TEAM: KORETSKY

PERMANENT COURT OF ARBITRATION

IN THE PROCEEDINGS BETWEEN

ATTON BORO LIMITED

(CLAIMANT)

v.

THE REPUBLIC OF MERCURIA

(RESPONDENT)

PCA CASE NO. 2016-74

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**YUKOS**

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<td>¶</td>
<td>Paragraph</td>
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<td>Art.</td>
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<td>Contracting Parties</td>
<td>The Republic of Mercuria and the Kingdom of Basheera as Contracting Parties of their BIT</td>
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<td>DoB Clause</td>
<td>Denial of Benefits Clause</td>
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<td>ECT</td>
<td>Energy Charter Treaty</td>
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<td>EU</td>
<td>European Union</td>
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<td>EU-Singapore FTA</td>
<td>EU-Singapore Free Trade Agreement</td>
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<td>FET</td>
<td>Fair and equitable treatment</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IIA</td>
<td>International investment agreement</td>
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<td>ILC articles</td>
<td>Draft Articles on Responsibility of States for Internationally Wrongful Acts published by International Law Commission</td>
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<tr>
<td>ISDS</td>
<td>Investor-state dispute settlement</td>
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<td>LTA</td>
<td>Long-Term Agreement</td>
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The Award

An award rendered by the Tribunal in commercial arbitration in Reef on January 2009

the BIT

Agreement between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments

the Claimant

Atton Borro Limited

the Respondent

the Republic of Mercuria

the Tribunal

Tribunal of the Permanent Court of Arbitration appointed to resolve current dispute

the WTO Decision

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<td>TRIPS</td>
<td>The Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Statement of facts

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”).

Atton Boro and Company is a company established under the laws of the People’s Republic of Reef (“Reef”) and acts as the primary holding company for Atton Boro Group, a drug discovery, and development enterprise. Its shares are held by a mix of private entities and private individuals of a wide variety of nationalities. Its directors come from several different countries, including Basheera and Mercuria. In April 1998, Atton Boro Group incorporated a wholly owned subsidiary in Basheera, Atton Boro Limited (“Atton Boro” as well as the “Claimant”). This company rented out an office, opened bank account, employed several people and conducted business activities in Basheera, namely managing a 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.

In May 2004 Atton Boro entered into a long-term agreement (LTA) with National Health Company (NHA) upon an invitation to make an offer sent by NHA. Apart from this, Atton Boro set up a manufacturing base in Mercuria and expanded into the other verticals in the Mercurian pharmaceutical market.

On 10 June 2008, the NHA terminated the LTA while violating its Clause 6, citing unsatisfactory performance by Atton Boro. Although Atton Boro was open to price renegotiation and offered a 10% discount on the very threshold of profitability, NHA insisted on discount of 40%, which would not make any profit to Atton Boro after all finances and effort invested in research and development of new drugs.
Pursuing unilateral termination of LTA, Atton Boro invoked arbitration against the NHA under the LTA. In January 2009, a Tribunal seated in Reef passed an award (the “Award”) in favor of the Claimant, finding that the NHA had breached the LTA by terminating it prematurely.\textsuperscript{8}

On 3 March 2009, Atton Boro filed enforcement proceedings before the High Court of Mercuria. The NHA filed its response in the matter, requesting the Court to decline enforcement of the Award on the ground that it was contrary to public policy.\textsuperscript{9} On several occasions, the hearings were postponed (e.g. on 10 June 2010, the NHA has been granted an extension for filing its response; on 3 September 2011, the HNA has been granted extension due delay of its counsel).\textsuperscript{10}

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. This judicial saga of 8 years is still pending.\textsuperscript{11}

On 30 October, the Claimant informed the court that all attempts to settle the dispute amicably had failed and the matter was adjourned to 2 January 2017.\textsuperscript{12}

On 7 November 2016 Atton Boro informed the Respondent about commencement of proceedings before PCA\textsuperscript{13}

Because of Respondent's actions, Atton Boro had lost nearly two-thirds of its market share and there are indications that several long-standing business partners of Atton Boro are preparing to switch to another supplier of drugs because of lower prices.\textsuperscript{14}

\textsuperscript{8} Ibid., p. 29, ¶ 17.
\textsuperscript{9} Ibid., p. 29, ¶ 18.
\textsuperscript{10} Timeline, pp. 7 - 12
\textsuperscript{11} PO no. 3, p. 50.
\textsuperscript{12} Timeline, p. 12, ¶ 43
\textsuperscript{13} Notice of Arbitration, p. 3, ¶ 1
\textsuperscript{14} Statement of uncontested facts, p. 31, ¶ 25.
PART ONE: JURISDICTION OF THE TRIBUNAL

I. The Award is an Investment According to Article 1 of the BIT.

1. Definition of an Investment

1. The question addressed in this part of Claimant's submission is whether the Award is an investment and whether the Arbitral Tribunal has jurisdiction over it. Furthermore, to elaborate this matter, it is important to deal with the term “investment” in a scope of legal theory and literature, which shall be a base for all Claimant's submission regarding the *ratione materiae* aspect in the present dispute.

2. The Claimant will further argue, that the Award is an investment according to the definition "claim to money" in Article 1 of the BIT. In case that the Tribunal would not acknowledge the Award as an investment according to this argument, the Claimant will argue, that the Award is an investment transformed from the LTA according to the Article 1 of the BIT.

3. In general, the term “investment” is wide-scope and very flexible regarding its interpretation.¹⁵ Profs. Dolzer and Schreuer provide a definition of investment based on economic debate, that includes these features: transfer of funds, long-term project, the purpose of regular income, participation of person transferring the funds in a project and business risk.¹⁶ Although this definition seems to be rather strict, according to profs. Dolzer and Schreuer, the necessity of fulfilment of all criteria are not fully recognised and a certain flexibility is needed for interpretation, along with a review of specific circumstances of each individual case.¹⁷

4. From a point of view of a legal definition, treaties usually make their own definitions¹⁸ and these are of a key importance for their protection. Definition of an investment in the treaty may be more restrictive than the theoretical concept of investment (including all features, for example, based on economic requirements) however treaties usually seek to capture a complete range of the types of foreign investments, as treaty definitions usually are broad with non-exhaustive lists.

¹⁵ DOLZER & SCHREUER, p. 60
¹⁶ Ibid.
¹⁷ Ibid., p. 69
¹⁸ Ibid., p. 60
5. Although there are many definitions of investment in legal theory, the Claimant submits, that the definition in the BIT is the most important measure for evaluation of Claimant’s investment. As to the Award itself, the Claimant submits, that the Award is an investment created by the transformation of the form of the initial investment of the Claimant in the territory of Mercuria, which is the LTA. According to the last sentence of paragraph 1 of Article 1 of the BIT, “[a]ny change in the form of an investment does not affect its character as an investment.”

2. The Award is an Investment According to Article 1 (1) (c) of the BIT

6. The Claimant hereby briefly submits, that the Award is an investment as it complies with the definition embodied in Article 1 of the BIT and therefore the Arbitral Tribunal has jurisdiction over claims related to the Award.

7. The general definition of Article 1 of the BIT defines investment as “any kind of asset, held either directly or indirectly”. This is very frequent and open definition, as their approach is to give the term “investment” a broad, non-exclusive definition, recognising that investment forms are constantly evolving. As this broad definition contains many forms of investments, arbitral awards are contained as well.

8. Speaking of specific paragraphs within Article 1, Article 1 (1) (c) is applicable, as it contains claims related to the arbitral award. The very essence of the arbitral award is a claim to the money. Basically, one party has a claim to money towards the other party and this leads to the dispute. The dispute is resolved in the proceedings that lead to the claim being either recognised by the court, arbitral tribunal or other authority or being dismissed. When the arbitral award regarding the claim is issued, it becomes a claim with transformed rights from the original issue of dispute. Argumentation concerning the Award as an investment according to the definition of a "claim to money" included in the Article 1 (1) (c) of the BIT may be further reinforced by the fact, that several other arbitral tribunals recognised arbitral award as an investment with similar definitions included in the BITs. According to the Claimant, these important cases with similarities to the present dispute are Saipem v Bangladesh, ATA v Jordan and White v India.

19 OECD DEFINITION, p. 49
9. In *Saipem* case, the tribunal recognised arbitral award as an investment with mention, that the arbitral award is a crystallization of the parties’ rights and obligations under the original contract.\(^{20}\) The applicable treaty in this dispute is Bangladesh - Italy BIT, which contains a definition of an investment in its Article 1. This provision contains definition "*credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter;*". The arbitral tribunal then relied on the phrase “credits for sums of money” contained within the definition of investment.\(^{21}\) In comparison with the present dispute, phrases "claims to money" included in the BIT is in the actual meaning very similar to the "credit for sums of money". Both of these formulations basically express an entitlement to the money. Therefore these similarities in the definitions of investment in *Saipem* case and the present dispute further speak up in favour of the argument, that the Award should be considered an investment according to the explicit definition contained in the Article 1 (1) (c) of the BIT.

10. Another similar case is the *ATA v. Jordan* case. In this case, the definition of investment even contains the same formulation. In *ATA v. Jordan* case, the tribunal recognised the arbitral award as a part of a broad investment\(^{22}\) with regard to the definition of investment contained in the Article 1 (2) (a) (ii), which contains the same definition, as in the present dispute, which is "claims to money". This resemblance in the definitions of the investment further demonstrates that the Award should be considered as an investment according to the explicit definition of "claim to money" in the Article 1 (1) (c) of the BIT.

11. As well as the *Saipem* and *ATA* cases, another case, namely *White Industries v. India* speaks in favour of the Claimant within a matter of classifying the Award as an investment according to the BIT, namely its Article 1 (1) (c). Australia - India BIT, which governs the *White v. India* dispute contains the definition of investment in its Article 1 (iii), which contains definition "*right to money or to any performance having a financial value, contractual or otherwise*". Again, the tribunal agreed with the remarks of the tribunal in *Saipem* case and recognised the arbitral award as a part of a

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\(^{20}\) *Saipem*, ¶ 127.


\(^{22}\) *ATA*, ¶ 117.
broad investment and concluded: “rights under the Award constitute part of White’s original investment (i.e., being a crystallisation of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT.”

In comparison with the White Industries case and the present dispute, White Industries case operated with the definition "right to money" and in comparison with the definition "claim to money" in the Article 1 (1) (c) of the BIT, these two phrases are very similar, as the words "right" and "claim" have very similar, if not effectively identical meaning. "Credit for sums of money", "claims to money", "right to money", all these definitions effectively means the same and all of these contained an arbitral award within as an investment according to the treaties. The Claimant therefore respectfully suggest that the Tribunal recognise these arguments and to consider the Award as an investment according to the explicit definition contained in the Article 1 (1) (c) of the BIT, as the Award clearly is a claim to money.

3. **The Award is a Transformed Investment According to Article 1 of the BIT**

12. List of investments contained in the Article 1 of the BIT is non-exhaustive, therefore it can contain other things considered an investment without explicit mention in the definition. Even if the Award was not considered an investment in a sense of explicit definition contained in the Article 1 (1) (c) of the BIT, the Award still shall be considered an investment. Overall, the idea of an arbitral award being an investment is nothing new in the investment law, as this practice was recognised by arbitral tribunals several times in the cases Saipem v. Bangladesh, ATA v. Jordan, White v. India, Frontier v. Czech Republic.

13. Without a doubt, arbitral awards are assets according to the Article 1 of the BIT. Oxford dictionary defines “asset” as “[a]n item of property owned by a person or company, regarded as having value and available to meet debts, commitments, or legacies.” Economic value is present in this case, as the enforcement or non-

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23 White Industries, ¶ 7.6.10
24 Definition of word "asset" provided by the Internet Oxford Dictionary, see: https://en.oxforddictionaries.com/definition/asset
enforcement is a matter of obtainment of a sum of money. Economic value is present whether the award is enforced or not.\(^{25}\)

The main purpose of international investment law is to grant a protection for the investments against the action of the states. However, in the scope of global development in the economy, investments are getting more complex and may consist of many partial aspects that together create economic value and are important for the investors. The Claimant hereby submits that the nature of the Award in the scope of defining the investment shall be observed in a wider point of view regarding the LTA as an original investment. The LTA is an initial investment made by the Claimant in the Mercuria\(^ {26}\) and the Award is a transformation of this investment. That is based on the fact, that the Award is a reflection and a transfer of the rights and obligations arising out of the LTA. Therefore the Award should be considered as a transformation of the Claimant’s original investment because rights and obligations contained within the Award have the origin in the LTA.

14. With regard to the Award and question, whether it may constitute investment, it is appropriate to mention the well-known practice of ICSID investment tribunals for analysing investments in the scope of the Art. 25 of the ICSID Convention. This practice is commonly known under a name “Salini test”, originating from the *Salini v. Morocco* case. The Claimant is mentioning this for further argumentation in favour of not following this practice with regard to the Award.

15. The Claimant hereby submits, that applying analysis known as the Salini test is not appropriate in the present dispute, whether it is a modified or an original version. Although the Salini test is also problematic since it freezes the definition of investment and makes it more rigid and non-flexible,\(^ {27}\) the main reason for its non-application is that it is bound with the Article 25 of the ICSID Convention and with dispute resolution in the regime of the ICSID Convention\(^ {28}\). However, the present dispute is different, as it is under the regime of the PCA. This is similar to the *White Industries v. India* case, which was not under the regime of the ICSID and the tribunal in that case

\(^{25}\) MISTELIS, p. 11.
\(^{26}\) Statement of uncontested facts, p. 29, ¶ 9.
\(^{27}\) KRISHAN, p. 9.
\(^{28}\) White Industries, ¶ 7.4.8.
explicitly rejected the application of the Salini test on these very grounds.\textsuperscript{29} Purpose of the Salini test is to specify the term “investment” in the Article 25 of the ICSID Convention, as this is not sufficiently defined and used by ICSID tribunals\textsuperscript{30} and it is intended only for use of ICSID arbitration.\textsuperscript{31}

16. Apart from the absence of ICSID arbitration regime in the present dispute, there is also no textual basis for the addition of Salini test or any other criteria. Such interpretation of the BIT would not be in accordance with the Art. 31 of the VCLT.\textsuperscript{32}

17. Even if the Award was to be subjected to the other criteria outside the explicit definition in the BIT, the Claimant submits, that these material criteria are complied with. There are indeed lots of possibilities in defining the term “investment” with a set of material criteria, therefore the Claimant considers appropriate to demonstrate compliance with strict criteria set by the prof. Schreuer.\textsuperscript{33} According to prof. Schreuer, typical features of an investment are these:

\begin{enumerate}
\item the project should have a certain duration;
\item there should be a certain regularity of profit and return;
\item there is typically an element of risk for both sides;
\item the commitment involved would have to be substantial;
\item the operation should be significant for the host state’s development.\textsuperscript{34}
\end{enumerate}

18. As the Claimant submitted above, the LTA is an initial investment made by the Claimant in the Mercuria\textsuperscript{35} and the Award is a transformation of this investment according to the last sentence of Article 1, paragraph 1 of the BIT.

19. This situation is similar to the situation in \textit{Frontier v. Czech Republic}, where the tribunal acknowledged, that arbitral award is a transformation of the original

\textsuperscript{29} \textit{Ibid.}, ¶ 7.4.9.
\textsuperscript{30} BALTAG, p. 3.
\textsuperscript{31} GRABOWSKI, p. 296.
\textsuperscript{32} RREEF, ¶ 157.
\textsuperscript{33} OECD DEFINITION, p. 61.
\textsuperscript{34} \textit{Ibid.}
\textsuperscript{35} Statement of uncontested facts, p. 29, ¶ 9.
investment\textsuperscript{36} while being subjected to the Article 1 (a) of the Czech Republic - Canada BIT, providing that “[a]ny change in the form of an investment does not affect its character as an investment”. Another relevant case is \textit{Saipem}, where the tribunal acknowledged, that the rights in the ICC Award have not originated from the ICC Award itself, but originated from the original construction contract, which is an investment, therefore fulfilling the \textit{ratione materiae} aspect.\textsuperscript{37}

20. The same provision regarding change of form of investments is embodied in Article 1 of the BIT. LTA as the original investment is in accordance with the definition in Article 1 of the BIT and as the Claimant further demonstrates, complies with a strict set of material criteria set by scholars. The Award is then a mere transformation in accordance with Article 1 of the BIT stating that “[a]ny change in the form of an investment does not affect its character as an investment.” Therefore as in the \textit{Frontier} case, there is no reason to consider the Award as non-compliant with the definition of investment in the BIT.

21. The Award in the present dispute contains rights originating from the LTA\textsuperscript{38}, which is the original investment. Now with the Award being a transformed original investment, the Claimant will demonstrate compliance of the LTA as an investment with the selected strict criteria set out by prof. Schreuer. It is important to subject the original investment to the criteria, as these must be fulfilled in case of original investment in order for the transformed investment to be considered as an investment as well.

22. The first criterion is a certain duration of the project. Regarding the time duration of the investment, facts are more than clear. The Claimant made the protected investment in 2004 by concluding LTA with the NHA as the other contracting party in May 2004.\textsuperscript{39} Withdrawal from the Mercurian market was announced by the Claimant in February 2017\textsuperscript{40} and certain aspects of the investment, such as enforcement of the Award are not resolved until the present day. One way or another, it is obvious, that Claimant’s investment endured at least for 12 years and 9 months, which is a long-term duration indeed and this criterion is fulfilled.

\textsuperscript{36} Frontier, ¶ 231.
\textsuperscript{37} Saipem, ¶ 127.
\textsuperscript{38} Statement of uncontested facts, p. 30, ¶ 17.
\textsuperscript{39} \textit{Ibid.}, p. 29, ¶ 9.
\textsuperscript{40} Statement of uncontested facts, p. 31, ¶ 25.
23. The second criterion is a certain regularity of profit and returns which is fulfilled as well. Although facts of the dispute do not provide exact numbers of Claimant’s profits and returns, it is certain that regular profit was present and this may be proved by the minimum guaranteed order-value contained within Clause 5 of the LTA.\textsuperscript{41}

24. The third criterion is an element of risk, which is also present in the case of Claimant’s investment. Apart from the LTA, Claimant’s presence on the Mercurian market also contained manufacturing capacities in the Mercuria,\textsuperscript{42} which naturally means a risk, since the NHA is apparently not a very reliable contracting partner, who is even willing to threaten its contracting partner by terminating the LTA\textsuperscript{43} and therefore potentially devalue Claimant’s investment.

25. The fourth criterion is a presence of a substantial commitment. This criterion is fulfilled as well, since the Claimant is present on the market for more than a decade, LTA shall be effective for whole 10 years according to its Clause 6\textsuperscript{44} and the Claimant even has a large industrial base within the territory of Mercuria, since the Claimant acquired lands and machinery necessary for production of medical products.\textsuperscript{45} Therefore it is obvious, that the Claimant was very committed to doing business in the Mercuria and for securing the investment.

26. The fifth and last requirement on the list mentioned above is a significance for the host’s state development. Now without a doubt, this last criterion is fulfilled as well. Since the Claimant had industrial production on the Mercurian territory\textsuperscript{46}, it is obvious that this must have created jobs and since the Claimant was producing and gaining profit, it is obvious, that the Claimant must have paid taxes. Besides this was contributing to Respondent’s economy, the main contribution of the Claimant for the Respondent was the supply of very necessary and demanded medicine to the disease-ridden country.

\textsuperscript{41} Ibid., p. 29, ¶ 9.
\textsuperscript{42} Ibid., p. 28, ¶ 5.
\textsuperscript{43} Ibid., p. 29, ¶ 15.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid., ¶ 10.
\textsuperscript{46} Ibid., p. 28, ¶ 5.
27. As explained above, Claimant’s original investment meets even the very strict list of material criteria of investment set out in scholar definition by prof. Schreuer.\(^\text{47}\) Although this is a strict definition, Claimant’s original investment meets all the criteria with ease, therefore the Claimant considers this sample a sufficient proof of the Award being the transformation of Claimant’s original investment (link between the LTA and the Award is explained above) and meeting the criteria of the investment outside the definition of the BIT. However, at this point, it is not relevant, whether the Award as a transformed investment is in compliance with these or any other set of investment criteria outside the provision of the BIT. If any of the investment criteria outside the BIT shall be taken into account, these shall comply in the case of the original investment. With regards to the Award, it is merely a transformation of rights and obligations and a character as an investment is preserved automatically, as in accordance with the Article 1 of the BIT.

28. In conclusion, the Claimant submits, that that the Award is an investment according to the definition "claim to money" in the Article 1 of the BIT. If the Tribunal does not accept this argument, the Claimant submits, that the Award is a transformation of the original investment, the LTA and this change of form does not affect the character of the Award as an investment according to the Article 1 of the BIT.

II. Claimant Has Not Been Denied Benefits of the BIT by the Respondent’s Invocation of Article 2 of the BIT

29. The Claimant made the protected investment in 2004 by concluding LTA with the NHA as the other contracting party in May 2004.\(^\text{48}\) Problems with price renegotiating occurred in 2008\(^\text{49}\) with following commercial dispute started in 2008 and resulting in the issuance of the Award by the commercial arbitration tribunal in Reef in January 2009, which resolved the dispute in favour of the Claimant.\(^\text{50}\) Withdrawal from the Mercurian market was announced by the Claimant in February 2017.\(^\text{51}\) However,

\(^{47}\) SCHREUER, p. 61.
\(^{48}\) Statement of uncontested facts, p. 29, ¶ 9.
\(^{49}\) Ibid., ¶ 15.
\(^{50}\) Ibid., ¶ 17.
\(^{51}\) Ibid., p. 31, ¶ 25.
denial of benefits was performed by the Respondent on 26 November 2016 via the Response to the Notice of Arbitration.  

30. Denial of benefits is a treaty mechanism for limiting the access of the investors to the ISDS, narrowing the scope of treaty application and its primary function is to carve out from the definition of investor so-called “shell companies”. However, by the same virtue, states may deny benefits to investors who would otherwise satisfy criteria of the investor to be protected by the treaty.

31. Now to the present dispute, it is important to look at the precise wording of the DoB Clause, embodied in the Article 2 of the BIT. Just in the very first sentence of the Article 2 of the BIT, it is worth noting, that denial of benefits is not performed automatically (as in that case, sentence would rather say: “denies the advantages”) but the contracting parties merely reserve the right to deny, meaning, that denial of benefits shall be active. Otherwise, it would violate the purpose of the article and wording of the BIT. The tribunal in Plama case also stated that the exercise of denial of benefits would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers and suggested several forms of such exercises, such as general declaration in the official gazette, statutory provision or a simple communication with investors.

32. Governing treaty in Plama case was ECT and its Article 17 containing DoB Clause, which says:

> Each Contracting Party reserves the right to deny the advantages of this Part to:

> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or...
33. Now it is worth noting, that apart from two underlined words in Article 17 of the ECT above, this provision is identical to Article 2 of the BIT. This resemblance is further important for understanding ECT based case law and similarities with the present dispute. Interpretation of this provision of ECT in presented case law is also important for the interpretation of DoB Clause in the BIT and because of all similarities, using the same rules of interpretation is a logical conclusion.

1. Denial of Benefits Has Only Prospective Effect

34. Denial has no retrospective effects and can only be made prospectively before investment had been made. The Claimant, therefore, submits that denial of benefits shall have only prospective effect. Time effect of the denial shall be subjected to the interpretation, as Article 2 of the BIT does not contain a provision of time effect. The Preamble of the BIT is a key measure of its interpretation and subsequently for interpretation of individual articles. For interpretation of DoB Clause and its time effect, it is important to notice stressed out recognition of stimulation the flow of private capital in the preamble. However, DoB Clause with retrospective effect results in the exact opposite, as it causes uncertainty to potential and already existing investors. Investors under the protection of the BIT are protected unless the host state exercises denial of benefits, however, if an investor was not protected by the BIT but has not been denied benefits of the BIT by the state, this investor still has a legitimate expectation of being protected by the BIT. Now if an investor plans to invest in a state, it would be reasonable for this investor expecting to be noticed whether his investment is about to be protected under the BIT or whether host state would exercise denial of benefits. If host state would deny benefits to the investor, the investor may have to reconsider and evaluate, whether to invest somewhere else or if it is worth the risk. However, if an investor in this situation would not have been denied benefits before entering the host state with legitimate expectations of protection but has been denied benefits anyway, it is damaging for the investors, disables long-term planning, makes investors uncertain, vulnerable and puts them in a hostage-like situation.

35. Prospective effect of denial of benefits was also acknowledged by the tribunal in Plama case, where the tribunal stated, that right’s exercise (right to deny benefits of

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58 TABARI, p. 102, ¶ 2. 150.
the ECT by virtue of its Article 17, paragraph 1) should not have retrospective effect.\textsuperscript{59} The tribunal also stated that the difference between prospective and retrospective effect is sharp for the investor and that the prospective effect is in accordance with good faith interpretation of the Article 17 paragraph 1 of the ECT.\textsuperscript{60} Another case of acknowledgement of the prospective effects of denial of benefit is Yukos case, with tribunal reaching the same conclusion as in Plama case. Yukos tribunal stated, that denial of benefits can only have prospective effects, as otherwise would not be compatible with the promotion of long-term investments.\textsuperscript{61}

36. Exclusively prospective effect of DoB Clause was also acknowledged by the tribunal in case Liman Caspian Oil v. Kazakhstan.\textsuperscript{62} The tribunal, in that case, argued, that retroactive notification would not be compatible with the object and purpose of the ECT and would be interpreted in contrary to the Article 31 of the VCLT. Tribunal argued, that retrospective effect would fail “to promote long-term co-operation in the energy field” and that long-term co-operation requires legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages.\textsuperscript{63}

37. Even if the previous argumentation presented by the Claimant would not convince the Tribunal and the Tribunal would acknowledge, that denial of benefits may have retrospective effect, another two conditions shall be fulfilled in order to deny the Claimant benefits of the BIT and the Claimant submits, that these conditions are not met.

38. A key provision in this matter is Article 2 paragraph 1 of the BIT, which sets out two conditions for the investor to be denied the benefits of the BIT, which are criteria for ownership or control and substantial business activity. Now the mutual relationship of both conditions contained within provision is crucial because both conditions are connected with a clutch “and”, making them two cumulative conditions, that must be fulfilled both at the same time.

\textsuperscript{59} Plama, ¶ 162.
\textsuperscript{60} Ibid., ¶ 164.
\textsuperscript{61} Yukos, ¶ 458.
\textsuperscript{62} Liman, ¶ 225.
\textsuperscript{63} Ibid., ¶ 225.
39. With regard to the criterion of ownership or control, the Claimant submits, that it is a company owned by Atton Borro Group, its parent company. According to the facts, there is no point in denial of Claimant’s corporate owner. However, for the denial to be effective, it is necessary to fulfill both cumulative conditions and the second condition (criterion of substantial business activities) is not fulfilled, as the Claimant will explain further.

40. Before evaluating Claimant’s business activities in Basheera in a scope of substance, it is important to stress out the main purpose of DoB Clause for better understanding the criteria and context of the present dispute. Denial of benefits is a safeguard provision against “mailbox companies”, which are nationals of third countries who would gain rights or interests despite the fact that the contracting states to the treaty did not wish to accord them those benefits. This definition comes from 1956, however, it is still suiting for the denial of benefits clauses in contemporary treaties. A similar definition is provided by profs. Dolzer and Schreuer, as they have described the denial of benefits clauses in this manner: “Under such a clause the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist of control by nationals of the state of nationality or in substantial business activities in that state.” According to these scholar definitions and the wording of the DoB Clause in the BIT, it is obvious, that this provision aims at the elimination of so-called “mailbox companies” from protective scope of the BIT because as the Claimant argues further, term “substantial” means of substance and not a form. Hence term “substantial business activity” is synonymous with “real” business activity. The opposite, against which is the DoB Clause aimed is the unfavourable state of “no business activities at all”, which is the main feature of a mailbox company.

41. DoB Clause shall be interpreted in accordance with the VCLT, namely its Article 31. According to this provision, "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." The Claimant further explains details of VCLT

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64 Statement of uncontested facts, p. 28, ¶ 4.
Problem, Procedural Order no. 2, p. 48, ¶ 3.
65 MISTELIS & BALTAG, p. 1303.
66 DOLZER & SCHREUER, p. 55.
application in ¶ 85. It is important to take into account an original purpose of DoB Clause, which is eliminating "mailbox companies". However according to the uncontested facts of the dispute (details of Claimant's business activities in Basheera are elaborated further), it is obvious, that the Claimant is far from being a mere "mailbox company" or an "empty shell".

2. **Claimant's Business Activities in Basheera are Substantial**

42. According to the facts, it is undisputed, that the Claimant was incorporated for the purposes of business and actually commenced actual business activities. Now it is important to define, what “substantial” means and whether business activities of the Claimant are substantial. For defining the term “substantial” it is useful to define the term “mailbox company”, as it is the exact opposite to a company with substantial business activities. Mailbox company means that such entity has no life of its own, existing only formally on papers without engaging any activity.

The true meaning of “substantial” with regard to the investments is therefore not a question of scale or quantity but a question of the real link of business activities and territory. This conclusion is based on case law, namely the *Amto* case.

43. In this case, the tribunal evaluated business activities of a claimant-company decided, whether its activities are substantial in a scope of the relevant treaty. According to the tribunal in *Amto* case, term “substantial” means “of substance and not merely of form” and “substantial” does not mean “large”, and the materiality not the magnitude of the business activity is the decisive question. Another definition of term “substantial” is provided in EU - Singapore FTA, specifically in its Chapter 9, containing Article 9.1 defining "substantive business operations" being the same as "effective and continuous link".

44. As to the character and substance of Claimant’s business activities in Basheera, there are several facts proving the Claimant’s statement, that it has substantial business activities in Basheera. First of all, it is an original purpose of incorporation of the

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67 Statement of uncontested facts, p. 28, ¶ 4.
69 MISTELIS & BALTAG, p. 1315
70 *AMTO*, ¶ 69.
71 EU-Singapore FTA, Chap. 9, Art. 9.1, footnote 5.
Claimant and its position in a corporate structure. The Claimant was incorporated in April 1998 by Atton Boro Group as its wholly owned subsidiary in Basheera for a purpose of carrying on business in South America and Africa. Apart from the actual business purpose, it is uncontested, that the Claimant rented out an office space, opened a bank account, has had between 2 and 6 permanent employees working in Basheera managing its patent portfolio and providing support for regulatory approval, marketing, and sales as well as legal, accounting and tax services. These are proof of Claimant’s actual business activities in Basheera. Case for comparison with the present dispute is Amto case, where the claimant was a company incorporated and seated in Latvia. The claimant had a seat in Latvia, paid taxes in Latvia, held a multi-currency bank account in Latvian bank, rented out an actual workplace office in Riga and had 2 permanent full-time employees and paid their social security obligatory payments. Business activities of the claimant in Amto case were in a field of financial investments, participating as a shareholder of other companies and was about to participate in a real estate investment project. At this point, both compared companies are very similar, except the Claimant employed even more employees. The tribunal in Amto case was satisfied with business activities being substantial, which includes small but permanent staff as a feature of these substantial activities, with permanence being the important factor. In comparison to this case, the structure of the Claimant as a company with its regular business features as an office, accounts, taxes, and employment is very similar to the structure of claimant-company in Amto case, where this was considered as “substantial”. With regard to this comparison, it would be more than logical to consider Claimant’s business activities substantial.

III. Conclusions of Claimant’s Submissions Regarding Jurisdiction

45. The Claimant submits that the Award is an investment according to the definition "claim to money" in the Article 1 of the BIT.

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72 Statement of uncontested facts, p. 28, ¶ 4.
73 Problem, Procedural Order no. 2, p. 48, ¶ 3.
74 AMTO, ¶ 67.
75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid.
79 Problem, Procedural Order no. 2, p. 48, ¶ 3.
80 AMTO, ¶ 69.
If the Tribunal would not accept this argument, the Claimant submits, that the Award is a transformation of the original investment, the LTA and this change of form does not affect the character of the Award as an investment according to the Article 1 of the BIT.

The Claimant submits that the Respondent has not denied the Claimant benefits of the BIT because this denial does not have retrospective effect.

If the Tribunal would admit retrospective effect of this denial, the Claimant submits, that conditions for denying benefits of the BIT in its Article 2 are not met, because the Claimant has substantial business activity in Basheera.

With respect to all previous arguments, the Claimant hereby respectfully suggest the Tribunal find jurisdiction over this dispute.
PART TWO: MERITS

IV. Enactment of Law NO. 8458/09 and the Grant of The License Amount to a Breach of the BIT, In Particular, The Fair and Equitable Treatment Standard.

46. At first, it is important to state that the Claimant is a pharmaceutical company, part of multinational drug discovery and development enterprise with over hundred years of experience in the field. As such, Claimant’s primary goal is to contribute to the world health standard by research, development, production, and distribution of pharmaceuticals. Its most pioneering efforts have been in the area of critical epidemic diseases that threaten developing world – AIDS, cancer, tuberculosis, malaria, and greyscale. In order to keep the process viable, it is critical to be able to fund it in the long term. A significant part of pharmaceutical development ends up in dead ends and is funded from successful products. That is the reason why patents are such important part of drug development. They ensure that costs of research, development, early production and distribution of all the developing drugs will be covered and that the pharmaceutical company behind it will remain profitable. It is also the reason why the Claimant went to obtain patent protection for their greyscale treatment compound, Valtervite, in 50 jurisdictions, including Respondent’s one. Over the years, the Claimant created a trustworthy business partnership with the Respondent and its regional business activities were conducted from Respondent’s territory because of the high standard of treatment by the Respondent. However, despite Claimant’s sincere efforts to provide pharmaceuticals in accordance with an agreement between the Claimant and the Respondent, the Respondent decided to prematurely terminate the agreement, promulgate a legislation enabling issue of non-voluntary licenses on patented inventions and grant other company a license on the Claimant’s patented pharmaceuticals that were the subject of the former agreement. Furthermore, the Respondent enabled export of the pharmaceuticals in question to the neighbouring states, depriving the Claimant of potential revenue of the whole region and making payback of costs expended on this highly effective and successful drug virtually impossible. By such actions, the Claimant is of the opinion that the Respondent violated the BIT, in particular, the Fair and Equitable Treatment standard set out in Article 3, Paragraph 2 of the BIT.
47. The Article 3 (2) of the BIT sets out **Fair and Equitable Treatment standard**. Because neither the FET clause itself nor any other provision of the BIT provides any specific interpretation basis of the BIT, the Tribunal is left to interpret the provisions in the manner it finds appropriate in the sense of Art. 8 (1) of the BIT, with applicable rules of international law\(^\text{81}\).

48. Despite FET becoming a relatively standardized feature of IIAs, there is no single version of it and therefore it is not possible to define it universally and its scope shall be subjected to autonomous interpretation.\(^\text{82}\) The exact wording of the FET clause, the BIT itself and the circumstances of the case must be taken into consideration every single time.\(^\text{83}\) At the beginning of viable interpretation of what FET standard in the BIT represents, it seems logical to look back to some of the respected arbitration awards of cases from the past, compare it with ordinary meaning resulting from VCLT and look for some common basis of the FET standard. The *Tecmed* tribunal proposed a quite exhausting definition of FET saying that “...*The foreign investor expects the host state to act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments as well as the goals and administrative policies*...”\(^\text{84}\). Well-known *Saluka* tribunal argues that FET standard should guarantee that the state “...*will not act in a way that is manifestly inconsistent, non-transparent, unreasonable or discriminatory.*”\(^\text{85}\) Prof. Hirsch also emphasizes good faith and refraining from bad faith as an essential duty under FET.\(^\text{86}\) By comparing presented contemporary points of view, it can be concluded that inherent elements of fair and equitable treatment are consistency, non-ambiguity, transparency, non-arbitrariness and that the actions of state must be reasonable and unbiased.\(^\text{87}\)

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\(^\text{81}\) Procedural Order No. 1, p. 26, ¶ 11.
\(^\text{82}\) DOLZER & SCHREUER, p. 124.
\(^\text{83}\) COLLINS, p. 125.
\(^\text{84}\) TECMED
\(^\text{85}\) SALUKA, ¶ 309.
\(^\text{86}\) HIRSCH, p. 8.
\(^\text{87}\) COLLINS, p. 129-130.
encompasses conducts which go far beyond the “minimum standard of treatment” in customary international law.  

49. Compliance with international obligations the state has committed itself to is a key principle of international law. In this sense and in the sense of the BIT itself, there is an argument for the inclusion of compliance with international obligations of the state in the scope of FET in the present case. VCLT, which is applicable for the reasons explained below, suggests such interpretation. Being a respected source of interpretation of international treaties, its Article 31 states 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.”, that “Any relevant rules of international law applicable in the relations between the parties.” shall be taken into account and that “A special meaning shall be given to a term if it is established that the parties so intended.”. In relation to what has been already written above, if acting fair and equitable means transparency, consistency and non-arbitrariness and if the preamble of the BIT specifically expresses “multilateral, regional, and bilateral agreements and arrangements” to which both Contracting Parties of the BIT are parties as a building feature of the BIT, acting in compliance with respective international obligations of the Respondent shall be considered an inherent part of FET.

50. One of the most important international obligations of the Respondent related to this case is his membership in The World Trade Organisation and in particular, his obligations resulting from The Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO’s instrument for the protection of intellectual property rights, including patent rights. They serve the purpose of liberalization of international trade, which is inherently related to the institutionalization of the trade instruments and

88 DOLZER & SCHREUER, p. 124.
89 ¶ 85 of the Memorandum.
90 VCLT, Art. 31, ¶ 1.
91 VCLT, Art. 31, ¶ 3 (c).
92 VCLT, Art. 31, ¶ 4.
93 Cross reference ¶ 49 of this part of the Memorandum.
94 Preamble of the BIT, Lines 986-987.
protection of respective rights of both Member States and their nationals.\textsuperscript{95} Member States of WTO and therefore Contracting Parties of agreements related to it have also agreed to delegate decisive powers to the WTO General Council, otherwise executed by Ministerial Conference of Member States. WTO General Council has the authority to act on behalf of the Ministerial Conference. Its decisions are binding for all WTO members.\textsuperscript{96} Importance of compliance with the WTO rules was also expressed by Contracting Parties in the preamble of the BIT. Although preamble is not legally binding \textit{per se}, according to the VLCT, it serves as an interpretational guideline.\textsuperscript{97}

51. \textbf{Legitimate expectations} of investors are understood to be a key element of FET by both legal scholars as well as arbitration tribunals\textsuperscript{98}, even though their explicit incorporation in the IIAs is rare. Being similarly comprehensive institute as the FET itself, it is impossible to give a unanimous definition of what legitimate expectations are. Several arbitration tribunals though provide a useful look at which expectations could be considered as legitimate.

52. A significant amount of matters attributed to legitimate expectations is the legal and regulatory framework of the state. The basic premise here is that investor may legitimately expect the state to stay consistent with the regulatory framework from the time the investor made the investment. That does not mean state shall not alter the legislation at all, rather it suggests that state should bear in mind investors’ expectations when making such changes and that it shall make efforts to reduce the potential harshness of such changes to the investor.\textsuperscript{99} That encompasses not only stability but also predictability of the legal environment. The investor shall have the possibility to familiarize itself with states’ actions in a sufficiently advanced time to be able to accordingly adjust its operations.\textsuperscript{100} Prof. Dolzer also argues that purpose of BITs is generally in creating a more hospitable environment for investments and because of that, states’ interests should not have the same weight as investors’

\textsuperscript{95} See https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm.
\textsuperscript{96} See https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm, Interpretation and Application of Article XVI, ¶ 282.
\textsuperscript{97} See ¶ 5 of this part of the Memorandum.
\textsuperscript{98} E.g. AWDI or DIEHL. ULYSSEAS, ¶ 240, even refers to legitimate expectations as “the essential element”, SALUKA, ¶ 302, as to the “dominant element” and ELECTRABEL as to the “most important function” of FET.
\textsuperscript{99} ARIF, ¶ 573.
\textsuperscript{100} OCCIDENTAL, ¶ 183.
In order to find out whether enactment of a new normative act can lead to exhaustion of investors legitimate expectations, the Charanne tribunal argues “that the legitimate expectations on the part of the investor must: (a) be analysed using an objective standard, (based on the circumstances) and not the mere subjective belief held by an investor; (b) be reviewed according to the relevant circumstances, which were those prevailing at the time the investment was made; and (c) have been reasonable.”

When trying to determine the adequate balance between stability of the legal environment and regulatory flexibility of state, tribunals tend to use balancing tests considering the proportionality of the two principles.

Before applying those findings to the present dispute, the background of the investment in the case must be further explained. Before the Claimant’s parent company entered Respondent’s market, they obtained a patent for his invention in 50 jurisdictions, seeking a potential for expansion of their business to the Respondent and neighbouring states. Afterwards, the Claimant’s parent company opened a subsidiary in Basheera, a state which already had functioning BIT with the Respondent. By the time, the Claimant commenced business in both Basheera and Respondent’s market, also with Respondent’s government and their newly set up National Health Authority. Because the commercial relationship with Respondent’s authorities has been smooth so far, the Claimant entered into a Long-Term Agreement with NHA, initiated by Respondent’s representatives. The first impulses that lead to the conclusion of the LTA were made by Respondent’s government by directing NHA to enter into long-term supply commitment and praising existing partnership between them, the Claimant, NHA, and by Respondent’s president assuring potential investors of Respondent’s amicable approach towards investors. With knowledge of that, the Claimant made significant investments in Respondent’s territory, setting up a manufacturing unit, purchasing land and a substantial amount of machinery. This all has been done due to the existence of serious business interest of the Respondent.

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101 DOLZER, p. 28.
102 CHARANNE, ¶ 494-495.
103 BANDALI, p. 148.
104 Statement of uncontested facts, ¶ 7.
105 Statement of uncontested facts, ¶ 8.
106 Statement of uncontested facts, ¶ 8.
represented by LTA, and expectations of fair treatment by the Respondent, represented
by above-described actions of Respondent’s representatives and presence of protection
under the BIT.

54. **By applying described legal position to the reality of the case**, there are several
arguments supporting the claim that the Respondent breached his obligations under the
BIT. First, the Respondent did not act in compliance with its international obligations
due to a breach of TRIPS Agreement.

a. Article 31 of TRIPS sets out necessary conditions for issuing non-voluntary
licenses of patented inventions. Its Paragraph (f) states that “any such use shall
be authorized predominantly for the supply of the domestic market of the
Member authorizing such use”. This provision has been modified by Decision
of the WTO General Council of 30 August 2003\(^{107}\), allowing generic copies
made under compulsory licenses to be exported to countries that lack
production capacity, provided certain conditions and procedures are followed.
One of the conditions is set out in its Paragraph 3, which says that

“Where a compulsory licence is granted by an exporting
Member under the system set out in this Decision,
adequate remuneration pursuant to Article 31(h) of the
TRIPS Agreement shall be paid in that Member taking into
account the economic value to the importing Member of
the use that has been authorized in the exporting Member.
Where a compulsory license is granted for the same
products in the eligible importing Member, the obligation
of that Member under Article 31(h) shall be waived in
respect of those products for which remuneration in
accordance with the first sentence of this paragraph is
paid in the exporting Member.”

b. Article 31 (h) of the TRIPS Agreement, referred to by the above-presented
provision, states that “the right holder shall be paid adequate remuneration in

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\(^{107}\) Accessible at: https://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.
the circumstances of each case, taking into account the economic value of the authorization”. What those provisions mean is that holder of the patent shall be paid adequate remuneration in either both or at least one of the countries that take advantage of the patent-protected invention thanks to a non-voluntary, i.e. compulsory license. However, the Law No. 8458/09 (“the Law”) does not provide any guarantee of remuneration of any kind to the patent right holder. It leaves all the discretion regarding the terms of the non-voluntary license upon the Court which grants it. This practice does not ensure that all the criteria of TRIPS and related WTO General Councils’ Decisions will be met, not only regarding the right to remuneration but also regarding the potential export of products made under the non-voluntary license, e.g. their distinctive features referred to in Paragraph 2 (b) of the WTO Decision. In the Claimant’s opinion, in order to act transparently, unambiguously and non-arbitrary (conditions which have been found as essential for FET), the possibility of export of the products made under non-voluntary license should be incorporated in the states’ legislation and not dependent solely on Court's discretion.

c. Regarding the interpretation of adequate remuneration, there are several ways of approach. Some claim that there might be no difference made between full compensation in case of expropriation and adequate remuneration in sense of Article 31 (h) of TRIPS as the consequences for the holder of the rights are comparable. Others hold more reluctant approach and claim that “to be adequate, remuneration should reasonably compensate for any conflict with normal exploitation and for any prejudice of legitimate interests”. Typically, adequate remuneration is percentage royalty based on sales of the actual patented good. In the present case, the value of the LTA can be calculated from the statement of the director of the NHA. According to him, 80% reduction of costs of the drugs resulted in over 1.2 billion USD in savings annually. That makes 1.5 billion USD expended on the drug per year in case the costs would have remained the same, i.e. in accordance with the LTA.

108 Cross reference ¶ 49 of this part of the Memorandum.
109 See GIBSON.
110 TAUBMAN, p. 952-955 and 957.
111 PERKAMS & HOSKING, p. 23.
Giving the fact that the non-voluntary license on Claimant’s drug has been issued approximately 5 years after the LTA came into effect, the Claimant could have legitimately expected earnings in the amount of at least 1.5 billion USD annually until the end of LTA, i.e. for 5 more years. That makes 7.5 billion USD of legitimately expected earnings. Their calculations are also supported by numbers provided in 2006 NHA Annual Report which says that in 2006, Respondent’s expense on Claimant’s drug would be 1 billion USD, increasing 10 times from previous year and suggesting that the increase would continue.\textsuperscript{112} Royalty paid to the Claimant under the non-voluntary license was fixed at 1 % of total earnings of the holder of the non-voluntary license. If we already established the annual costs of the drug after reduction are 0.3 billion USD, 1 % of that amount makes only 3 million USD per annum. That amount not only substantially differs from legitimately expected annual earnings by approximately 500 times, it does not even cover neither expense made on development and introduction of the drug on the market, nor other expenses made in the territory of the Respondent, such as investments in the manufacturing units, land, and machinery. According to the CEO of Claimant’s parent company, Atton Borro Group, expenses on development and introduction of the drug to the market were well over 1 billion USD. Even though the exact amount of money spent by the Claimant altogether is not available, 3 years of early supplies of the drug (considering that order value more than doubled by the time\textsuperscript{113}) most definitely do not cover it.

d. Also, the WTO Decision expresses its aim “to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector”. It has also been the aim of Doha Declaration, as its Paragraph 6 says that “We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem…” . It is questionable

\textsuperscript{112} 2006 NHA Annual Report, Lines 1359-1370.
\textsuperscript{113} Statement of uncontested facts, ¶ 15.
whether there was such shortage in availability of the drug in the region, considering all the efforts to satisfy the demand of the market that the Claimant made, as described above.

e. Because of the reasons presented above, the Respondent has breached the BIT, in particular, FET, by breaching his international obligation, not complying with described provisions of TRIPS and other WTO rules when he failed to pay the Claimant adequate remuneration for issuing a non-voluntary license of his patent-protected invention.

f. According to the Article 23 of the WTO Dispute Settlement Understanding (DSU), WTO’s dispute settlement mechanism, Member States “shall not make a determination to the effect that a violation has occurred ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.” However, investment arbitration is not a unilateral remedy imposed in response to a WTO violation, neither is it WTO dispute settlement. Therefore, it may provide a means of compensating or attenuating the harm caused to investors without offending the WTO restrictions on unilateral trade remedies.\(^{114}\)

55. Second, the Respondent violated Claimant’s legitimate expectations by issuing the Law No. 8458/09 (“the Law”), by terminating the LTA and by failing to act accordingly with individual assurances made by Respondent’s representatives.

a. As to the issue of the Law, the Respondent did not notify or otherwise signalize his intention to issue a law or other action of such nature, leaving no space for the Claimant to adjust his activities accordingly. This lead to substantial losses in Claimant’s business activities, causing loss of nearly two-thirds of Claimant’s market share after the non-voluntary license, issued on basis of the Law, has been granted and loss of several long-standing business partners.\(^{115}\) All Respondent’s actions suggested that the Claimant is Respondent’s valued business partner whose rights would be fully protected. The Respondent did not signalize by either official or unofficial way that he

\(^{114}\) ALFORD

\(^{115}\) Statement of uncontested facts, ¶ 24.
would take any action leading to the change of legal position of patent holders, needless to say, he would promulgate law allowing to issue compulsory licenses. It is safe to say that the promulgation of the law was inconsistent with Respondent’s previous behaviour and that it happened before the Claimant could take any effective action to prevent losses coming from the enactment of the Law. Such behaviour of the state is in conflict with stability and predictability of legal environment which is an essential condition of FET.116 Also, enactment of the Law does not observe proportionality principle. Recognized elements of proportionality tests are suitability, necessity, proportionality stricto sensu.117 Even though one could claim that such measure legitimately aims at the respective goal and is suitable to achieve it, it was not necessary as the Claimant expressed willingness towards a renegotiation of the LTA under conditions more amiable for the Respondent.118 That also makes the law unreasonable, giving the fact that Claimant’s expectation of stable legal environment did not have to be prevailed by Respondent’s right to regulatory flexibility as there were other means of achieving the same goal – providing citizens with needed pharmaceuticals.

b. Because of the reasons presented above, the Respondent violated Claimant’s legitimate expectations of certain treatment and stability, which is a fundamental element of FET, as has been analysed above.119

V. Respondent is Responsible For The Conduct Of Its Judiciary In Enforcement Proceedings Under Article 3 of The BIT

56. The Claimant submits that the Respondent’s judiciary has not provided effective means for asserting claims of the investor. The requirement of providing adequate access to justice system is covered by the notion of FET as protected by the Article 3 of BIT. As will be stated below, the Respondent has failed to establish an effective system of justice and therefore has violated the BIT. The Respondent denied the Claimant any means for enforcing its award against NHA a state-controlled company

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116 Cross reference ¶ 53 of this part of the Memorandum.
117 UNIVERSITY OF OSLO, p. 31-35.
118 Statement of uncontested facts, ¶ 15.
119 Cross reference ¶ 53 of this part of the Memorandum.
and at the same time giving NHA numerous opportunities to obstruct the proceedings. Since violation of the BIT is a breach of international obligations of the state and as such constitutes as an internationally wrongful act, the Claimant will prove that the Respondent should be held responsible in the light of ILC Draft Articles.

**Minimum Standards Of Protection**

57. The Respondent undertook the obligation to accord the investor FET pursuant to the Article 3 (2) of the BIT. In the BIT, however, the parties have not specified the methods of the interpretation of Article 3 (2) of the BIT, or the BIT as a whole for that matter. The Claimant submits that the respective article shall be interpreted by using the VCLT. The Claimant is aware of the fact that the Respondent has not ratified by the VCLT, however, the VCLT constitutes a binding set of rules as it is *de facto* a codified customary international law. Therefore, it is a binding source of international law whose use shall be also triggered by Article 9 (1) of the BIT which sets forth that the tribunal shall decide in accordance with applicable rules of international law. The VCLT was relied on in the case of Noble Ventures v. Romania when the tribunal was finding the exact meaning of the provision in question. Identically, the tribunal in the case of Aguas-Vivendi\(^{120}\) concluded that the BIT was indeed a treaty and was to be interpreted in accordance with the rules expressed in VCLT.

58. Article 31 (1) of the VCLT provides 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. It was noted by the tribunal in the case of Methanex\(^{121}\) that Article 31 (1) of the VCLT is comprised of three separate principles. First, good faith, which does not need further explanation. Second is the general principle of interpretation in accordance with the ordinary meaning of a term. As to the third general principle, the term is not to be examined in isolation or *in abstracto*, but in the context of the treaty and in the light of its object and purpose. Object and purpose of the BIT are expressed in its Preamble. The preamble is referred to in the VCLT, particularly in Article 31 (2) thereof that says that the context for the purpose of the interpretation of a treaty shall comprise of its preamble. Villiger

\(^{120}\) AGUAS-VIVENDI, para. 7.4.2.

\(^{121}\) METHANEX, para. 16
highlights that “the context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty, i.e., its text, including its preamble and annexes.”122 The Claimant relies on the opinion of pros. Dolzer and Stevens who says that “[...] reference may be made to the preamble which sets out the context in which the treaty and the individual obligations have to be read.”123 The Claimant also urges that the preamble should be taken into consideration when expressing the background of the adoption of Article 3 (2) of BIT, relying on the opinion of the prof. Sauvant who considers the preamble as a tool that can help to “indicate and color the treaty's objects and purpose...”124

59. The Claimant submits that the tribunal in case of Siemens v. Argentina considered the wording of the preamble when interpreting the wording of FET provision in the respective BIT.125 The same approach was taken by the tribunal in the case of Noble Ventures.

60. Article 3 (2) of the BIT shall be, in accordance with aforesaid, given its ordinary meaning put in the context of its object and purpose. The Claimant submits that the ordinary meaning of FET is “just”, “even-handed”, “unbiased”, “legitimate”126 The Claimant submits that the fair and equitable must be also read as “in accordance with rules” which suggests not only the relation to national rules (e.g. procedural law) but more importantly to the international rules and standards. The Claimant submits that the term “fairness” gives the possibility of the attention being paid not only to the acts of the person acting but also to the acts of the person who is acted upon.127 Therefore the Claimant submits that the tribunal shall consider the course of procedural history and the acts taken by both the Claimant and the Respondent.

61. As outlined above, FET is to be interpreted in the light of the parties’ wishes expressed in the preamble of the BIT, which is to recognize “the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration.”

122 VILLIGER, p. 427.
123 DOLZER AND STEVENS, p. 20.
124 SAUVANT, p. 579.
125 SIEMENS, para. 290.
126 MTD, paras. 110-112.
127 MUCHLINSKI, p. 635-636.
Therefore, the Claimant submits that the parties to the BIT intended to be obligated to provide the investors effective means of asserting claims, which is to establish a secure an effective system of justice.

62. Therefore, the Claimant concludes that the procedural minimum standard is covered by Article 3 in light of FET and is essential part of enjoyment a and security of the investment.

63. As to the content of this procedural standard, the Claimant fully agrees with the conclusions of the Ambatielos tribunal that came to following conclusions:

“The foreigner shall enjoy full freedom to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country”

64. The Claimant submits that it is a state responsibility not only to have a judicial system but it is vital to establish a judicial system that allows for the effective exercise of the substantive rights of investor. The Respondent failed to provide such minimum procedural standard.

**Effective Means Standard**

65. As to the assertion of the Respondent that “[Claimant's] claim in relation to enforcement of the Award falls far short of the high threshold for constituting an internationally wrongful act on the part of a national court” The Claimant contends that it is aware of the fact that threshold for concluding the presence of internationally wrongful act is very high. The Claimant, however, seeks “effective means” claim which has a substantially lower threshold. Despite other judicial claims, such as denial of justice claims, that require the total failure of the judicial system as a whole, the effective means standard is violated when the state fails to provide the investor an access to the court or the court fails to assess the matter effectively. The Claimant says that adjective “effectively” shall be read as successful in producing the desired result.

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128 AMBATIELOS, p. 111.
Despite that, the Respondent’s obligation shall not be to produce results that will please the Claimant under all circumstances but rather to establish and keep the environment that is capable of producing such a result. As put in other words, the Claimant shall be able to present its case and win the case if it can bear the burden of proof.

66. The first tribunal to comprehensively address the issue of “effective means” was the Chevron-Texaco v. Ecuador that produced an analysis of the meaning of effective means standard, that can be summarized as follows:

   a. the effective means standard is distinct from denial of justice and has less demanding test/threshold;

   b. the standard requires the state to establish and provide working judicial system;

   c. undue delay in proceedings may amount to a breach of the effective means standard;

   d. if the investor experiences regular or extensive delays, it may be evidence of a systemic problem within the judiciary;

   e. a claimant does not have to exhaust local remedies, must, however, use the local tools effectively;

   f. as with denial of justice under international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case and the behavior of the courts themselves.

67. Because FET does not have a universally binding meaning and does not the effective means standard, there is no test to be assessed. Nevertheless, the Claimant submits that the Tribunal shall consider following:

   a. **Length of the proceedings**;

68. The Claimant deems that at this stage, it is useful to remind the tribunal of the course of procedural history, which is stated in Exhibit I and shows clear incompetency and even bias shown by the judge, leniency and support given to the NHA by the court
during NHA’s numerous (and successful) attempts to obstruct the course of the proceedings. Currently, the enforcement proceedings remain pending.

69. The Claimant contends that the description of the history of the proceedings would be “far from ideal”. The NHA was granted extensions on several occasions for filing and refiling its submissions. Moreover, the NHA was granted extensions due to non-presence of its counsel. This was allowed by the court in an untimely manner, causing a majority of the delay in this case. As of this date, the matter remains unheard 8 years later.

70. The Claimant is of the opinion that in such an environment, it would be hard for any investor to keep the proceedings going without a chance of the case being thoroughly heard in an upcoming time. The Respondent imposed an unbearable burden on the Claimant by letting the other litigant – NHA – obstruct and prolong the course of proceedings not for an insignificant piece of time. Therefore, the Claimant was deprived of its right to assert the claims effectively. Under such circumstances, the Claimant fails to believe that it would be able to enforce its rights and that the judicial system in Mercuria offers such an opportunity.

71. The Claimant notes that no one can reasonably demand that before commencing this proceeding, it is required to exhaust local remedies. The BIT does not contain such a clause. This requirement is also harmful to both the Claimant and the Respondent because it creates an unnecessary burden of going through almost endless proceedings for the Claimant and is also harmful to the Respondent, because it states that the host state is not investor-friendly.

b. Actions of the court;

72. The Claimant submits that for the judicial system to be effective, the key elements, such as impartiality and non-arbitrariness have to be present. However, the Claimant contends that on several occasions the judge clearly showed that his sympathies lead up towards the NHA. Namely, on 8 November 2011, the judge said “private parties ought to be more accommodating of their public counterparts who have limited resources at their disposal. A delay in service of one rejoinder will hardly run a billion-dollar corporation into the ground” when reacting to the Claimant’s objections.
that the NHA broke Mercurian procedural law. The Claimant also contends that the NHA was granted countless adjournments and its failure not to be present at the hearing was tolerated by the court, even though it has broken the Mercurian procedural law. Thus, the Respondent is responsible for 80 months in delay of total 96.

73. The Claimant acknowledges the fact that the Respondent is a developing country, however, no country should be given such a leniency not to provide a decent judicial system that can handle simple enforcement hearing in a reasonable time.

**Attribution and Internationally Wrongful Act**

74. Although independent of the Government, the judiciary is not independent of the state. The judgment given by a judicial authority emanates from an organ of the state in just the same way as a law promulgated by the legislature or a decision taken by the executive.\(^\text{129}\)

75. The Claimant submits that the Respondent is liable for the conduct of its High Court under the customary international law represented and codified by the ILC articles, this view is shared by the case law,\(^\text{130}\) *inter alia* by the tribunal in Noble Ventures v. Romania,\(^\text{131}\) where the tribunal held that “[the ILC articles] are widely regarded as a codification of customary international law.”

76. Moreover, case law refers to the ILC articles as a source of binding rules when establishing state’s responsibility. This view is also stressed by prof. Hobér, who says that “there is a general consensus that the [ILC] articles accurately reflect customary international law on state responsibility.”\(^\text{132}\) Prof. Hobér\(^\text{133}\) also adds that “the ILC Articles are widely accepted as guidelines for purposes of attribution in situations where the activities of state organs are being reviewed.” Therefore, the ILC articles shall apply to this case.

\(^\text{129}\) AZINIAN, para. 98.
\(^\text{130}\) Significant number of tribunals have acknowledged the ILC as a source of decision, such as WINTERSHALL, UPS, JAN DE NUL, WALTER BAU and MONDEV.
\(^\text{131}\) NOBLE VENTURES, para. 50.
\(^\text{132}\) HOBÉR, p. 553.
\(^\text{133}\) Ibidem.
77. Internationally wrongful act shall be concluded when the act consists of an action or omission which is attributable to the state under international law and constitutes a breach of an international obligation of the state.

78. Article 4 of the ILC articles sets forth that the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the state. The Claimants says that High Court of Mercuria is without a doubt a state organ, which exercises judicial power. Thus, its conduct shall be fully attributable to the Respondent.

79. Regarding the breach, Article 12 of the ILC articles sheds light on the term by stating that there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character. As put, in other words, the obligations are breached when the state is inconsistent with what is agreed upon, which includes “failure to provide” or “acting contrary to”. The assessment is the comparison of what the state was legally prescribed to do with what the state has actually done. In present case, the Claimant submits that the Respondent was obliged to accord Claimant’s investment FET, as interpreted in accordance with the preamble (including the provision of effective means of asserting claims), which was to establish and maintain an effective system of justice that will allow the Claimant to enforce its rights within reasonable time. However, the Respondent took over 8 years to merely hear the case. The Claimant submits that the Respondent has breached the obligation set forth in Article 12 of the ILC articles.

80. With respect to submissions above, the Claimant suggests the Tribunal to find that the actions carried out by the Respondent during the course of proceedings were not fair and equitable.

VI. Termination of The Long-Term Agreement Amounts To a Violation of Article 3 (3) of The BIT.

81. Article 3 (3) of the BIT states that
“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.”

82. Such kind of provision is so-called umbrella clause and it a treaty instrument for the protection of obligations regarding contracts between states and individual investors. Even though there is general agreement about the function of such provision, the scope of obligations protected by it is subject to a discussion and is usually determined by the wording of the clause.134

83. Umbrella clause in the BIT shall be interpreted by the Tribunal, in the sense of Article 8 (1) of the BIT, with applicable rules of international law.135

84. Even though the VCLT did not pass through full ratification process in both Contracting Parties of the BIT, it shall be considered as a source of interpretation of international treaties no matter that (therefore, adoption of the VCLT by the state as an international obligation by process of ratification only strengthens interpretation powers of the VCLT).136 Ignoring the VCLT when interpreting provisions of BITs lead to heavy criticism from both legal scholars and arbitration tribunals.137 The VCLT suggests a broad interpretation of the umbrella clause in this case, given its relatively comprehensive wording. Article 31 of the VCLT states 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.”138 and that “A special meaning shall be given to a term if it is established that the parties so intended.”139

85. Object and purpose of the BIT is suggested by its preamble, saying that Contracting Parties are “Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Contracting Party in the

134 COLLINS, p. 145-149.
135 Procedural Order No. 1, ¶ 11.
136 Procedural Order No. 3, Lines 1564-1566, also see Procedural Order No. 1, p. 26, ¶ 11 and 1168-1169 of the BIT, Art. 9, ¶ 1.
137 DOLZER & SCHREUER, p. 158.
138 VCLT, Article 31, ¶ 1.
139 VCLT, Article 31, ¶ 4.
territoire of the other Contracting Party”, that means of treatment protected by the BIT shall “stimulate flow of private capital and the economic development of Contracting Parties” and the Contracting Parties are “Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment...”. All those provisions and the last one, in particular, suggest that the BIT shall serve the purpose of protecting investments of investors in order to bolster economic activity between the Contracting Parties. If effective means of asserting claims are not provided otherwise, it is effective to overcome the undesirable state of matters and achieve goals of the BIT by a broad interpretation of “any obligations” as appropriate. “Any obligations” in the wording of the umbrella clause is capacious – it means not only obligations of a certain type, but any obligations entered into with regard to investment of investors of the Contracting Party. It is an elementary rule of interpretation of treaties that any provision of the clause is to be interpreted as meaningful rather than meaningless.140 In that sense, breach of contractual obligation establishes a breach of the BIT itself.

86. Comparable umbrella clause as the one in the BIT was analyzed by the tribunal in Noble Ventures, Inc. v. Romania. Umbrella clause in the Romania-USA BIT says that

“Each Party shall observe any obligation it may have entered into with regard to investments.”

87. The tribunal in Noble Ventures came to a similar conclusion as presented above, holding that any other interpretation of this provision than that it covers all contracts between the state and the investor with regard to the investment would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host state and the provision would be therefore deprived of its practical applicability.141

88. The tribunal in SGS v. Philippines came to even broader interpretation of comparable umbrella clause

140 EUREKO, ¶ 248 and 248.
141 NOBLE VENTURES, ¶ 52.
“[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other investors of the Contracting Party.”

89. They concluded that it “creates an obligation for the state to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other Party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc.”

90. Applying presented legal basis to the factual reality of the case, termination of the LTA by the NHA is, same as all its other respective actions, attributable to the Respondent and makes him responsible for the consequences resulting from it.

91. Article 5 of the ILC Draft Articles, conduct of persons or entities exercising elements of governmental authority, states that

“The conduct of a person or entity which is not an organ of the State under article but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

a. National Health Authority (NHA) is Respondent’s national agency directed by it. Its annual reports serve as a guideline of Respondent’s government. Members of the government have effective directive powers over the NHA. It is politically accountable to the government of the Respondent. It is funded by national taxation and some private contributions. It is organized by NHA trusts, which are established by the National Health Authorities Act, and in

142 SGS PHILLIPINES, ¶ 68.
143 ibid, ¶ 77.
144 Statement of uncontested facts, ¶ 6 and ¶ 14.
145 Statement of uncontested facts, ¶ 7.
effect, they constitute public sector corporations.\textsuperscript{146} By being public sector entity, arguably executing certain elements of governmental authority (e.g., administration of pharmaceuticals supply in the territory of the Respondent), NHA’s conducts are attributable to the Respondent.

92. If the Tribunal would not find the attribution in the sense of Article 5, Article 8 of the ILC Draft Articles, dealing with \textit{Conduct directed or controlled by a State}, states that

\begin{quote}
“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”
\end{quote}

As this provision deals with attribution of individual entities acting under the state’s direction or control, it supports the claim of the Respondent being accountable for NHA’s actions. The key determinant of attribution in sense of Article 8 is whether the respective conduct of entity was an integral part of long-term state’s operations. Considering state’s approach towards Greyscale and NHA’s actions in accordance with governmental needs, there is an argument for attribution of NHA’s conducts to the Respondent.

93. As a result of the attribution described above in this memorandum, the Respondent breached Article 3 (3) of the BIT by NHA’s premature termination of the LTA, without providing the Claimant with any prior notice or latter compensation.

94. As to the fact that disputes related to the LTA were already dealt with arbitration referred to in Claimant’s Notice of Arbitration\textsuperscript{147}, commence of arbitration based on the BIT is not excluded. It is explained above, in the Paragraph 5 of this part of the Memorandum, that if \textit{“effective means of asserting claims and enforcing rights with respect to the investment”} are not provided, it is the purpose of the BIT and intention of its Contracting Parties that such issue could be raised in arbitration on the basis of the BIT as well.

\textsuperscript{146} Procedural Order No. 3, Lines 1591-1594.
\textsuperscript{147} Notice of Arbitration, ¶ 9.
VII. Conclusions of Claimant's Submissions Regarding Merits

95. Enactment of Law No. 8458/09 and grant of a license for the Claimant’s invention violate Claimant’s legitimate expectations and therefore amount to a breach of Article 3 (3) of the BIT.

The High Court of Mercuria is indeed a state organ for which actions shall the Respondent be held liable.

The actions carried out by the Respondent in the enforcement proceedings constitute internationally wrongful act and therefore amount to the breach of Article 3 (2) of the BIT.

NHA’s actions are attributable to the Respondent. The Respondent breached Article 3 (3) of the BIT by NHA’s premature termination of the LTA.

REQUESTS FOR RELIEF

96. With respect to all previous submissions, the Claimant respectfully requests the Tribunal to:

a. Find its jurisdiction over the claims and find these claims admissible

b. Declare that the Respondent is liable for violation of Article 3 of the BIT, including failure to accord FET to the Claimant and failure to observe its obligation towards the Claimant’s investment;

c. Order the Respondent to pay damages to the Claimant for the losses caused as a consequence of the violation valued at no less than USD 1,540,000,000;

d. Find that the Claimant is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements;

e. Order payment of pre-award interest and post-award interest at a rate to be fixed by the Tribunal; and

f. Grant such further relief as counsel may advise and that the Tribunal deems appropriate.
Respectfully submitted on 18 September 2017 by:

Team Koretsky

On behalf of the Claimant

Atton Boro Limited