ARBITRATION UNDER
THE MERCURIA-BASHEERA BIT,
THE PCA ARBITRATION RULES 2012
(AND THE OFFICIAL RULES AND INSTRUCTIONS OF THE FDI MOOT)

BETWEEN

ATTON BORO LIMITED
(Claimant)

AND

THE REPUBLIC OF MERCURIA
(Respondent)

PCA CASE NO. 2016-74

Memorial for Claimant

18 September 2017
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STATEMENT OF FACTS

1. Claimant – Atton Boro Limited (Atton Boro) made a considerable investment in the Republic of Mercuria (Mercuria) by manufacturing a drug which would successfully inhibit the increasing rate of greyscale infections. The investment was made by virtue of a Long Term Agreement (LTA), signed by Claimant with Mercuria’s National Health Authority (NHA) in May 2004. Through the LTA, Atton Boro would become Mercuria’s supplier of the Fixed-Dose Combinations (FDC) pill, which was significantly more effective in treating greyscale than previously available treatments.

2. Atton Boro and Company is the primary holding company for Atton Boro Group, a leading drug discovery and development enterprise with over a hundred years of industry experience. Atton Boro Group synthesized Valtervite, an FDC drug that radically improved treatment of greyscale infections – an extremely contagious and incurable virus spread primarily through sexual contact. Atton Boro Group obtained patents for this drug in 50 jurisdictions, including Mercuria (Mercurian Patent No. 0187204, granted on 21 February 1998). The collaboration between the parties came about after Atton Boro Group incorporated a wholly-owned subsidiary (Atton Boro) in Basheera. As a result of this incorporation, the Mercurian patent, owned by Atton Boro and Company was assigned to Atton Boro. Before the incorporation of Atton Boro, Atton Boro Group had already established a presence in the Basheera pharmaceutical market. Its subsidiary, Atton Boro, further expanded this presence in Basheera by renting out office space, opening a bank account, and hiring both a manager and accountant.

3. In 2003, a report from the Ministry of Health of Mercuria identified Mercuria’s increasing incidence of greyscale infections among working-age individuals across the country. Greyscale is a chronic, non-fatal, and incurable disease. The
only greyscale treatment available in Mercuria at that time fell far short of the national standard, as it was only effective if the infection was detected at very early stages. Other countries afflicted by the spread of greyscale were already using a much more efficient drug – the FDC pill. The Ministry of Health of Mercuria directed the NHA to estimate the need for the FDC pill in Mercuria and directly invited offers from several pharmaceutical companies for long-term supply of the FDC pill at discounted rates. In 2004, in the context of a successful pre-existing collaboration between the NHA and Atton Boro, and in coherence with Mercuria’s express intent to attract foreign investment, the NHA wrote an invitation to Atton Boro to make an offer for supplying its FDC drug, marketed under the brand name of Sanior.

4. As a result, the NHA and Atton Boro entered into an LTA which was to be valid for a period of at least 10 years. The LTA explicitly stated that the NHA would purchase Sanior at a 25% discounted rate by periodically placing purchase orders. Clause 5 of the LTA stipulated the minimum guaranteed annual order-value. Atton Boro rapidly established a robust manufacturing base in Mercuria and started manufacturing the drugs. The first consignment was delivered by June 2005. Despite a series of public health awareness campaigns conducted by the NHA aimed at preventing the rapid spread of the disease, the need for Sanior increased at an exponential rate. In order to meet the rising demand for Sanior in Mercuria, Atton Boro was compelled to augment its expenditure by purchasing land and additional machinery. Immediately after Atton Boro bolstered its production setup, Mercuria asked to renegotiate the price for Sanior. Mercuria disregarded the fact that a discount purchase rate of 25% was already stipulated in the LTA and simply justified its unexpected demand by admitting its failure to accurately estimate the number of greyscale cases.

5. In spite of the already heavily discounted price included in the LTA, Atton Boro offered an additional discount of 10% for the remaining period of the LTA. Nonetheless, the NHA sought to coerce Atton Boro into accepting an additional discount of 40% by threatening to terminate the LTA prematurely. Accepting this offer would consequently mean that Mercuria would be purchasing Sanior at the
impossibly discount rate of 65%; reducing Atton Boro’s profit margins to essentially nil. As previously mentioned, Atton Boro significantly expanded its operation in order to meet the need of the greyscale outbreak in Mercuria. This expansion caused Atton Boro to incur significant additional expenses in order to bolster its production of Sanior. Therefore, accepting such a highly discounted rate would put Atton Boro in a precarious financial position, especially due to the colossal costs of operating and maintaining such large-scale production.

6. On 15 May 2008, the Minister for Health and the President of Mercuria met privately with the Director of the NHA. Shortly after, newspapers released reports that the agenda for the meeting was to resolve budgetary problems that had arisen in several government healthcare programs. Approximately one month after that meeting, the NHA unilaterally terminated the agreement on 10 June 2008. Atton Boro invoked arbitration against the NHA under the LTA; subsequently, an arbitral tribunal seated in the country of Reef passed an award (the Award) in favor of Atton Boro, recognizing the NHA’s breach of the LTA. Immediately after Atton Boro filed enforcement proceedings in the courts of Mercuria on 3 March 2009, the NHA filed a response requesting the Court to deny the enforcement of the Award, which Mercuria argued was contrary to public policy. Mercuria, through the NHA, its Parliament, and its courts, employed a myriad of delay tactics throughout the proceedings – causing the Award to remain unenforced. For example, the NHA was absent on at least eight occasions; forcing the Mercurian Court to continuously adjourn the proceedings. Atton Boro submitted that the NHA’s absence from court without good reason had breached Mercurian procedural law, but the Mercurian Court did not respond to their objection. The NHA constantly requested extensions for filing its response. Yet, the Mercurian Court seemed to indulge every delay tactic employed by the NHA. As a result, the enforcement actions of the award have been delayed over seven years, despite both Reef and Mercuria being party to the New York Convention.

7. Atton Boro’s financial loss intensified when the President of Mercuria promulgated the National Legislation for its Intellectual Property Law (Law No. 8458/09), in October 2009. This new legislation introduced a provision allowing
for the use of patented inventions without the authorization of the patent holder. In November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application before the Mercurian High Court under the new provision, seeking grant of a license to manufacture Valtervite. The Court granted an indefinite license to HG-Pharma and fixed the royalties to be paid to Atton Boro at 1% of total earnings. The devastating economic impacts of these actions were felt almost instantaneously by Atton Boro. By early 2014, Atton Boro had lost nearly two-thirds of its market share to the generic FDC pill. Adding insult to injury, many of Atton Boro’s distributors expressed their intent to switch to the alternatively manufactured drug once their contracts with Atton Boro expired.

8. In February 2015, the head of Atton Boro’s Mercuria division announced that the company would cease any further dealings of Sanior in Mercuria as it still needed to recoup billions of dollars in order to once again be financially sustainable. During the announcement, Atton Boro reaffirmed its intention to pursue every available legal recourse against the misappropriation of its intellectual property. On November 7, 2016, a notice of arbitration was delivered to the Republic of Mercuria.
PART ONE: JURISDICTION AND ADMISSIBILITY

9. Pursuant to Art 1(1) and Art. 3(3) of the Bilateral Investment Treaty between the Republic of Mercuria and The Kingdom of Basheera (BIT), this Tribunal has jurisdiction over the claims submitted by Atton Boro. Such fact is supported by the following contentions:

(1) The arbitral award is an investment pursuant to the definition set in the BIT;
(2) The NHA’s acts are attributable to Mercuria;
(3) The Tribunal has jurisdiction over the breach of the LTA by virtue of Art. 3(3); and
(4) Art. 2 does not affect the jurisdiction of this Tribunal.

I. This Tribunal has jurisdiction over the claims related to the enforcement of the Award because the Award is an investment within the meaning of the BIT

10. Claimant respectfully submits that this Tribunal has jurisdiction over the dispute at hand between Atton Boro and Mercuria because the Award, together with all other actions undertaken by Atton Boro, is an investment within the meaning of the BIT. The plain meaning of Art. 1 of the BIT covers a broad scope of investments. Under this provision, the term “investment” is defined as:

any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws.

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1 Agreement Between The Republic of Mercuria and The Kingdom of Basheera For the Promotion and Reciprocal Protection of Investment, Annex No. 1, entered into force Jan. 11, 1998 [hereinafter BIT].
2 BIT, Art. 1(1)(a-d).
3 BIT, Art. 1(1).
11. Further, Art. 1 provides a non-exhaustive list of assets fitting that definition. Art. 1(c) unequivocally provides that “claims of money, and claims to performance under contract having a financial value” are investments.⁴ Article 31(1) of the Treaty on the Law of Treaties⁵ provides that:

as the main rule for treaty interpretation, 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.

12. An arbitral award rendered in favor of an investor on the basis of an investment contract is indisputably a claim of money. Thus, according to the ordinary meaning of the terms of Art. 1, the Award is clearly an investment under the BIT. The fact that the Award was rendered in Reef, and not in Mercuria, does not change this conclusion. Mercuria is a party to the New York Convention, thus the Award has a privileged status in Mercuria. The New York Convention requires courts of contracting states to give effect to private agreements to arbitrate, and to recognize and enforce arbitration awards made in other contracting states.⁶ The fact that the Award is linked to other activities and arises out of a contract to be performed in Mercuria further bolsters this contention.

13. The plain meaning of the language of the BIT is also established in the object and purpose of the treaty. The BIT was created in recognition of the importance of providing efficient ways of asserting claims and enforcing rights. In the preamble, the parties recognize:

that agreement on the treatment to be accorded to such investment will stimulate the flow of private and the economic development of the Contracting Parties;
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.⁷

⁴ BIT, Art. 1(1)(c).
⁷ BIT, Preliminary Section.
14. Similarly to most multilateral and bilateral investment treaties, the BIT between Mercuria and Basheera features a broad definition of the term investment. This approach has been adopted because of the constantly evolving nature of forms of investments. For instance, the 2004 US Model BIT and the recent US FTAs broadly define what constitutes an investment “as every asset owned or controlled, directly or indirectly, by an investor, which has the characteristics of an investment”; including a non-exhaustive list of “forms” of investment—the BIT follows this trend. In addition, the 2012 PCA Arbitration Rules do not contain any independent definitions of investment, as do other international instruments such as the ICSID Convention. Consequently, the plain meaning of the language of the BIT—confirmed by the object and purpose of the treaty—is sufficient to establish the meaning of the term investment.

15. Claimant therefore contends that the Tribunal should not have to consider any independent definition of investment, as the terms of the BIT are sufficient for the purpose of establishing jurisdiction. If, however, this Tribunal considers that an independent definition of investment must also be established, the Award—together with the other actions of Atton Boro related to the production of Sanior in Mercuria—meets this independent definition. Where an independent definition of the term “investment” is required, an operation is usually considered to be an investment once it meets the following requirements:

   (1) the investment has a certain duration;
   (2) there is a regularity of profit and return;
   (3) there is an assumed risk that goes beyond that of a common contractual relationship;
   (4) the investment entails a substantial commitment;
   (5) the contracting party has made contributions in the host country which have an economic value such as loans, materials, labor and services.

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9 Id. at 9.
10 Id. at 82.
16. An arbitral award is a valid investment if formed as part of an “overall operation” which satisfies an independent definition of the term “investment.”\textsuperscript{12} This approach has been used by previous arbitral tribunals: e.g., under the ICSID Convention, an arbitral tribunal was called upon to determine whether an arbitral award constituted an investment for the very first time in Saipem S.p.A. v. The People’s Republic of Bangladesh.\textsuperscript{13}

17. In \textit{Saipem}, a request for arbitration was filed after one party failed to pay monies due under a contract and the tribunal rendered its award in favor of Saipem.\textsuperscript{14} The arbitral tribunal followed the double-keyhole approach, which meant determining whether an investment was made in terms of Article 25(1) of the ICSID Convention as well as the Italy-Bangladesh BIT.\textsuperscript{15} The tribunal also used a four-pronged test, introduced by Salini, which arbitrators were to use to determine whether two parties had in fact made an investment for the purposes of ICSID arbitration.\textsuperscript{16} The test required:

1. A contribution of money or assets;
2. A certain duration over which the project was to be implemented;
3. An element of risk; and
4. A contribution to the host state's economy.

18. First, the tribunal held that the Saipem investment met the requirements of the four prongs of the Salini Test\textsuperscript{17} for the purpose of Article 25(1) and the requirements of the Italy-Bangladesh BIT.\textsuperscript{18} Then, the tribunal held that the entire or overall operation included the Pipeline Contract as well as the related ICC award. Because the Pipeline Contract met the requirements of the Salini Test,

\begin{footnotesize}
\textsuperscript{12} See Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSIS Case No. Arb/05/07, 8, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2001) [hereinafter Saipem v. Bangladesh].
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{16} Id.
\textsuperscript{18} Id.
\end{footnotesize}
Saipem's overall operation, including the commercial arbitral award, was considered to be an investment by the tribunal. 19

19. The subsequent step was for the tribunal to determine whether Saipem had made an investment in terms of the Italy-Bangladesh BIT. The definition of investment provided in Art. 1(1) of the Italy-Bangladesh BIT is as follows:

The term “investment” shall be construed to mean any kind of property . . . [w]ithout limiting the generality of the foregoing, the term “investment” comprises: credit for sums of money or any right for pledges or services having an economic value connected with investments.

20. The Saipem tribunal held that by their ordinary meaning the words “credit for sums of money” also include an arbitral award ordering a party to pay a sum of money. 20 Though that tribunal did not explicitly state that an award comprised an investment, it ruled that the jurisdictional requirement was met for the reasons set forth hereafter. First, it contended that because the rights embodied in the ICC award resulted from the contract, such an award “crystallized the parties’ rights and obligations” under the original contract. 21 The tribunal further asserted that it would not need to address whether the award itself qualifies as an investment, since the contract rights, which are crystallized by the award, constitute an investment within Art. 1(1)(c) of the BIT. 22 The Saipem tribunal considered that the “entire operation,” including the underlying “Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration” was an investment under Art. 25 of the ICSID Convention. Thus, the tribunal in Saipem concluded that the arbitral award was an investment by virtue of the fact that it was part of an overall system of investment. 23

21. Similar to Saipem, the entire operation realized by Atton Boro in Mercuria for the purpose of providing Mercuria with the FDC drug Sanior qualifies as an investment independently. First, the duration of the operations extend over a
course of more than 10 years, based on the duration of the LTA. Second, under the LTA, there is unquestionably a regularity of profit and return, since the agreement is structured so as to allow the NHA to place regular orders of Sanior. Third, there is inherent risk in the operations because Atton Boro had to invest considerable amounts of money to assure production of the drug in the territory of Mercuria, without having the certainty that it would recover these sums under the LTA. Fourth, there was and continues to be a substantial monetary commitment by Atton Boro, for the reasons stated above. Finally, there is no doubt that Atton Boro’s operations contributed to the economic development of Mercuria: an important part of its operations was based in Mercuria, and, further, curbing the greyscale epidemic would ultimately lead to the well-being of Mercuria’s heavily affected working-age population, allowing that crucial population to become productive actors in Mercuria’s economy. Consequently, even if this Tribunal considers that an independent definition of the term investment has to be met, the Award, together with Atton Boro’s other operations in Mercuria, constitutes an investment.

22. The Claimant’s investment includes the final Award itself, which constitutes a claim to money and a right to legitimate performance having financial value related to an investment. This is further confirmed by the approach taken by the arbitral tribunal in *ATA*, which concluded that, “the Claimant’s legal and contractual rights under the Contract, as enforced in the underlying arbitration and upheld in the Final Award, cannot be separated from the rest of the Claimant’s investment.” In the interest of harmony and consistency in the international realm, such a principle should apply to Atton Boro.

23. Hence, as demonstrated by the language of the BIT, the Award, crystallizing Atton Boro’s rights arising out of the LTA, and the arbitration agreement fall within this wide definition of investment. In this case, Atton Boro’s underlying investment is the LTA and the arbitration agreement. It is undisputed that Atton’s Boro underlying investment, which formed the basis of its subsequent legal and

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24 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2 (2010).*
contractual claims, qualifies as an investment under the Mercuria - Basheera BIT. Since the BIT contains a definition of investment, and since the arbitration rules do not make reference to the term investment, it is not necessary to have recourse to any further definition of investment. However, even if this Tribunal considers that the Award has to meet an independent definition of an investment—e.g. by way of the Salini Test\textsuperscript{25}—these requirements would also be met. Pursuant to the LTA, over the duration of the performance of the contract and beyond, Atton Boro made contributions and participated in the risks of the transaction. Atton Boro’s investment entailed a substantial commitment, as it entered into a 10 year long agreement with the NHA, set up a large manufacturing facility, and purchased land and equipment. Atton Boro’s contributions to the Republic of Mercuria are immense. Atton Boro’s financial investments, referenced above, were significant. In the end, Atton Boro manufactured a drug that was vital to saving the health innumerable citizens of Mercuria – at a generously discounted rate.

24. Thus, the investment undertaken pursuant to the LTA must be taken to include the Award, which crystallized the legal and contractual claims arising from the contract. The plain meaning of the BIT confirms the existence of a qualifying investment. The context and purpose of the BIT in combination with a substantial number of secondary sources corroborate this finding. Reaching this conclusion is in line with the reasoning of other arbitral tribunals that used a holistic approach to address this question. An application of the holistic approach, in fact, confirms that the Award is part of the investment. For the reasons set above, the Claimant respectfully submits that the Award is an investment within the meaning of the BIT.

\textsuperscript{25} Salini, supra note 16.
II. The Tribunal has jurisdiction to hear claims related to actions of the NHA because the NHA’s acts are attributable to the Respondent

25. The NHA is an organ of the Republic of Mercuria, which reports to Mercuria’s Ministry of Health. NHA made an offer to Atton Boro to become its supplier of the FDC drug, Sanior, following a press conference in which the Minister for Health of Mercuria lauded the success of the Mercuria Comprehensive HIV/AIDS Partnership between Atton Boro and the NHA. The pertinent rules on attribution for the purpose of State responsibility under international law are defined in the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) – which are widely recognized as customary in international law.

26. Articles 4 and 5 of the ILC Articles strongly support the assertion that NHA’s actions are attributable to Mercuria. Article 4 stipulates as follows:

[T]he 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.

27. Article 5 also contends that:

[T]he conduct of a person or entity which is not an organ of the State under Article 4 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.

28. Article 8 of the ILC Articles also attributes to the State the conduct of private persons acting on the instructions of the State in carrying out the wrongful conduct. The wrongful conduct is attributed to the State if the person or group of

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persons is in fact “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

29. The NHA was in fact formed by the government of Mercuria, rendering the latter responsible for its acts. Article 5 covers a wide variety of bodies, which may be authorized to exercise some governmental authority. This includes public corporations, semipublic entities, public agencies, and even private companies; as long as the entity is sanctioned by the law of the State to exercise public functions, usually exercised by State organs. An act is determined to be a governmental act if it is normally regarded as governmental in a current setting.

The doctrine of attribution collectively considers the conduct of any State organ and the conduct of a person or entity which is not an organ of the State, but which is sanctioned by the law of that State to exercise elements of governmental authority. The doctrine encompasses the conduct of a person or group of persons, acting under the control of that State. Hence, in order to attribute conduct that constitutes a breach of international law to the state, it is sufficient to establish at least one of the following elements:

(1) The entity is an organ of the State;
(2) It is empowered to “exercise elements of the governmental authority”; or
(3) It is controlled by the State.

30. A substantial number of factors point to the fact that the NHA is an organ of Mercuria according to Article 4 of the ILC Articles. In any case, the NHA is empowered to exercise elements of governmental authority and acted within the framework of this authority according to Article 5 of the ILC Articles when it terminated the LTA.

27 Id.
28 Id.
29 Eureko, supra note 69.
30 Id.
31. First, the NHA was established by the Minister of Health, inarguably a State organ of Mercuria. The NHA had to be empowered by the Minister of Health with the authority to extend an invitation to Atton Boro to make an offer for supplying a drug urgently needed by Mercuria. The NHA had the authority to negotiate on behalf of Mercuria, determine a purchase rate, and enter into a 10 year-long agreement. Further, the NHA engaged in several awareness campaigns in educational institutions and workplaces to reduce the spread of the illness. The fact that the NHA terminated the LTA immediately after meeting with the Minister for Health and the President of Mercuria to discuss budgetary problems in government healthcare programs, strongly indicates that the NHA breached the LTA under instruction from the Minister of Health. Finally, the ability to autonomously terminate the LTA prematurely under certain conditions contained in the LTA shows the extent of the NHA’s governmental authority. The extensive scope of the NHA’s authority in deciding critical governmental matters clearly proves that the NHA is in fact a State organ of Mercuria.

32. To the extent that this Tribunal does not consider the NHA to be a State organ, it should—at the very least—be considered either an entity or body which is empowered by the law of the State and/or controlled by the State, as established by the undisputed facts set forth in this proceeding. For instance, in Helnan International Hotels32 the Tribunal weighed the following facts to determine whether a party’s conduct could be attributable to the State:

(1) The fact that an entity can be classified as public or private according to the requirement of a given legal system;

(2) The existence of State participation in the ownership of its assets; and

(3) The fact that it is not subject to executive control.

33. After reaching the decision that the gathered facts were insufficient to attribute the party’s conduct to the State under Article 4, the Tribunal concluded that the conduct of the party was still attributable to the state in relation to Article 5.33

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32 Helnan International Hotels A/S v Republic of Egypt (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction of 17 October 2006, para. 93.
33 Id.
Thus, Claimant submits that the actions of the NHA are attributable to the Republic of Mercuria under Article 4, 5, or 8 of the ILC Articles.

III. This Tribunal has jurisdiction over the breach of the LTA by virtue of Article 3(3)

34. Claimant submits that this Tribunal has jurisdiction over Atton Boro’s claims, including the claim based on the breach of the LTA by Mercuria through the NHA—the actions of which are attributable to Mercuria as previously established—since all claims submitted in this proceeding arose by virtue of Mercuria’s treaty violations. Further, Art. 3 of the BIT converts Mercuria’s breach of contract into treaty violations. Finally, the fact that a method of dispute resolution was already established in the LTA does not affect the jurisdiction of this Tribunal since Atton Boro has not been allowed to enforce its arbitral award.

A. Atton Boro’s claims are treaty-based claims which resulted from Mercuria’s breach of Art. 3 and Art. 6 of the BIT.

35. All claims submitted before this tribunal are treaty-based claims that arose as a result of Mercuria’s violation of Art. 3 and Art. 6 of the Basheera – Mercuria BIT. It is acknowledged between the parties that the contractual dispute has already been settled before an arbitral tribunal pursuant to the dispute resolution provided for under the LTA. 27. It is fairly common for disputes between an investor and its host State to give rise to multiple types of claims; creating the possibility of parallel proceedings.34 The simple fact that an investment treaty tribunal rules on a dispute that originates in a contract between an investor and a State entity does not affect the jurisdiction of this Tribunal,35 because the treaty obligations of States are interwoven with the sovereign authority of the State.36 Furthermore,

35 Id.
36 Id.
the acts of the State that trigger the disputes are “sovereign acts.” Thus, a treaty may bind the State as the sovereign in relation to contracts that it has entered into as a private party.  

36. A well-defined distinction exists between treaty-based and contract-based claims. Arbitral tribunals have long recognized this distinction during the course of arbitral proceedings. For example, following a contractual dispute between an Egyptian Hotels Company (EHC) and its foreign investor, the Egyptian company seized the investor’s property. Because Egyptian authorities failed to compel EHC to return the hotel property and compensate the investor for its losses, the tribunal concluded that Egypt violated the treaty – based on the fair and equitable treatment and full protection and security standards. Similarly, in this proceeding, Atton Boro’s dispute originated in a contract, but later evolved into treaty-based claims when Mercuria violated Art. 3 and Art. 6 of the BIT. Subsequent sections of the memorial address the breach of the BIT, while the contention that the NHA’s actions are attributable to Mercuria has already been well-established.

B. This Tribunal has jurisdiction over the breach of the LTA by virtue of Art. 3(3) of the BIT.

37. As will be discussed in more detail in a following section regarding the merits of the proceeding, Art. 3(3) of the BIT contains a broadly worded umbrella clause, which converts violations of the LTA into direct violations of the BIT. In accordance with Art. 3 of the BIT, parties must observe any obligation it may have entered into with regard to the investments. Particularly, the fact that the LTA was entered into with the NHA and not with Mercuria is irrelevant here. As the NHA’s acts are evidently attributable to the State of Mercuria, the LTA should be deemed to have been concluded with the State of Mercuria itself.

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37 Id.
38 Wena Hotels Ltd v. Egypt (Merits) (8Dec2000), 41 ILM 896 [hereinafter WenaHotels].
39 Id.
40 Id.
Consequently, the breach of the LTA can be elevated to a breach of the BIT through Art. 3(3) of the BIT, despite the LTA being concluded with the NHA.

**C. The LTA arbitration clause does not affect the jurisdiction of this Tribunal because all attempts to resolve the dispute through such means have invariably failed.**

38. Just because a claim was raised in another, previous proceeding does not at all preclude the jurisdiction of this Tribunal.\(^{41}\) In a similar instance, a Tribunal relied on the following holding in *Selwyn* to address jurisdictional claims:

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual . . . . \(^{42}\)

39. Well-settled precedent corroborates this principle. An example from the proceeding of *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentina* bears robust similarities to the instant one.\(^{43}\) In *Compañía*, the claimants entered into a contract with the Argentine province of Tucumán. The contract contained an exclusive jurisdiction clause in favor of administrative courts of the Province of Tucumán. Upon the Province’s unilateral decision terminating the contract, a claim was raised against Argentina under the French–Argentine BIT. The following claims were asserted:

> (1) Argentina had breached its treaty obligations by failing to ensure that the Province properly performed the contract; or
> (2) Alternatively, claimants contended that the actions of the Province were attributed to Argentina as a matter of international law, and that those actions themselves constituted a breach of the treaty.

\(^{41}\) GAMI Investments, Incorporated v Mexico, Final Award, IIC 109 (2004), 15th November 2004, Ad Hoc Tribunal (UNCITRAL).
\(^{42}\) Laurence Shore, *supra* note 23.
40. The Tribunal held Kompetenz-Kompetenz that it had jurisdiction because the claim was properly brought against Argentina itself, whether on the basis of its own defaults, or on the basis of the attribution to it, as a matter of State responsibility, of the defaults of its Province. The Tribunal further held that the contractual jurisdiction clause did not deprive it of jurisdiction. In the same vein, Atton Boro’s contractual jurisdiction does not bar the jurisdiction of this Tribunal.

41. Further to this point, the arbitration clause in the LTA does not affect the jurisdiction of the tribunal under the BIT since the arbitral award has been enforceable in Mercuria. After a lengthy duration of over seven years—a shocking duration for the enforcement of any arbitral award covered by the New York Convention—Atton Boro has little hope that enforcement of the Award will be ever be granted by the courts of Mercuria. As such, there are no concerns of overlapping claims given that Mercuria’s High Court has failed to enforce Atton Boro’s arbitral Award after seven years of attempted judicial proceedings.

IV. Art. 2 of the BIT does not apply here, because Atton Boro has undeniably established substantial business activities in the territory of Basheera

42. Mercuria may not invoke Art. 2 of the BIT to deny Atton Boro’s claims because Atton Boro has established substantial business activities in Basheera. The denial of benefits clause states that parties only have the right to deny the advantages of the BIT to a legal entity if:

   (1) citizens or nationals of a third state own or control such entity, and

   (2) if that legal entity has no substantial business activities in the territory of the Contracting Party in which it is organized.

43. Hence, Art. 2 of the BIT clearly establishes a two-prong test. It is undisputed that Atton Boro is owned by Atton Boro Group. However, the denial of benefits clause
only becomes effective if it is proven that Atton Boro does not have significant business activities in Basheera. Such is not the case.

44. Mercuria’s claim that Atton Boro is merely a “mailbox company” is entirely unsubstantiated. In order to accurately interpret such a clause, it is important to remember that the purpose of the denial of benefits clause is to exclude from the protection of BITs investors with no real economic ties to the contracting party which is not a party to the dispute.\(^\text{44}\)

45. Precedent under Article 17 of the ECT might be helpful to understand the case at hand, as it deals specifically with a denial of benefits clause. Article 17(1) of the ECT also gave the contracting parties the ability to omit from the benefits conferred by the ECT any investor who is owned or controlled by citizens or nationals of third countries, which have few economic ties to the host state. In \textit{Plama},\(^\text{45}\) the arbitral tribunal used a two-prong analysis to interpret Article 17. In the first part of its analysis, the Tribunal addressed whether the claimant is a legal entity owned or controlled “by citizens or nationals of a third state," and, in the second part, discussed whether the claimant has no substantial business activities in the territory of the contracting party. As expressed above, it is not necessary to dwell on the first prong of this test since it is uncontested that Atton Boro Group owns Atton Boro. Again, to be able to invoke the denial benefits clause, Mercuria must also prove that Atton Boro does not have substantial business activities in Basheera, which is not the case.

46. In the second part of its analysis, the \textit{Plama} Tribunal addressed the factual question of whether the Claimant "has no substantial business activities in the Area of the Contracting Party in which it is organized." The clause in question gave the right to deny the benefits of the treaty to a company that does not have a sufficient economic nexus to the State party to the BIT, which is not a party to the dispute. The ECT does not provide an explicit definition of the term


“substantial business.” However, based on the “mailbox company” typology, the Tribunal considered that it logically follows that it is an entity which “has no life of its own”: i.e., an entity which exists only on paper and does not engage in any activities. It is further contended that this type of assessment should be conducted based on the specific facts of each case. 47

47. Based on the plain meaning of Art. 2 of the BIT—confirmed by the object and the purpose of the BIT—it can equally be concluded that Art. 2 meant only to exclude in-fact mailbox companies, which have absolutely no life of their own. In fact, the purpose of the BIT, as outlined in the preamble, is to further the economic development of both contracting States. As a consequence, Art. 2 can only have meant to exclude investors which did not contribute to the economy of their place of incorporation, because they would be mere mailbox companies. The facts of this case fall short of this criterion, as substantial evidence establishes Atton Boro’s economic ties to Basheera. Atton Boro Group, which incorporated Atton Boro (a wholly owned subsidiary) in Basheera, already had an established presence in Basheera’s pharmaceutical market before incorporating Atton Boro – which was the reason why it incorporated Atton Boro in the first place, years before the conclusion of the LTA. Further, Atton Boro is much more than a mere “mailbox company,” as it has an established tangible presence in Basheera. Atton Boro rented out office space with which to conduct business and set-up an account in a financial institution in Basheera. It also hired top-level employees to oversee its business activities in Basheera.

48. In conclusion, the denial of benefits clause in Art. 2 of the BIT cannot be invoked in the present case to deny the Arbitral Tribunal’s jurisdiction over Atton Boro’s claim. Neither the plain meaning of the treaty, nor its object and purpose warrant such a conclusion.

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46 Loukas, supra note 36.
47 Id.
PART TWO: MERITS

49. Mercuria breached Art. 3(2) and Art. 6 of the BIT when it enacted Law No. 8458 and granted a license to manufacture Valtervite to HG-Pharma. In fact, the fair and equitable standard guaranteed by the BIT was violated by virtue of the following actions: (1) Mercuria disregarded Atton Boro’s legitimate expectations once it promulgated Law No. 8458 and granted a license to manufacture Valterite to HG-Pharma; and (2) Mercuria expropriated Atton Boro’s investment without providing any compensation. Mercuria is also liable under Art. 3 of the BIT for the conduct of its Judiciary in relation to the enforcement proceedings because it failed to accord adequate justice to Atton Boro and treated Atton Boro in a fundamentally unfair manner. Finally, the unexpected termination of the BIT was a clear violation of Art. 3(3) of the BIT, which states that each party must observe any obligation entered into with regard to investments.

I. Mercuria breached Art. 3(2) and Art. 6 of the BIT in enacting Law No. 8458 and granting a license to manufacture Valtervite to HG-Pharma.

50. Art. 3(2) of the Mercuria-Basheera BIT firmly establishes that the investments of the contracting parties must be afforded “fair and equitable treatment.” The BIT also assures the full protection and security of Atton Boro’s investments in Mercuria. The fair and equitable treatment standard prohibits the following types of host state misconduct:

(1) A government’s violation of an investor’s legitimate expectations;

(2) Inconsistent treatment of an investment by different organs or officials of the same government;
(3) A lack of transparency that impedes an investor from operating its investment;
(4) Failure by a government to provide adequate advance notice of measures that will negatively impact an investment;
(5) Governmental treatment of an investment that is in bad faith; and
(6) Discriminatory conduct. 48

51. Atton Boro was divested of fair and equitable treatment once Mercuria violated its legitimate expectations by enacting Law No. 8458 (Intellectual Property Legislation) and granted a license to manufacture Valtervite to HG-Pharma.

A. Mercuria violated Atton Boro’s legitimate expectations once it promulgated Law No. 8458 and granted a license to manufacture Valtervite to HG-Pharma.

52. Atton Boro legitimately expected that its intellectual property would be protected based on the Mercurian patent for Valtervite, the LTA, Art. 3(2) of the Mercuria-Basheera BIT, and TRIPS. 49 These expectations were an essential basis for their investment. Without these assurances, Atton Boro would not have invested in the manner that they did. The Tribunal must bear in mind that the goal of the BIT, as expressed in its preamble, is to stimulate greater economic cooperation with respect to investments by one contracting party in the territory of the other contracting party. Both parties recognized the significance of providing efficient ways to assert claims and enforce rights in relation to investments. Accordingly, these expectations and rights are decisively established in the BIT.

53. In accordance with Art. (3)(2) of the BIT, Atton Boro expected that Mercuria would protect their patents, registered under Mercurian law and further protected by the fact that Mercuria is a party to the TRIPS agreement. A patent owner has the exclusive right to prevent or stop others from commercially exploiting the

48 Fair And Equitable Treatment. UNCTAD Series On Issues In International Investment Agreements II. United Nations Conference on Trade and Development. See also Saluka Investments BV v Czech Republic, Saluka Investments BV v Czech Republic, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006, Permanent Court of Arbitration [PCA].
49 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Art. 28(1).
The Respondent breached this legitimate expectation when it granted HG-Pharma the license to manufacture Atton Boro’s patented active ingredient, Valtervite.

54. Atton Boro rightfully expected that their patent rights would be protected under Art. 28:1 of the TRIPS Agreement. Atton Boro has standing to take into account Mercuria’s international obligation as contained in the TRIPS agreement because it has a “close attachment” to Basheera, a member state of the World Trade Organization. The TRIPS agreement applies to nationals and includes “persons, natural or legal, who have a close attachment to other Members without necessarily being nationals.” Hence, Atton Boro legitimately expected Mercuria to act in conformity with its obligations under TRIPS and to continuously protect Atton Boro’s patent, which had already been granted under national law.

55. According to its obligations under the TRIPS agreement, Mercuria may not make, use, sell, or import Atton Boro’s patented product, or use the patented process, without Atton Boro’s consent. Mercuria is required to indemnify Atton Boro, even if a compulsory license is granted due to a national crisis exception. The indemnification of a 1% royalty falls far short of this requirement, as it does not come close of the real value of the patent and has, in any case, not been paid. Further, Mercuria made no attempt to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time, as required by TRIPS. Under this agreement, the exceptions must not unreasonably interfere with the normal exploitation of the patent, and cannot unreasonably prejudice the rights of the party. Mercuria has severely interfered with the normal exploitation of Atton Boro’s patent by requiring HG-Pharma to pay a meager royalty of 1% of its total revenues to Atton Boro. Mercuria magnified such interference as soon as it permitted other states to access the Valtervite products manufactured under the

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50 TRIPS, supra note 23.
51 Id.
52 Id.
53 TRIPS, Art. 31.
54 Id.
55 Dispute Settlement. United Nations Conference on Trade and Development. World Trade Organization. 3.14 TRIPS.
compulsory license. In fact, compulsory licenses should be granted predominantly for the supply of the local market.\textsuperscript{56}

56. More broadly, under Art. 3(2) of the BIT, Mercuria must provide a transparent legal environment to its investors because transparency is critical in order for investors to comply with such regulations and thus to plan accordingly.\textsuperscript{57} The following Tribunal’s argument supports this principle:

A 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 investment . . . \textsuperscript{58}

57. Mercuria should have considered the following factors before changing any of its regulations: (1) an investor’s legitimate expectations must be protected; (2) the state’s conduct must be substantively proper, and (3) the state’s conduct must be in compliance with due process and fair administration.\textsuperscript{59} It is worth noting that even if Mercuria is allowed to change its regulations under certain circumstances, its actions are limited by the legitimate expectations it has generated in Atton Boro and that are the predicate of the investments.\textsuperscript{60}

58. Contrary to the principles outlined above, Mercuria did not consider any of Atton Boro’s legitimate expectations when it promulgated its new intellectual property law. Moreover, Atton Boro is the entity responsible for the synthesizing of Valtervite and securing a patent in the Republic of Mercuria. The Respondent’s argument that this measure was justified by its public health crisis is unfounded. Atton Boro was able to meet the demand of the country and willing to accord an additional, substantial discount. Further to the point, Atton Boro took the necessary measures to bolster its production setup as soon as the demand increased. Thus, Mercuria violated Atton Boro’s legitimate expectations once it

\textsuperscript{56} TRIPS, Art. 31.
\textsuperscript{57} Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1
\textsuperscript{58} Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
promulgated Law No. 8458 and granted a license to manufacture Valtervite to HG-Pharma.

B. Mercuria violated Art. 6 of the BIT when it expropriated Atton Boro’s investment.

59. Art. 6 of the BIT protects Atton Boro against any forms of expropriation and explicitly submits the following:

The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.

60. Mercuria indirectly expropriated Atton Boro’s investment when it passed its Intellectual Property Legislation, as it severely interfered with Atton Boro’s rights of ownership. As previously discussed, Mercuria divested Atton Boro of its ownership rights once it asserted the authority to grant licenses of Atton Boro’s patent without its permission and required HG-Pharma to pay a royalty of only 1% of its total revenues. The mere fact that Mercuria’s actions resulted in Atton Boro’s loss of nearly two-thirds of its market share to the generic FDC pills is evidence of the indirect expropriation of its investments.

61. Further, Art. 6 guarantees Atton Boro’s rights to adequate compensation if an investment is expropriated for public purposes. Art. 5 of the BIT provides that a Contracted Party whose investments suffer losses due to a national emergency must be compensated for such losses. Assuming arguendo that the Respondent’s promulgation of its new Intellectual Property Legislation was due to a national crisis or public purpose, two articles of the BIT obligate Mercuria to adequately indemnify Atton Boro for its losses. Thus, by failing to do so, the Republic of Mercuria violated Articles 5 and 6 of the BIT.

62. In support of this interpretation, international law standards mandate that States must respect the acquired rights of foreigners. Tribunals have relied on the
following key principles to determine whether there has been indirect expropriation:

(1) The form of the measure and the intent of the State are not determinative;
(2) Substantial deprivation must be proven;
(3) Tribunals must consider a police powers exception, if applicable; and
(4) The legitimate expectations of the investor concerning its investment must be examined.61


63. There are different forms of expropriations. In a direct form of expropriation, the State deliberately seizes property, whereas in an indirect form of expropriation, a government action results in the investor’s disposssession of its property. Here, Mercuria indirectly expropriated Atton Boro’s property through its enactment of Law No. 8458. In fact, the passing of this law caused Atton Boro to suffer a substantive deprivation of its patent ownership rights, as established previously. Though States have the right at times to expropriate for public purposes, the expropriation must be in accordance with due process, must be non-discriminatory, and the injured party must be compensated.62 Atton Boro received no compensation from the Republic of Mercuria. Finally, as aforementioned, Atton Boro had a legitimate expectation that its intellectual property would be protected.

C. Mercuria’s proffered necessity defense cannot be substantiated by the circumstances surrounding this proceeding.

64. The circumstances of this proceeding do not substantiate Mercuria’s necessity defense. First, under customary international law, necessity may not be invoked by a State to justify an act that is not in accord with an international obligation of that State, unless the act: (1) is the only way for the State to protect an essential interest, and (2) does not seriously harm an essential interest of the other party.63

It is also worth noting that Art. 12 of the BIT does not apply to this case. Art. 12 states the following:

[N]othing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in its essential security interests in time of war or armed conflict, or other emergency in international relations.

65. The fact that Mercuria was undergoing a crisis is undisputed. Yet, the Respondent may not utilize this defense, because divesting Atton Boro of its legitimate rights was not the only way for the State to safeguard its essential interests during the national crisis. Again, Atton Boro was able to supply the needed Valternite and agreed to provide it at an even greater discounted price than originally agreed to by the parties.

66. Essentially, Mercuria breached the Mercuria-Basheera BIT and the fair and equitable treatment standard when it enacted Law No. 8458. Allowing others to use Atton Boro’s patent without its authorization was inarguably improper. Mercuria’s actions violated Atton Boro’s legitimate expectations and were insufficiently justified.

II. **Mercuria is liable under Art. 3 of the BIT for the conduct of its Judiciary in relation to the enforcement proceedings.**

67. The assertion that the judicial acts of Mercurian courts are attributable to Mercuria is undeniable, since courts are State organs. Therefore, Mercurian courts are also required to adhere to the Basheera-Mercuria BIT. The Court of Mercuria violated Art. 3(2) of the BIT when it failed to accord fair and equitable treatment to Atton Boro. In fact, Art. 3(2) of the BIT specifically provides:

> Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
68. The interpretation of Art. 3(2) of the BIT should start from the normal canons of treaty interpretation as stated in Articles 31 and 32 of the VCLT. The plain meaning of the terms “fair and equitable” is “just”, “even-handed”, “unbiased”, [and] “legitimate.” It is worth noting that a state’s conduct does not need to be “egregious” to violate the fair and equitable treatment standard. Preserving the notion of fair judicial procedures is a fundamental requirement of the rule of law and an essential element of the fair and equitable treatment standard. For this reason, denial of justice claims are seen as a component of fair and equitable treatment in investments treaties. Tribunals recognize the following four categories as potential denials of justice claims:

1. Refusal to consider a suit request;
2. Undue delay of judicial proceedings;
3. Inadequate administration of justice; and

69. Mercuria incurs responsibility because its courts administered its laws to Atton Boro, a foreign investor, in a “fundamentally unfair manner.”

A. Mercuria failed to accord adequate justice to Atton Boro by indulging in myriad delay tactics used by the NHA.

70. Mercuria acted unjustly when its courts failed to preclude NHA’s incessant delay tactics. A denial of justice can be pleaded in front of a Tribunal “if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.” The NHA unreasonably

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64 Vienna Convention, supra note 5, Art. 31, 32.
65 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7.
66 Saluka Investments BV v Czech Republic, Saluka Investments BV v Czech Republic, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006, Permanent Court of Arbitration [PCA].
hindered the enforcement proceedings through a multitude of unexcused absences and its recurrent requests for extensions. Nevertheless, the High Court of Mercuria indulged every delay tactic employed by the NHA, causing a seven-year delay in enforcement of the award – that continues to this day. Mercuria was absent on multiple occasions without any reasonable justifications. Atton Boro pointed out to the Court that the NHA’s absence without good reason breached Mercurian procedural law. The Court took no measures to address Mercuria’s disregard of Mercurian procedural law and failed to even respond to Atton Boro’s objections.

71. Furthermore, Mercuria requested an inordinate number of extensions for filing its response. Other instances include the fact that the NHA would file its response and serve a copy to Atton Boro merely three days before the proceeding. For example, during the proceeding on 2 May 2011, the Court granted the NHA an extension to file its reply even after Atton Boro informed the Court that it had filed its reply and served a copy on the NHA on 30 April 2010 – almost a year before the proceeding. The NHA used frivolous excuses such as its counsel had to travel, or counsel had been unable to contact its client. The NHA submitted that it had filed its rejoinder on 30 October 2011. Atton Boro informed the Court that the NHA had not served the rejoinder on them, and pointed out once more that the NHA had breached Mercurian procedural law. Yet, the Court unjustifiably responded that, as a private party, Atton Boro should be “more accommodating of their public counterparts who have limited resources at their disposal.”

B. The Mercurian Courts treated Atton Boro in a fundamentally unfair manner.

72. A denial of justice can be pleaded if a court administers justice in a seriously inadequate way.\footnote{Patrick Dumberry, The Substantive Content of Article 1105, The Fair and Equitable Treatment Standard: A guide to NAFTA Case Law on Article 1105, Kluwer Law International, Wolters Kluwer.} As previously mentioned, the BIT was created with the parties’ intent to promote and protect investments. In its preamble, the BIT recognizes the importance of providing effective means of asserting claims and enforcing rights,
relating to investments. Art. 10 of the BIT also creates the parties’ obligation to ensure the satisfaction of judgments in adjudicatory proceedings. Simply because a State has a judicial system in place to review an investor’s claim does not suffice to avoid a denial of justice claim, as a State is also obligated to provide a fair and effective system of justice.\footnote{Mavluda Sattorova, Denial of Justice Disguised - Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct, 61 Int’l & Comp. L.Q. 223, 246 (2012).} Mercuria’s High Court failed to adjudicate Atton Boro’s claim in a fair and effective manner. In fact, throughout the course of the proceedings, a discernible double standard is employed by the Court. For instance, while the Court had previously failed to address Atton Boro’s objections, it immediately responded to NHA’s objections to the jurisdiction of the Commercial Bench. As previously discussed, the fact that the Court consistently granted the NHA’s request for extensions has further placed Atton Boro at a significant disadvantage.

III. Mercuria violated Art. 3(3) of the BIT when its National Health Authority prematurely terminated the LTA.

73. Art. 3 of the BIT explicitly states that the obligations or commitments of both contracting parties entered into in connection with a foreign investment are under the protective "umbrella" of the BIT. In fact, Art. 3(3) of the BIT creates an obligation that “each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” The language of the Mercuria – Basheera BIT is clear and unequivocal in terms of creating such obligations, as it used words of obligations such as “shall observe” or “shall respect.” The object and purpose of the BIT supports an effective interpretation of Art. 3(3). As stated in its preamble, one of the BIT’s main objectives is to promote and reciprocally protect investments. The treaty was created because of the parties’ desire to encourage better economic collaboration with respect to investments. Both parties recognize the importance of ensuring effective ways of asserting claims and enforcing rights with respect to
investments.⁷³ Such statements demonstrate the parties’ genuine intent to resolve uncertainties in its interpretation so as to favor the protection of investments.⁷⁴ Interpreting the BIT in this manner is also supported by well-settled precedent.

74. In several cases, tribunals have given full-effect to umbrella clauses. For instance, in SGS, the Tribunal argued that the uses of the mandatory term “shall” demonstrates the intent of the parties. It also contended that the term “any obligation” is capable of applying to obligations arising under national law, for instance those arising from a contract.⁷⁵ Finally, it concluded that in interpreting the actual text of the umbrella clause in this case which says, that each “Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.⁴⁷ Article X(2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework.”

75. More recent precedent supports the interpretation that all obligations must be respected. One tribunal found that:

[A]ny obligations is capacious; it means not only obligations of a certain type, but any – that is to say, all – obligations entered into with regards to investments of investors of the other Contracting Party.⁷⁶

76. Mercuria has incurred international responsibility because of a breach of its contractual obligations towards Atton Boro.⁷⁷

77. The umbrella clause must be interpreted in its framework; explicitly as a provision in an international treaty for the protection of foreign investment.⁷⁸ Treaties in force are binding and must executed in good faith.⁷⁹ Even if this Tribunal decides to adopt a narrower approach in its interpretation of Art. 3(3), which excludes purely commercial obligations from its scope, Atton Boro

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⁷³ BIT, at 32.
⁷⁵ Id.
⁷⁶ Eureko BV v Poland, Partial Award and Dissenting Opinion, IIC 98 (2005), 19th August 2005, Ad Hoc Tribunal (UNCITRAL).
⁷⁷ Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11.
⁷⁸ Laura Halonen. Containing the Scope of the Umbrella Clause, Chapter 2.
prevails. There are sufficient elements of public authority here that the violation of the contract amounts to a violation of the BIT independently from the umbrella clause, which allows the Claimant to invoke Art. 3(3).

78. Further, the NHA clearly breached the LTA. Because Atton Boro diligently performed all of its duties under the LTA, the NHA had no legal grounds to terminate the LTA prematurely in accordance with Clause 6 of the LTA. This is why the Award held the NHA liable of breach of contract. Since the NHA breached the LTA with additional elements of public authority, and since the NHA’s actions are attributable to Mercuria, Mercuria breached Art. 3(3) of the BIT.
79. Mercuria is obligated to assume responsibility for its violation of the Basheera – Mercuria Treaty. Moreover, it is well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved no matter the nature of the obligation it has failed to respect. The Permanent Court of International Justice has held that where an international obligation is violated

reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.81

80. Further Art. 35 of the Articles of Responsibility of States for Internationally Wrongful Acts affirms that:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.

81. The NHA admitted that by virtue of its actions it saved 1.2 billion USD – Atton Boro was entitled to those profits. Hence, the profits Atton Boro has lost, plus pre and post-award interests, should be awarded to Atton Boro.

82. For the multitude of reasons submitted herein, the Claimant, Atton Boro, respectfully prays the Tribunal:

(1) Declare that Mercuria is liable for violations of the BIT;
(2) Order Mercuria to pay damages to Atton Boro for the losses caused as a consequence of the violation, valued at no less than USD 1,540,000,000;
(3) Find that Atton Boro is entitled to all costs associated with these proceedings, including all legal and other professional fees and disbursements; and

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(4) Order payment of the pre-award interest and post-award interest at a rate to be fixed by the Tribunal.