the ICC Award could be characterised as directly arising out of the Conversion Contract or the Products, the Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and t*he Award itself involves no contribution to, or relevant economic activity* within, Ukraine such as to fall – *itself* – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention. For the same reason, the Settlement Agreement and Repayment Agreement, as well as the Award, cannot be considered as falling within the terminal

proviso of Article 1 of the BIT ("Any change to the form in which assets are invested shall not affect their nature as investments").[13]

34. Very similarly in the present dispute none of the operations, namely, the LTA and the award involve no contribution to economic cooperation or to stimulation of development. Thus, none of them can be considered as an investment.

35. The respondent notes that the cited case is an ICSID case, in which the tribunal had to review the term investment under the parameters of Article 25 of the ICSID Convention. The present dispute is an ICSID case, nevertheless under the applicable BIT the contribution requirement mentioned by the tribunal in GEA v Ukraine also apply for the reasons previously explained. Also, the use of ICSID cases as references is valid due to the alternative of an investor to recourse to ICSID rules under Article 8(2) of the Mercuria-Basheera BIT.

36. As the tribunal in *Romak v Uzbekistan* did when faced to the same jurisdictional objection as the one in this dispute, the tribunal cannot ignore the fact that Article 8(2) of the Mercuria-Basheera BIT gives the possibility to the investor to resort to arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[14] In this sense, the treaty interpreter independently of the arbitration rules applied should have the same standard for defining the term "investment" under the same treaty. Not doing so, "…would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty".[15]

[13] Final Award, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, 31 March 2011, para. 162.

[14] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), done at Washington, March 18, 1965.

[15] Final Award, Romak v Uzbekistan, PCA Case No. AA280, November 26, 2009, para. 189.

3.1.5 Conclusion

37. Based on the foregoing arguments, Mercuria request the Tribunal to find that the Tribunal lacks jurisdiction over the claims related to the enforcement of the Award dated 20 January 2009.

3.2 Issue 2: whether the Claimant has been denied the benefits of the Mercuria-Basheera BIT by virtue of the Respondent's invocation of Article 2 of the BIT

38. On 26 November 2016, in its Response to Notice of Arbitration, Mercuria denied the advantages of the BIT to the Claimant. In the current memorial the Respondent will address the issue and present the entirety of its legal argument to prove that it properly executed its legal right under Article 2 of the BIT.

3.2.1 Legal Basis

39. Article 2.1 of the BIT holds a definitive legal standard for denial of benefits that is relevant for the current case.

40. Mercuria could reserve the right to deny the advantages of the BIT to a legal entity if two cumulative conditions are met: (i) if citizens or nationals of a third country own or control such entity; and (ii) if it has no substantial business activities in Basheera.

41. As we will further show, both these substantive conditions were met and all the necessary procedural issues were respected by Mercuria.

3.2.2 Burden of Proof

42. We acknowledge that is the Respondent who bears the burden of proving that the both conditions of article 2.1 of the BIT are met to properly invoke its provisions.

43. Regarding a similar text in Ukraine-USA investment treaty, a Tribunal noted in *Generation Ukraine v Ukraine*:

> "In the absence of any competing considerations advanced by the Respondent, the Tribunal is satisfied that "third country control" over Generation Ukraine is a

> prerequisite for any purported invocation of Article I(2) by the Respondent. Furthermore, the burden of proof to establish the factual basis of the "third country control", together with the other conditions, falls upon the State as the party invoking the "right to deny" conferred by Article 1(2). This is not, as the Respondent appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State." (emphasis added)

44. Thus, the burden of establishing the proper factual basis and proving that the relevant conditions were met falls on the Respondent who invokes the said provision. Respondent acknowledges this issue and accepts the burden of proof.

3.2.3 Procedural Issues and Timing

45. The Claimant may argue that the timing of the denial of benefits was not proper, but its arguments are without merit.

46. Indeed, in a number of Energy Chapter Treaty cases Tribunal decided that the benefits under the investment treaty could be denied only proactively, and with such interpretation an issue may rise regarding the current case because denial of benefits was invoked only during the arbitration proceedings. For example, in *Plama v Bulgaria*, the Tribunal decided clearly that "the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect" . However, these legal interpretations are not applicable under the BIT because of the different wording in the denial of benefits clause. In Energy Chapter Treaty, only benefits of Part III of the investment agreement may be denied. This part concerns only investment promotion and protection and omits certain substantive and procedural issues including, most importantly, dispute settlement in Part V of the Energy Chapter Treaty. Thus, the host state may not deny the claimant of benefits regarding initiation of an investor-state dispute.

47. However, unlike Energy Chapter Treaty Article 2.1 of the BIT does not distinguish the substantive protections and dispute settlement, allowing for any benefits under the BIT to be denied of the Claimant. The similar wording is found in several investment treaties negotiated by the United States that have been carefully analyzed in arbitration proceedings. The Tribunal in *Ulysseas v Ecuador* explained that retroactive application of the provision is allowed:

> "The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State."

48. Moreover, in *Rurelec v Bolivia*, the Tribunal supported this conclusion and further explained the reasons behind it:

> "The Contracting Parties to the BIT could have agreed otherwise, but they decided not to do so. Instead they agreed that a Contracting Party could deny benefits (including the benefit of having a dispute decided by an arbitral tribunal) subject to meeting certain conditions, none of which entails that such denial is only effective in relation to disputes arising after the notification of such denial or imposes any other limitation period that would occur before the Respondent's submission of its Statement of Defence."

49. Thus, at any moment the Respondent can deny the advantages of BIT including the rights provided to the claimant regarding the settlement of investor-state disputes. It is what the Respondent actually did in its Response to Notice of Arbitration: denied all the advantages of the BIT including the dispute settlement.

50. Thus, with all the preliminary issues addressed in this Memorial the Respondent can continue with the substantive part of its legal argument.

3.2.4 Ownership or Control

51. First, to allow the Respondent to invoke denial of benefits, the investor has to be owned or controlled by citizens or nationals of a third country. As we will further show, Atton Boro Limited was indeed controlled by the national of a third country.

52. Given the lack of explicit definition of term "national" in the BIT it must be interpreted taking into account the ordinary meaning of the word "national" ("a citizen of a particular country") together with the context of the BIT and in the light of its object and purpose under Article 31 of the Vienna Convention. The fact that Article 25(2)(b) of the ICSID Convention recognizes

nationals as both natural persons and juridical persons who have a given nationality forms part of the relevant context for the BIT. As the restrictive and literal interpretation results in redundancy and effectively defies the purpose of the negotiators who agreed upon using "nationals" in addition to simply limiting the text of Article 2 of the BIT to "citizens", we have to agree that, given the context of the BIT, nationals may include the legal persons.

53. The lack of such explicit definition distinguishes the current case and several cases where the investment treaties by the United States of America were at issue. Specifically, in Ulysseas v Ecuador the Tribunal decided that the term "nationals" meant only natural persons, but based its conclusion on the fact that US-Ecuador treaty included an explicit definition of the term: "a natural person who is a national of a Party under its applicable law" . The BIT at issue is notably different in this respect and has no such limitation.

54. This is the issue in the present case: ultimately, claimant is controlled by the legal person which is national of the third country, the People's Republic of Reef.

55. Atton Boro Limited was controlled by Atton Boro Group and, ultimately, by Atton Boro and Company. Both the Claimant and the Respondent agreed that "Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited" . It is also agreed by the parties to this dispute that "shares of Atton Boro Limited are currently held by Atton Boro Group affiliates, which are all ultimately controlled by Atton Boro and Company." Atton Boro and Company, the primary holding company in Atton Boro Group is a national of Reef as "a corporation organized under the laws of the People's Republic of Reef" . Reef is not subject to the BIT and is therefore a third country.

56. Thus, the Claimant, Atton Boro Limited, is controlled by the national of the third country.

3.2.5 Substantial Business Activities

57. Second, to allow the Respondent to invoke denial of benefits, it has to prove that the investor has no substantial business activities in Basheera.

58. As the definition of "substantial business activities" is not present in the BIT, we have to resort to the interpretations provided by the Tribunals in similar cases. In *Amto v Ukraine*, a tribunal, with a view that the aim of provisions on denial of benefits was to limit "exclude from ECT protection investors which have adopted a nationality of convenience" , provided such an explanation:

> "Accordingly, 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question."

59. In *Pac Rim v El Salvador*, the Tribunal found that the activities of the Claimant were not substantial because "Claimant's activities, both in the Cayman Islands and the USA, were principally to hold the shares of its subsidiaries in El Salvador" and also "Claimant's activities as a holding company were not directed at its subsidiaries' business activities in the USA, but in El Salvador."

60. Similarly, in the present case, the Claimant's principal activities were not aimed on Basheera, but were limited to "managing its portfolio of patents registered in South America and Africa, and providing support for regulatory approval, marketing, and sales as well as legal, accounting and tax services for Atton Boro Group affiliates in South America and Africa" (Basheera is located not there, but in Westeros). Effectively, even despite the fact that Atton Boro Group itself "had an established presence in Basheera's pharmaceutical market" , these activities were not conducted by Atton Boro Limited.

61. Moreover, it is arguable that the Claimant was incorporated mostly for commencing business in Mercuria. Quickly after its creation, Atton Boro Limited was assigned the Mercurian Patent for Valtervite on 15 April 1998 and was funded "to set up its manufacturing unit in Mercuria, as well as to perform the agreements it entered into with the NHA from 1998 onwards." While no evidence can ever be produced regarding what was the original intent behind incorporation of Atton Boro Limited in Basheera, its immediate start of operations in Mercuria does not seem coincidental. By incorporating Atton Boro Limited in Basheera Atton Boro Group attempted to adopt a nationality

of convenience to access the otherwise unattainable benefits of the BIT, which compounds the lack of substantial business activities.

62. Therefore, Mercuria had the proper right to deny the benefits of the BIT to the Claimant because it had no substantial business activities in Basheera.

3.2.6 Conclusion

63. We request that the Tribunal agrees to the objection of Mercuria in respect of Article 2 of the BIT and decides that Atton Boro Limited cannot use the benefits of the BIT.

3.3 Issue 4: whether the enactment of Law No. 8458/09 and/or the grant of a license for the Claimant's invention amount to a breach of the Mercuria-Basheera BIT, in particular, the Fair and Equitable Treatment standard

64. It is Respondent's submission that the enactment of Law No. 8458/09 and/or the grant of a license for the Claimant's was not in violation of Fair and Equitable treatment standard under Mercuria-Basheera BIT. First, Atton Borro Ltd. could not have legitimate expectations with respect to Mercuria's compliance with its international treaties obligations, including TRIPs Agreement. Next, this tribunal is not in the position to rule on the alleged WTO Agreements inconsistency, as such matters are under exclusive jurisdiction of the WTO Dispute Settlement Body. Lastly, and without prejudice to the previous position, Mercuria's actions are in compliance with its international obligations under the TRIPs Agreement.

3.3.1 Atton Borro Ltd. could not have legitimate expectations with respect to compliance with TRIPs obligations

65. The Respondent first submits that Atton Borro Ltd. could not have legitimately expected Mercuria to comply with its international IPRs obligations, including those contained in the TRIPs Agreement.

66. At the time the investment was made, Mercuria made no specific representation to Atton Borro Ltd. with respect to compliance with any international obligations. At the time the investment is made all investors must reasonably assume that the regulatory environment is subject

to change. Next, Mercuria-Basheera BIT did not contain any stabilization clause for Atton Borro Ltd. to assume otherwise.

67. According to the tribunal in *Saluka*, no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectation was justified and reasonable, the host state's legitimate right subsequently to *regulate domestic matters in the public interest must be taken into consideration as well* [emphasis added].[16]

68. Next, the language of the BIT, which shall be interpreted in accordance with the customary rules of treaty interpretation as guided by the Vienna Convention on the Law of Treaties, does not provide for any specific obligations the parties undertook with respect to their compliance with respective international obligations. Should the parties intended to do so, the language of the fair and equitable treaty standard in Mercuria-Basheera BIT would read '…*each Contracting Party shall at all times be accorded fair and equitable treatment* ***in accordance with international law***'. In the present case, however, Article 3(2) of Mercuria-Basheera BIT does not contain such a reference to international obligations, meaning that (1) the parties had no intention for the BIT in question to cover such matters and (2) Atton Borro Ltd. could not have reasonably expected Mercuria to comply with its international obligations, including those under TRIPs Agreement.

69. Therefore, since no specific representation was made to Atton Borro Ltd. at the time the investment was made, and Mercuria-Basheera BIT does not extend the coverage to the respective international obligations, including international protection of intellectual property rights obligations pursuant to the TRIPs Agreement, Atton Borro Ltd. could have not reasonably expected Mercuria to comply with the aforementioned obligations.

[16] Saluka Investments BV v. Czech Republic (Partial Award, 17 March 2006). Para 305.

3.3.2 Matters related to the alleged WTO inconsistency are under exclusive jurisdiction of the WTO Dispute Settlement Body

70. Next, the Respondent submits that any alleged WTO inconsistencies shall be established only under the auspices of the WTO, since WTO Dispute Settlement Body has an excusive jurisdiction over such matters.

71. Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') reads:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

72. As explained by the Panel in *US — Section 301 Trade Act*,

Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU. (emphasis added)[17]

73. In order to avoid that the application of TRIPs by arbitral tribunal established under the present BIT contravenes TRIPS Article 64 and DSU Article 23, the tribunal should refrain from any interpretation of the standards of treatment under Mercuria-Basheera BIT (in particular, fair and equitable treatment ('FET')) in view of TRIPs that could essentially turn the BIT into a vehicle to enforce TRIPs against Mercuria. Any other interpretation would be contrary to the customary

[17] WTO Panel Report, US — Section 301 Trade Act, para. 7.43.

rules of treaty interpretation, in particular to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires the interpreter to arrive at an interpretation that is consistent with other treaties to which Mercuria is a party.

74. Atton Borro Ltd. submits that Mercuria violated BIT FET standard by not complying with TRIPs obligations. In order to establish such BIT violations, the tribunal will inevitably have to establish whether the alleged TRIPs violation occurred. As explained above, the Respondent submits that the tribunal is not in the position to rule on the alleged WTO-inconsistency as such matters are under exclusive jurisdiction of the WTO Dispute Settlement Body. Deciding otherwise would be not in accordance with the international customary rules of treaty interpretation and would undermine the whole integrity of the multilateral trading system.

3.3.3 Mercuria acted in compliance with TRIPs obligations

75. Finally, and without prejudice to the previous position, Mercuria submits that it acted in conformity with its international IPRs obligations, including those under TRIPs.

76. Article 31 of TRIPs specifically provides the rules for granting and managing compulsory licenses. When adopting the relevant legislation and granting a license to HG-Pharma, Mercuria respected the aforementioned provisions, and, therefore, acted in compliance with Article 31 of TRIPs.

77. Next, the WTO Doha Declaration on the TRIPS Agreement and Public Health, agreed by WTO members in 2001, helped to frame the health policy context of the intellectual property system. It stressed the need for the TRIPS Agreement to be part of the wider national and international action to address public health problems afflicting developing countries and least-developed countries. The Declaration identified specific options open for governments to address public health needs, also termed ‘flexibilities’, and the importance of such flexibilities was highlighted more recently by their inclusion in the Sustainable Development Goals.

78. The flexibilities identified in the Doha Declaration include “the right to grant compulsory licences”. A compulsory license is issued by a government authority or a court to make certain

use of a patented invention without the consent of the patent holder. This mechanism is generally present in most patent laws, is recognized as a permissible option or flexibility under the TRIPS Agreement, and has been used by a number of WTO members in the pharmaceutical field. However, TRIPS rules originally restricted compulsory licences to serve mainly the domestic market, unless they were issued to deal with anti-competitive behaviour.

79. The Doha Declaration recognized that this restriction on compulsory licensing could hamper its effective use by countries with insufficient or no manufacturing capacities in the pharmaceutical sector. The amendment of the TRIPS Agreement aims at removing this difficulty by creating an additional form of compulsory licence that had not existed before: a compulsory licence especially tailored for the export of medicines to countries in need – in effect, a 'trade related' compulsory licence.

80. The new Article 31bis of the TRIPS Agreement gives full legal effect to this system and allows low cost generic medicines to be produced and exported under a compulsory licence exclusively for the purpose of serving the needs of countries that cannot manufacture those products themselves. For the minority of WTO members yet to accept the amendment, an interim waiver will continue to apply.

81. Therefore, it is Respondent submission that it had the right to grant compulsory license under the present WTO framework and did so in compliance with its TRIPs oblligations.

3.3.4 Conclusion

82. Therefore, Mercuria submits that first Atton Borro Ltd. could not have legitimate expectations with respect to Mercuria's compliance with its international treaties obligations, including TRIPs Agreement. Next, this tribunal is not in the position to rule on the alleged WTO Agreements inconsistency, as such matters are under exclusive jurisdiction of the WTO Dispute Settlement Body. Lastly, and without prejudice to the previous position, Mercuria's actions are in compliance with its international obligations under the TRIPs Agreement.

3.4 Issue 4: whether Mercuria is liable under Article 3 of the BIT for the conduct of its judiciary in relation to the enforcement proceedings

83. The republic of Mercuria did not violate its obligation to provide fair and equitable treatment to investment pursuant article 3.2 of the BIT in relation to the conduct of its judicial

84. The Respondent submits that it did not violate its obligation to provide fair and equitable treatment to investment pursuant Article 3.2 of the BIT in relation to the conduct of its judiciary. The complainant has asserted that there was a denial of justice basing on the conduct of its Judicial organ, but the respondent would like to submit that the complainant has failed to prove the existence of the denial of justice and to meet the established standard of proof of the existence of denial of justice. Denial of justice occurs if a state organ conducts amounts to an act which shows such prejudice that "would shock the conscience of the outside word".[18]

85. The tribunal in *Dan Cake (Portugal) S.A. v. Hungary*[19] held that "The test for establishing denial of justice sets a high threshold''[20]. Atton Boro must show the judiciary conducted itself in a manner to show that it (the judiciary) had intentions of treating Atton Boro differently from other litigants, that the judiciary acted in an arbitrary, grossly unfair, unjust or idiosyncratic way, that the treatment was discriminatory, that the conduct amounted to refusal to judge/denial of justice.[21]

86. Other tribunals[22] have held that for the claim of denial of justice to be upheld there must be "a wilful disregard of due process of law, . . . which shocks, or at least surprises, a sense of judicial

[18] Dan Cake (Portugal) S.A. v. Hungary (ICSID Case No. ARB/12/9) p

[19] In Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, PCA Case No. 34877

[20] Id. 244

[21] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Parag 102-103

[22] In Elettronica Sicula S.p.A. ("ELSI") (United States of America v. Italy), 1989 ICJ Rep. 15, 28 ILM 1109, Judgment

propriety,"[23] with that regard its clear from the fact that the court did not disregard the due process of the law in resolving the dispute rather the dispute was delayed because of normal court congestion by having a lot of cases to attend and therefore the complainant has failed to prove the denial of justice by the court.

87. In *Liman Caspian Oil v. Republic of Kazakhstan* [24] the tribunal addressed the standard of proof with regard to the claims of denial of justices and it stated that "the Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice . . . To decide the case at hand, it is sufficient to state that a judicial act breaches both or either of those standards only if the act attains the high threshold which is described in Waste Management''.[25] The respondent would therefore like to submit that the complainant has failed to meet this standard of proof of denial of justice.

88. Also, the Tribunal must take into account the circumstances of Mercuria as a developing country with a population over 67 million people, it is with no doubt that its judiciary is over-stretched, further that the separation of the court bench shows the willingness of the judiciary to curb the backlog of cases and ensure efficiency.

89. In any event, it is important to note that delay is a natural, well-known and entirely predictable feature in developing countries, it reflects no illegitimate conduct directed towards Atton Boro,and that an investor must take the conditions of the host state as it finds it, as it was addressed by the tribunal in the Arbitral Award between *Chevron Corporation and Texaco*

[23] Id. 128

[24] Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14,

[25] Id, 279

Petroleum Company v. The Republic of Ecuador[26] which held that "The tribunal does not find that a specific amount of delay alone results in an automatic breach of the BIT, … Court congestion and backlogs are relevant factors to be considered in determining the period of delay that is reasonable in the circumstance''

90. In light of the former, the respondent would like to request to this arbitral tribunal to consider the level and the judicial capacity of the government of Mercuria in resolving disputed and finally find that the delay was not intentional neither malicious against the investor but rather it's the result of the court congestion with the backlogs of case and therefore the period of delay could not amount to denial of justice to the Complainant by the court.

91. With regard to claims by the Complainant on failure to provide effective means of enforcing rights the respondent submit that the means available in the country are sufficient to render justices to any person in the country considering to the developmental capacity of the country, on top of that the respondent submits that the complainant cannot use the claim on failure to provide effective means of enforcing rights as a basis for breach of obligation under the BIT as the requirement is only stated under the preamble of the BIT and it does not form part of the substantive obligation under the BIT and therefore the respondent is not bound to fulfil the obligation so to say no breach of any obligation.

3.4.1 Issue 5: whether termination of the Long-Term Agreement by the Respondent's National Health Authority amounts to a violation of Article 3(3) of the Mercuria-Basheera BIT.

92. The termination of the Long-Term Agreement by the Respondent's National Health Authority does not amount to a violation of Article 3(3) of the BIT

93. The Long-Term Agreement ("**LTA**") was a purely commercial supply arrangement between Mercuria's National Health Authority ("**NHA**") and Atton Boro, and the termination of the LTA was NHA's decision acting as a purchaser. Obligations under a commercial contract are distinct

[26] Supra, Note 1

from those under an investment agreement, and there can be no attribution of international responsibility to Mercuria for acts done by the NHA in a commercial capacity. This view is only furthered by the fact that the LTA provided for recourse to a specific dispute resolution forum which, by Atton Boro's own admission, has conclusively decided the matter.

3.4.2 There is no privity of contract between the claimant and the respondent

3.4.2.1 The Acts of NHA are not attributable to Mercuria.

94. Given that the Mercuria-Basheera BIT does not have any provision regarding attribution, the former should be determined, as done by case law27, through the application of customary rules of international law, that are reflected in the International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts.

95. Pursuant the mentioned Draft articles, there are three types of conducts that can be attributed to a State: 1) Conducts of organs of the State (Article 4 of the ILC Articles); 2) Conducts of persons or entities exercising elements of governmental authority (Article 5 of the ILC Articles); 3) Conduct directed or controlled by a State (Article 8 of the ILC Articles).

a. The Acts of NHA are not attributable to Mercuria because the NHA is not an organ of the State (Art. 4 ILC Articles)

96. The respondent submits that the NHA is not an organ of the State pursuant to article 4 of the ILC Articles. In the mentioned provision, the reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf.[28] In *Jan de Nul v. Egypt* the tribunal considered an independent legal personality as a determinative factor for being not being considered as part of the State structure.

[27] See Final Award, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, 6 November 2008.

[28] 2001 Commentary to Article 4 of the ILC Articles, para 1.

97.

98. It is an uncontested fact that the NHA operates independently. It is organised by NHA trusts, which are established by the National Health Authorities Act, and in effect they constitute public sector corporations.[29] The complainant directly sued the NHA recognizing its entitlement of autonomous legal personality, and furthermore the arbitral tribunal issued an award[30] attributing responsibility directly and solely to the NHA. This proves that this entity does not form part of the structure of the State.

b. The Acts of NHA are not attributable to Mercuria because the NHA is not a public entity having exercised governmental authority functions (Art. 5 ILC Articles)

99. In the alternative, the respondent submits that the NHA is an entity exercising elements of governmental authority. For this purpose, according to article 5 of the ILC articles, it has to fulfill two conditions: the act must be performed by an entity empowered to exercise elements of governmental authority; and the act itself must be performed in the exercise of governmental authority.

100. The NHA did not exercise governmental authority in the termination of the LTA, the termination of the LTA was NHA's decision acting as a purchaser. Noticing that the conditions in which the LTA was concluded had significantly changed, the NHA attempt to renegotiate the terms of the LTA accordingly. The NHA observing that the new proposal presented by the supplier (Atton Boro Limited) did not adjust to the new circumstances and that it was not possible to reach an agreement with Atton Boro Limited decided to end the agreement.

[29] Procedural Order No. 03, 28 August 2017, p. 2.

[30] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 17.

101. The former act is by itself a commercial act that is not exercised under governmental authority, rather it is exercised by NHA's commercial capacity, deciding that the new conditions presented by the supplier of the contract were not favorable enough.

c. The Acts of the NHA are not attributable to Mercuria because the NHA has not acted upon the instruction of the State (Art. 8 of the ILC Articles)

102. To the extent that the tribunal finds that neither Article 4 and 5 of the ILC Articles are applicable, the respondent submits that the negotiation, conclusion and termination of the LTA are acts in control or direction of the State. For this international jurisprudence requires fulfilling the "effective control test" that requires: general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake[31].

103. First, there is no general control of the State over the NHA. As mentioned above the NHA operates independently.[32] The fact that it is politically accountable to the government of the state and some instances of cooperation between the NHA and the Ministry of Health does not entail general control. The NHA is both founded by public taxation and private contributions[33], which denotes that the presence of the government it is not general.

104. Second, it is an uncontested fact that there is no record of direct participation by Mercurian officials in the negotiation of the LTA.[34] The act of attribution which is at stake was developed independently by the NHA in its commercial capacity acting as a purchaser. The decision to re-negotiate the LTA was made by the NHA stating that it had "grossly underestimated the number of greyscale cases in Mercuria" and needed to supply medicines for nearly twice the number of

[31] Final Award, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, 6 November 2008, para.173.

[32] Procedural Order No. 03, 28 August 2017, p. 2.

[33] Procedural Order No. 03, 28 August 2017, p. 2.

[34] Procedural Order No. 03, 28 August 2017, p. 2.

patients.[35]The termination of the LTA was made also independently by the NHA, citing one of the causes to terminate the validity of the contract, this is, unsatisfactory performance by Atton Boro.

3.4.3 The termination of the Long-Term Agreement (LTA) is not under the scope of Article 3(3) of the BIT

105. Article 3(3) of the Mercuria-Basheera BIT provides: " 3. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

106. The tribunal in SGS v Pakistan interpreting the umbrella clause in the 1995 Pakistan-Switzerland BIT concluded that contractual claims should not be elevated or equated to treaty violations, the tribunal particularly expressed:

> A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT. Applying these familiar norms of customary international law on treaty interpretation, *we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to "elevate" its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT*, and accordingly to bring such contract claims to this Tribunal for resolution and decision.[36]

107. The similarity among the legal provision that served as a basis for this analysis in SGS v Pakistan and Article 3(3) of the Mercuria-Basheera BIT should be noted. In this sense, Article 11 of the 1995 Pakistan-Switzerland BIT, entitled "Observance of commitments" established that "Either Contracting Party shall constantly guarantee the observance of the commitments it has

[35] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 15.

[36] Decision on jurisdiction, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, para. 165.

entered into with respect to the investments of the investors of the other Contracting Party."[37] (emphasis added)

108. The former clarification is important due to the different approaches taken by tribunals in the interpretation of umbrella clauses. The use of the decisions of previous tribunals as orientation for the analysis in a particular case, should prioritize decision with a similar legal basis.

109. In fact, the existence of a distinct treaty text in *SGS v Philippines* in Article X of the Philippines-Switzerland BIT[38], which states that "Each Contracting Party shall observe any obligation *it has assumed* with regard to specific investments in its territory by investors of the other Contracting Party.", justified this tribunals departure from the cited approach taken in *SGS v Pakistan.*

110. In *SGS v Paraguay*, the tribunal underlined the importance of these distinctions in the following manner:

> The *SGS v. Philippines* tribunal suggested that it reached a different result […] based at least in part on difference between the umbrella clause language of the Switzerland-Philippines BIT and the supposedly less direct or less specific language of the umbrella clause in the Switzerland-Pakistan BIT. […] Inasmuch as we reach the same result on jurisdiction as the SGS v. Philippines tribunal, on the basis of the same Treaty language as was before the SGS v. Pakistan tribunal, it follows that this Tribunal does not see the language as meaningfully different. That is, we do not consider that the wording of Article 11 of the Treaty is so general or hortatory as to preclude reading it as an obligation of the State to comply with, inter alia, its contractual commitments.[39]

[37] Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and reciprocal protection of investments, singed on 11 July 1995.

[38] Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and reciprocal protection of investments, singed on 31 March 1997.

[39] Decision on jurisdiction, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, para. 169.

111. Other decisions have also taken the approach that the scope of umbrella clause which contain the words "entered into" with regard to or in relation to investments, does not include contractual obligations. For instance, the Annulment decision in CMS v Argentina determined:

112. "The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e. the persons bound by it and entitled to rely on it) are likewise not changed because of the umbrella clause."

113. On the basis of the foregoing, the respondent submits that the tribunal should find as support and guidance for its interpretation of Article 3(3) of the Mercuria-Basheera BIT the cited cases with similar legal basis that take the approach that the scope of the umbrella clause does not encompasses contractual breaches.

114. In any case, the elevation of contractual obligations to International treaty obligations is an exception to the norm that municipal law governs domestic disputes, while international law is reserved for international relations and therefore should be interpreted restrictively.

3.4.4 In the alternative, the termination of the LTA did not violate Article 3(3) of the Mercuria-Basheera BIT.

115. As justified by the NHA at the moment it decided to terminate the LTA, this decision is due to unsatisfactory performance by Atton Boro.[40] The authority to terminate the agreement for the mentioned cause is provided in Clause 6 of the LTA, titled "Validity of the Agreement" read "This Agreement shall be valid for a period of 10 years effective from commencement date *subject to the Supplier's satisfactory performance."* (emphasis added).

116. The cited provision allowed the NHA to duly terminate the contract due to unsatisfactory performance. Thus in the alternative that the tribunal finds that Article 3(3) of the Mercuria-

[40] Procedural Order No. 1, 10 January 2017, Statement of uncontested facts, para. 17.

Basheera BIT cover contractual obligations the respondent submits that the termination of the LTA was justified under the terms of the LTA and consequently was consistent with Article 3(3).

3.5 Request for relief

117. Mercuria hereby requests the Tribunal to:

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

2. Declare that Atton Boro cannot avail itself of the benefits of the BIT by virtue of application of Article 2 of the BIT;

3. Where the Tribunal does not grant the second prayer, declare that no act of Mercuria's violates the substantive protections of the BIT;

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

5. Grant such further relief as counsel may advise and that the Tribunal deems appropriate.