

Second Annual
Foreign Direct Investment International Moot Competition
22 October to 24 October 2008

MEDBERG Co.

(Claimant)

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA.

(Respondent)

MEMORANDUM FOR RESPONDENT

Respectfully Submitted

Team Ago

Counsel

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STATEMENT OF FACTS

1. MedBerg (Claimant) is a company incorporated in The Republic of Bergonia (Respondent). Claimant had acquired a patent (Bergonian Patent No. AZ2005 from Dr. Frank who is employed by MedScience Co.
2. MedBerg is a locally incorporated company that is under the full control of MedX which is a company in Conveniencia, which is 50% - 50% owned by MedScience and Dr. Frank.
3. Claimant had licensed this patent to BioLife a Bergonian company to manufacture drugs to treat obesity on 31 March 2005, which is a problem in Bergonia, with 34% males and 38% females affected by this problem¹
4. Claimant terminated the License Agreement in accordance with the License Agreement's notice and termination provisions on 31 March 2007. BioLife had tried to renegotiate the terms with the claimant but the process was terminated by the claimants within a span of three days.
5. On June 2007, the Bergonian IP office commenced proceedings for the issuance of a "*Compulsory License*" for the patent, to address important domestic medical needs in the country, as the claimants were not ready to issue a new license immediately to no other Bergonian company.
6. The IP office issued the compulsory license on 1st November 2007, for a period of 48 months², which is a period that is a minimum requirement to meet the immediate needs of Bergonia³.
7. BioLife and the other five companies that had invoked the compulsory license starting immediately producing the drugs in bulk and also exported some of them to other countries in need for the drug which included developing countries.⁴

¹ "Clarification to Question No. 65"

² "Clarification to Question No. 66"

³ "Clarification to Question No. 66"

8. The Bergonian IP Office has collected royalties from the six Bergonian companies and has offered these royalty payments to Claimant, but as of the date on which these ICSID proceedings were initiated Claimant had refused to accept them.
9. On November 1, 2008, the ICSID Secretary General registered the dispute for arbitration.

⁴ “Clarification to Question No. 62”

SUMMARY OF ARGUMENTS

ISSUE ONE: WHETHER THE TRIBUNAL HAS JURISDICTION IN VIEW OF THE NATIONALITY OF THOSE PARTIES CONTROLLING THE CLAIMANT.

10. The object and purpose of ICSID is “stimulating a larger flow of private international capital into those countries which wish to attract it”. It is designed to facilitate the settlement of disputes between States and foreign investors”. The ICSID Convention and the Treaty between the Contracting Parties is to be interpreted according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.
11. A basic reading of the definition of investor in the BIT states that the state of incorporation decides the nationality of the company. *Siège social* or incorporation is then generally accepted principle in international law to determine corporate nationality. Thus according to the literal interpretation MedBerg is a national of Bergonia.
12. Medx which is the owner of the claimants in Conveniencia is a mere shell that is being setup to invoke ICSID arbitration. The ultimate owners (MedScience in Laputa and Dr. Frank, Bergonia and Amnesia) of MedBerg have set it up to take advantage of the BIT passed between Bergonia and Conveniencia.
13. Article 25(2)(b) of the Convention permits deviation from the general rule for defining the nationality of juridical entities, but only if there is an agreement between the Contracting Parties to do so. Thus consent is the cornerstone of ICSID jurisdiction. Bergonia has not agreed to treat MedBerg because of foreign control as a Conveniencian national and in the absence of such an express consent; MedBerg has to be treated as a Bergonian national.
14. The MFNC is being used by the claimants to obtain express consent that is required to treat MedBerg as a foreign (Conveniencia) national. Procedural aspects cannot be invoked through MFN only substantive issues can be raised. Had it been the intention of the Bergonian Republic and Conveniencia to include stipulations applicable to

procedural issues within the scope of the MFN clause, they would have included a phrase that allowed for such construction, or a general phrase referring to all matters addressed by the BIT.

15. The generally accepted principle in international law is that an MFN clause cannot substitute for actual consent of the parties. Thus the claimant's argument that the MFNC can be used to obtain express consent is meritless. The BIT that is concluded by the respondents with other third nations has no relation with the claimants and it is an independent agreement between countries.

ISSUE TWO: WHETHER CLAIMANT'S EXPLOITATION OF ITS INTELLECTUAL PROPERTY IN BERGONIA CONSTITUTED AN INVESTMENT UNDER APPLICABLE INTERNATIONAL LAW

16. International law provides for protection of international investments in the territory of the host state. This is an even continued state practise which is followed by all civilized nations.
17. Respondent entered into a BIT with Conveniencia, whereby they agree to protect international investment and should extend all treatment to them as provided by the applicable international laws.
18. Respondent have included the word 'patent' in its definition clause and hence it wishes to extend the protection to patent similar to investments of other kind.
19. With the virtue of protected investment, the exploitation of its intellectual property in Bergonia is governed by TRIPS and Customary International Law
20. TRIPS provide treatment like National Treatment, Most Favored Nation, Fair and Equitable Treatment etc.
21. However, Respondent since it is a developing country, it avails the exception so provided under TRIPS for implementation of international principle into its domestic laws.

22. Obesity is a serious threat to the country so while invoking general exceptions, Respondents declares this act of compulsory licence in the interest of public and hence such exploitation cannot be covered under TRIPS
23. Customary International Laws are state practises which are *lex specialis* and cannot be codified. Further, Respondent does not wish to follow any of the model BITs so floated by certain developed countries as it believes that situation in the territory of Bergonia is unique and hence cannot be generalised.
24. Therefore, the exploitation of its intellectual property in Bergonia is not covered under application international laws and hence is not a covered or protected investment.

ISSUE THREE: WHETHER THE COMPULSORY LICENSE AMOUNTS TO EXPROPRIATION OR DISCRIMINATION, OR OTHERWISE VIOLATES GENERAL PRINCIPLES OF INTERNATIONAL LAW.

25. A patent holder's right is one that is not a fundamental right that is guaranteed to the patent holder. It is in turn a right that is given by the state in order to form a due incentive. Thus a patent right is a right that is conferred by the state and the states interference will amount only to a limited withdrawal by the state of a right which is its own creation.
26. The compulsory license that is awarded by Bergonia is in confirmation with the TRIPS and DOHA declaration. The provision of compulsory license applied is valid as it has been issued in a case of national emergency to deal with public health emergency that had spread in Bergonia, and this is in view of article 31 of the TRIPS. The DOHA declaration has also stated that export to other countries in need is applicable and countries are free to decide grounds for issuing compulsory license.
27. Thus the CL was a very important step taken by the Bergonian government to prevent a monopoly being established by MedBerg in relation to this drug. The compulsory license that is issued was to cater to the important domestic medical needs in Bergonia

as obesity was a severe problem there and this specific drug was an important drug for the same.

28. The state of Bergonia even though had invoked the CL but no obligation that is guaranteed under the respective BIT has been violated by Bergonia. Fair and Equitable treatment as not been violated as the CL issued does not constitute denial of FET as it was the states obligation to address the urgent needs of its people. The principle of legitimate expectation is not being violated as this is an exceptional circumstance and the state acted in a situation of national emergency when the priority is to cater the needs of its citizens. There was no expropriation in the present case as to take steps to meet the needs of the people is considered under customary international law as “within the police powers of the state “and thus no compensation is also to be granted.
29. The facts that arose were not foreseeable and CL was the only means to safeguard the need of the people and so is not in violation of general international law.

ARGUMENTS ADVANCED

PART ONE: JURISDICTION

ISSUE ONE: WHETHER THE TRIBUNAL HAS JURISDICTION IN VIEW OF THE NATIONALITY OF THOSE PARTIES CONTROLLING THE CLAIMANT.

A. NON APPLICABILITY OF ARTICLE 25 (2) (b) OF THE ICSID CONVENTION TO MEDBERG OUSTS JURISDICTION OF THE CENTRE.

30. The ICSID system rests on the Convention on the Settlement of Investment Disputes between States and Nationals of other States signed on March 18, 1965 (hereafter: the Convention), which had been formulated by the Executive Directors of the World Bank and to which both Bergonia and Conveniencia are parties. The object and purpose of the Convention is set out in the *Report of the Executive Directors on the Convention* as well as in the provisions of the Convention itself.

31. The *Report of the Executive Directors on the Convention* explains that the creation of ICSID was “designed to facilitate the settlement of disputes between States and foreign investors” with a view to “stimulating a larger flow of private international capital into those countries which wish to attract it.”⁵

32. The *Report* explains that, while

*“investment disputes are as a rule settled under the laws of the country in which the investment concerned is made,... both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.”*⁶

⁵ ICSID, *Report of the Executive Directors, ICSID*, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), reprinted in ICSID Convention, Regulations and Rules 35, 41 (2003), available at [http://www.worldbank.org/icsid/basicdoc/ICSID English.pdf](http://www.worldbank.org/icsid/basicdoc/ICSID%20English.pdf).

⁶ *Ibid*, para.10.

33. It states that:

*“adherence to the Convention by a country would... stimulate a larger flow of private international investment into territories, which is the primary purpose of the Convention,”*⁷ and adds that “the broad objective of the Convention is to encourage a larger flow of private international investment.”⁸ *The object of the Convention, so the Report explains, is to “offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply.”*⁹

34. The Convention, for its part, refers in its Preamble to “the possibility that from time to time disputes may arise in connection with investment between Contracting States and nationals of other Contracting States.”

35. “While such disputes”, so the Preamble states, “would usually be subjected to national legal processes, international methods of settlement may be appropriate in certain cases”; that is why it has been regarded as appropriate to establish “facilities for international arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire.” Accordingly, Article 25(1) of the Convention establishes the Jurisdiction of the Centre over disputes “between a Contracting State and a national of another Contracting State” Over other disputes the Centre has no jurisdiction.

36. From this it appears that the ICSID arbitration mechanism is meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors. It is because of their *international* character, and with a view to stimulating private *international* investment, that these disputes may be settled, if the parties so desire, by an *international* judicial body.

37. Article 25 of the Convention requires that, in order for the Centre to have jurisdiction, a dispute must be between ‘a *Contracting State* and a *national of another Contracting State*’. [Emphasis added]. Article 25(2) (b) defines ‘national of another Contracting State,’ to include ‘any juridical person which had the nationality of a Contracting State other than the State party to the dispute’. The Convention does not define the method

⁷ *Ibid*, para.12.

⁸ *Ibid*, para.13.

⁹ *Ibid*, para.11.

for determining the nationality of juridical entities, leaving this task to the reasonable discretion of the Contracting Parties.¹⁰

38. In the present case, the central issue in dispute is the nationality of MedBerg and consequently its right to approach ICSID. *Aron Broches* stated that, the purpose of Article 25(2) (b) is not to define corporate nationality but to:

*[I]ndicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of ‘nationality’ and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion.*¹¹

39. In the specific context of BITs, *Professor Schreuer*, notes that the Contracting Parties enjoy broad discretion to define corporate nationality: “definitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2) (b) have been met.”¹² He adds, “any reasonable determination of the nationality, of juridical persons contained in national legislation or in a treaty, should be accepted by an ICSID commission or Tribunal.”¹³

40. Furthermore, Article 1(3)(a) of the Bergonia-Conveniencia BIT defines the term ‘investors’ with respect to Bergonia as - Bergonian within the meaning of the Basic Law of the Democratic Commonwealth of Bergonia,

*[a]ny juridical person as well as any commercial or other company or association with or without legal personality **having its seat in the territory** of the Democratic Commonwealth of Bergonia, irrespective of whether or not its activities are directed at profit.*

¹⁰ See ARON BROCHES, “*The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,” 136 *Recueil Des Cours* 331, 359-60 (1972-II)

¹¹ *Ibid.* at 361 [emphasis added]; See also C.F. AMERASINGHE, *Interpretation of Article 25(2) (b) of the ICSID Convention, in International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity* 223, 232 (R. Lillich and C. Brower eds. (1993).

¹² CHRISTOPHER SCHREUER, “*The Dynamic Evolution of the ICSID system*”, 2006.

¹³ *Ibid.* See also CHRISTOPHER SCHREUER, “*The Interpretation of ICSID Arbitration Agreements, in: International Law: Theory and Practice, Essays in Honour of Eric Suy*” (1998).

41. As have other Tribunals, the ICSID Convention and the Treaty between the Contracting Parties is to be interpreted according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.¹⁴

42. Article 31 of the Vienna Convention 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 light of its object and purpose.”*¹⁵

43. Thus, according to the ordinary meaning of the terms of the Treaty, the (Claimant) MedBerg is an ‘investor’ of Bergonia; it is an entity having a real legal existence that was founded on a secure basis in the territory of Bergonia in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an ‘investor’ of Bergonia.

44. The definition of corporate nationality in the Bergonia-Conveniencia BIT, on its face and as applied to the present case, is consistent with the Convention and supports the analysis under it. Although Article 25(2) (b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation.¹⁶

45. Indeed, ICSID Tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.¹⁷ Moreover,

¹⁴ See also, *Mondev Int’l Ltd v. United States of America*, Award, Case No. ARB (AF)/99/2, 42 I.L.M. 85 (2003), at para. 43; *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, Case No. ARB/97/7 at para. 27; *Waste Management, Inc. v. United Mexican States*, Award, Case No. ARB (AF)/98/2, 40 I.L.M. 56 (2001).

¹⁵ *Vienna Convention on the Law of Treaties*, Article 31(1), May 22, 1969, 1115 U.N.T.S. 331

¹⁶ CHRISTOPHER SCHREUER, *The ICSID Convention: A Commentary*, Art. 25, at 278-79; See also GR. DELAUME, “*ICSID Arbitration and the Courts*,” 77 *Amer. J. Int’l Law* 784, 793-94 (1983); M. HIRSCH, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Graham & Trotman/ Nijhoff, Dordrecht eds.) 85 (1993).

¹⁷ *Ibid* at 279-80 (citing *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction, Case No. ARB/74/3 July 6, (1975)), 1 ICSID Reports 296, 303 (1993); *SOABI v. Senegal*, Decision on Jurisdiction, Case No. ARB/82/1 (Aug. 1, 1984), 2 ICSID Reports 175, 180-

the overwhelming weight of the authority points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2) (b).¹⁸ As *Professor Schreuer* opines, “a systematic interpretation of Article 25(2) (b) would militate against the use of the control test for a corporation’s nationality.”¹⁹

46. The object and purpose of the Treaty is also reflected in the Treaty text. Article 1, which sets forth the scope of the BIT, defines ‘investor’ as ‘any juridical person having its seat’ in Bergonia. The BIT has nowhere discussed the control test. The Respondents have not agreed to treat the Claimants as a national of Convenencia as in accordance with Article 25(2) (b) of ICSID. If any deviation was intended by the parties it would have been clearly mentioned in the BIT between Bergonia and Convenencia. Thus, to use the control-test would be inconsistent with the object and purpose of the Treaty.

47. It is thus respectfully submitted that Claimant, therefore, is an entity having a real legal existence that was founded on a secure basis in the territory of Bergonia. The registration of MedBerg by the Bergonian Government indicates that it was founded in conformity with the laws and regulations of that country. The very fact that the Bergonian corporate registry had MedBerg listed in it is proof enough to show that it was established under Bergonian laws. According to the ordinary meaning of Article 1(3) (a).

48. Therefore, a perusal of the abovementioned facts and observation clearly establishes that the Claimant is an investor in Bergonia as well as a national of Bergonia. This completely negates the contention of Claimant that- MedBerg is a ‘foreign national’.

81; *Amco v. Indonesia*, at 396); *See also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/00/5 (Sept. 27, 2001), 16 ICSID Review-FILJ 469 (2001), at para. 108.

¹⁸CHRISTOPHER SCHREUER, *The ICSID Convention: A Commentary*, Art. 25, at 281.

¹⁹ *Ibid.* at 278.

B. A NATIONAL OF CONVENENCIA DOES NOT HAVE CONTROL OF THE CLAIMANT WITHIN THE MEANING OF ICSID CONVENTION ARTICLE 25 (2) (b).

i. MEDX IS A MERE SHELF COMPANY

49. In the present case MedBerg (Claimant) is not an entity controlled by nationals of Conveniencia in two principal respects. First, that “control” refers to the ultimate controller, who in this instance is MedScience a Laputan national and Dr. Frank who is a Bergonian national by birth and descent²⁰, Second, that the question of whether an entity is “controlled, directly or indirectly,” is a question of fact which is not necessarily satisfied by 100 percent ownership.

50. In this case there is no local company that is being controlled by a national of Conveniencia. Given the circumstances of the case the corporate veil must be pierced as the Conveniencian company that claims to have control over MedBerg, which is a locally incorporated company is not controlling but is a mere vehicle to control the Bergonian company through other companies. Reference is made in this respect in *Aguas del Tunari S.A v. Bolivia*²¹.

51. In the *Barcelona Traction* case²², the International Court of Justice stated that, in international law, it is allowed to pierce the corporate veil, for instance to prevent the misuse of the privileges of legal personality or to prevent the evasion of legal requirements or obligations. In the *Tokios Tokeles* case²³, the possibility of piercing the corporate veil of a Dutch company was analysed, but the Tribunal did not allow this to be done, since it found none of the grounds indicated in the *Barcelona Traction* case to be present. This case differs from the present one, since there was an ostensible attempt in the present case to conceal the true controller of the company (i.e. Dr. Frank and MedScience) by projecting MedX as the controller of MedBerg.

²⁰ “Clarification to Question No. 22”

²¹ *Aguas del Tunari S.A v. Bolivia* ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction para 255, 21 October (2005).

²² *Barcelona Traction, Light and Power Co. Ltd (Belgium v Spain)*, ICJ 1970, 3, 5 January (1970)

²³ *Tokelés v. Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction, paras.54–56, 29 April (2004). See also Dissenting Opinion of President Prosper Weil, para. 23.

52. The present endeavour of the Claimant seeking to project MedX as the actual controller of MedBerg, is in reality a fraudulent attempt to gain the position of a ‘Conveniencian investor’; This is done, so that the Claimant can take advantage of such rights and benefits as are available only to (a) a foreign national and (b) to Convenencian investor under Bergonia-Conveniencia treaty. Alternatively, the comments made by Professor Weil should be applied. According to him, only a genuinely foreign investment should be protected by the ICSID mechanism. Implying that investments by the nationals of the same contracting state which are being projected as ‘foreign investments’ , for gaining access to ICSID jurisdiction or such other insincere motives, are not genuine and do not deserve the consideration or protection of ICSID.
53. An investor wishing to take advantage of a dispute resolution mechanism favorable to it could simply have the case brought by an affiliate or entity within the corporate chain that is based in the appropriate country and incorporate an investment vehicle for the purpose of assuming the most favorable nationality²⁴. In the present case, the entity so placed in the corporate chain is MedX, intentionally based in Conveniencia to take advantage of its nationality and avail the benefits and dispute resolution mechanism available only under Bergonia- Conveniencia BIT.
54. Evidently, MedX is a corporate vehicle without any real control over MedBerg. It is supported by the fact that there is an absence of Conveniencian nationals in MedBerg’s management board.²⁵ MedX can thus be seen as a cover for invoking ICSID arbitration. The BIT between both the countries was passed on 30th May 2003. As on January 2003 MedX was a company incorporated by Convenencian companies SAARL, and immediately after execution of this BIT, was acquired by MedScience and Dr. Frank. This strongly suggests that the only purpose MedX was created was to take advantage of the BIT between both countries. The controlling party is not MedX but MedScience, a Laputan national, which is not a signatory to the ICSID Convention. Thus, the company MedBerg is not under foreign control of any national

²⁴ SCOTT VESEL, “*Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*”, 32 Yale J. Int’l L. 125.

²⁵ “Clarification to Question. No. 75”

of Convenencia but is under the true control of another Bergonian national namely Dr. Frank which further strengthens the fact that even on these grounds MedBerg proves to be a Bergonian National.

ii. RESPONDENT HAS NOT CONSENTED TO TREAT CLAIMANT AS A NATIONAL OF CONVENIENCIA

55. Consent of the parties is the cornerstone of ICSID jurisdiction. Article 25(2) (b) requires a clear expression in writing of the parties' consent to ICSID jurisdiction and of their agreement that a national of the host state may be treated as a national of another contracting state.²⁶

56. The second clause of Article 25(2) (b) provides that parties can, by agreement, depart from the general rule that a corporate entity has the nationality of its state of incorporation. It extends jurisdiction to 'any juridical person which had the nationality of the Contracting State party to the dispute on [the date on which the parties consented to submit the dispute to arbitration] and which, *because of foreign control*, the parties have agreed should be treated as a national of another Contracting State' [emphasis added]

57. This exception to the general rule applies only in the *context of an agreement* between the parties. Here there is no agreement, implied or express, between both parties concerned to treat the Claimants (MedBerg) as a foreign national because of foreign control. Thus the control test should not be used to grant jurisdiction as this is against

²⁶ *Holiday Inns v. Morocco* (Case No. ARB/72/1), in P. LALIVE, "The First World Bank Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems", 1 ICSID Reports 645 (1993), Ven. Auth. 4; *Cable Television of Nevis, Ltd and Cable Television of Nevis Holdings, Ltd, v. Federation of St. Christopher (St Kitts) and Nevis* (Case No. ARB/95/2), Award of December 16, 1996, 13 ICSID Review—FILJ 328 (1998), Ven. Auth.3; *Klöckner Industrie- Anlagen GmbH and others v. Republic of Cameroon* (Case No. ARB/81/2), Award of October 21, 1983, 2 ICSID Reports 4 (1994), Ven. Auth. 5; *Amco Asia Corporation and Others v. The Republic of Indonesia* (Case No. ARB/81/1), Decision on Jurisdiction of September 25, 1983, 1 ICSID Reports 377 (1993), Ven. Auth. 1; *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia* (Case No. ARB/83/2), Award of March 31, 1986 and Rectification of May 14, 1986, 2 ICSID Reports 343 (1994), Ven. Auth. 6); *Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal*, Decision on Jurisdiction of August 1, 1984, 2 ICSID Reports 165(1994), Ven. Auth. 8).

the intention of the BIT. Especially when the projected ‘foreign controller’ is in fact a shelf company and not a real legal entity.

58. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. The very fact that Bergonia did not have any specific laws that made it mandatory for a foreign investor to have a locally incorporated company to do business within Bergonia²⁷ clearly counters any argument of the claimants that they setup MedBerg as a subsidiary in Bergonia of MedX according to Bergonian law requirements.

59. Further the Convention implicitly states, that such practice, makes the company technically a national of the host country, but simultaneously it is apparent that there is need for an exception to the general principle that that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. The incorporation of the provision under Art 25(2) (b) is for providing jurisdiction of ICSID to company’s set-up under such exceptional circumstances. . *If no exceptions were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention.*²⁸ This provision however should not be allowed to be misused by such nationals of the country which have either no real foreign control over them or to which the status of foreign national has not been explicitly granted.

60. ICSID Tribunals likewise have interpreted the second clause of Article 25(2) (b) to expand, not restrict, jurisdiction. In *Wena Hotels Ltd. v. Egypt*, the Respondent argued that Wena, though incorporated in the United Kingdom, should be treated as an Egyptian company because it was owned by an Egyptian national.²⁹ Egypt relied on Article 8.1 of the *U.K.-Egypt BIT* provision, which states: “such a company of one Contracting Party in which before such dispute arises a majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with

²⁷ “Clarification to Question No. 107”

²⁸ *Ibid* 6 at 358- 359

²⁹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999, Case No. ARB/98/4, 41 I.L.M. 881, 886 (2002).

Article 25(2) (b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.³⁰ Thus this clearly confirms the fact that the purpose of the BIT must always be kept in mind. In the present case the BIT between Bergonia-Convenencia does not have any provision that has agreed to treat the claimant as a foreign national because of foreign control. ICSID jurisprudence also confirms that the second clause of Article 25(2)(b) should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties

61. In *CMS v. Argentina*, the Tribunal states, that the reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State *was precisely meant to facilitate agreement between the parties*.³¹ In the present case, there was no agreement between the Contracting Parties to treat the Claimant as anything other than a national of its state of incorporation, *i.e.*, Bergonia.

62. *Mr. Broches* states that the text of Article 25(2) (b) ‘implicitly assumes that incorporation is a criterion of nationality.’³² He argues, however, that this provision does not preclude *an agreement between parties* to define juridical entities by methods other than state of incorporation, including ownership and control.³³ In other words, **the Convention permits deviation from the general rule for defining the nationality of juridical entities, but only if there is an agreement between the Contracting Parties to do so.** Here, there is no such agreement providing for deviation. The agreement under the Bergonia-Convenencia BIT suggests that the standard rule (incorporation) applies.

63. This rule of incorporation has been confirmed by long practice and by numerous international instruments.³⁴ According to *Oppenheim’s International Law*, it is usual to attribute a corporation to the state under the laws of which it has been incorporated

³⁰ *Ibid* at 887.

³¹ *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, Case No. ARB/01/8 (July 17, 2003),

42 I.L.M. 788 (2003), at para. 51 [emphasis added] (‘*CMS*’).

³² *Ibid* at 360

³³ *Ibid.* at 360-6.

³⁴ *Barcelona Traction, Light and Power Co. Ltd (Belgium v Spain)*, ICJ 1970, 3, 5 January (1970).

and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.³⁵ Thus, the Bergonia-Convenencia BIT uses the same well established method for determining corporate nationality as does customary international law.

64. Hereby it is respectfully submitted that the Respondents never agreed to treat MedBerg as a foreign national, whether by virtue of the Bergonian- Convenencia BIT or otherwise. For all purposes MedBerg is a Bergonian national and therefore the benefit of the BIT or the Jurisdiction of ICSID cannot be extended to it. Hence, there can be no reasonable inference that Bergonia agreed to ICSID jurisdiction in context of disputes arising in relation with MedBerg,

C. CLAIMANT CANNOT INVOKE ARTICLE. VI.8 OF THE BERGONIA-TERTIA BIT BY USE OF MFNC OF BERGONIA-CONVENENCIA BIT.

65. The I.C.J. has stated that the purpose of an MFN clause is "to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned."³⁶ In the specific context of investment law, the purpose has been described as one of "giving investors a guarantee against certain forms of discrimination by host countries, and [establishing] equality of competitive opportunities between investors from different foreign countries."³⁷ It has also been suggested that the MFN clause aims to effect a "general equalization of the legal conditions for competition"³⁸ or to "harmonize"³⁹ or "abolish differences in the legal

³⁵ *Oppenheim's International Law* at 859-60 (Sir Robert Jennings and Sir Arthur Watts eds), 9th ed. (1996)

³⁶ *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, I.C.J. 176, 192 Aug. 27 (1952)

³⁷ U.N. Conference on Trade and Development [UNCTAD], "Most-Favored-Nation Treatment", 1, U.N. Doc. UNCTAD/ITE/IIT/10(Vol. III) (1999), available at <http://www.unctad.org/en/docs/psiteiitd10v3.en.pdf> [hereinafter UNCTAD, Most-Favored-Nation Treatment].

³⁸ EDOUARD SAUVIGNON, *La clause de la nation plus favorisee* 4 (1972) ("egalisation generale des conditions juridiques de la concurrence") (translation by author)

³⁹ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, para. 62, 5 ICSID (W. Bank) 396, 410 (2000). Available at <http://www.worldbank.org/icsid/cases/emiliodecisionJurisdiction.pdf>; See also EMMANUEL GAILLARD, "Chronique des sentences arbitrales", 132 *Journal du Droit International* 135, 162 (2005) (arguing that MFN clauses have the double function of fighting discrimination

regime"⁴⁰ applicable to foreign investors in a given state. Since this equalization or harmonization results in convergence at the "most favourable" level of treatment, "MFN clauses have ... become a significant instrument of economic liberalisation in the investment area."⁴¹

66. The most favoured nation clauses (hereinafter called "*MFN clauses*") in the BIT are not applicable for the claimant to invoke foreign nationality. The MFN clause in Article 3 of the BIT between Bergonia and Conveniencia relates in particular to purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country. The intention of Bergonia and the Conveniencia was to add such protection to substantive issues and not to procedural issues.

67. The MFN clause in Article 3 relates to the protection and security standard and does not include express consent as a condition for invoking MFN. This also appears from the wording of Article 3(3) which differs from the wording of MFN clauses in some other bilateral investment treaties which extend the protection to all matters governed by the treaty. Had it been the intention of the Bergonian Republic and Conveniencia to include stipulations applicable to procedural issues within the scope of the MFN clause, they would have included a phrase that allowed for such construction, or a general phrase referring to all matters addressed by the BIT.

and contributing to the harmonization of international investment law).

⁴⁰ See JEAN-PIERRE LAVIEC, *Protection et Promotion des Investissements: Etude de Droit International Economique* 9 (1985) ("En fait, nombre de gouvernements et de législateurs ont émis de doutes, et manifeste des réticences sur l'opportunité de ces traités. En fonction des expériences historiques qu'ils ont subies, des pays ayant été colonisés ont craint que certains de leurs intérêts légitimes ne soient, en définitive, lésés.").

⁴¹ [OECD], *Most-Favoured-Nation Treatment in International Investment Law* 2-3 (Working Paper No. 2004/2, Sept. 2004), Available at <http://www.oecd.org/dataoecd/21/37/33773085.pdf> (noting the diversity of formulation and context of MFN clauses and providing representative samples).

**i. AN MFN CLAUSE CANNOT SUBSTITUTE FOR ACTUAL
CONSENT**

68. The I.C.J. has stated that "an important principle of customary international law should [not] be held to have been tacitly dispensed, in the absence of any words making clear an intention to do so."⁴² The principle that an international Tribunal lacks jurisdiction, absent the parties' consent is just such a principle that cannot be tacitly dismissed. The Permanent Court held in the *Chorzow Factory Case* that, consent must be affirmatively established by a preponderance of evidence.⁴³ Article 25(1) of the ICSID Convention requires that "the parties to the dispute consent in writing to submit [the dispute] to the Centre,"⁴⁴ and as the Report of the Executive Directors on the Convention put it, "Consent of the parties is the cornerstone of the jurisdiction of the Centre."⁴⁵ Consent is thus an essential ingredient in any arbitration as the essence of the institution of arbitration lies entirely on consent of the parties. Against this backdrop, and in light of the vigorous debate over whether MFN clauses apply to dispute settlement provisions at all, it would be difficult - if not impossible - to establish a preponderance of evidence in favour of jurisdiction on the basis of an MFN clause combined with consent with regards to a third party.

69. From the perspective of a Tribunal, therefore, the host state's consent to its jurisdiction must be established as a threshold matter. A state's consent is both forum-specific and party-specific; so that consent to arbitration under UNCITRAL rules does not constitute consent to ICSID arbitration, or does consent to ICSID arbitration of disputes with Finnish nationals constitute consent to arbitration with nationals of Cyprus.⁴⁶ Thus similarly in the present case the automatic consent or express consent that is given by Bergonia to the Tertian investors cannot be used by the claimants to invoke express consent that is required by MedBerg to be treated as a foreign national

⁴²*Elettronica Sicula, S.P.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 42 (July 20)

⁴³*See Chorzow Factory Case (Ger. v. Pol.)*, Jurisdiction, 1928 P.C.I.J. (ser. B), No. 3, at 32, available at <http://www.worldcounts.com/pcij/eng/decisions/1927.07.26/chorzow>

⁴⁴ ICSID, *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, reprinted in *Convention, Regulations and Rules*, 7, 18 (2003)

⁴⁵ ICSID, *Report of the Executive Directors, ICSID*, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), reprinted in *ICSID Convention, Regulations and Rules* 35, 41 (2003), available at [http://www.worldbank.org/icsid/basicdoc/ICSID English.pdf](http://www.worldbank.org/icsid/basicdoc/ICSID%20English.pdf) at para. 23

⁴⁶*Supra note 20*

because of control from a foreign national. Reference to the same has been made in *F. Salini v. Jordan*⁴⁷ and *G. Plama v. Bulgaria*.⁴⁸

70. A more difficult question arises when a Claimant seeks to expand the scope of the **host** state's consent to arbitration through an **MFN** clause. Even BITs envisioning arbitration in the same forum (e.g., ICSID) may be materially different in terms of their scope. Allowing investors to mix and match dispute settlement provisions may require states to apply configurations of dispute settlement provisions to which they have never actually consented giving way to unrestrained, provision-by-provision treaty shopping.⁴⁹
71. An **MFN** clause cannot be applied in a way that would violate basic principles of international law, impose results that could not have been intended by the parties, or otherwise disrupt the predictability and stability of the international investment law system.
72. When the BIT of a particular country is specific and it does not give explicit consent to treat a locally incorporated company as a foreign national, then the Claimants in such case cannot force this issue on the nation that as consent has been given in another BIT to some other state, the MFNC can be used to invoke the consent in their case. If such contentions were allowed, they would be against the basic purpose and the scope of the treaty passed between different nations.
73. The Claimants have contended that, Article 3 of the Bergonia-Conveniencia BIT (MFN clause) permits it to invoke Article VI. 8. of the Bergonia-Tertia BIT. Wherein express consent to treat nationals under foreign control as 'foreign nationals' is automatically granted to the concerned parties. But in the view of the respondents such an argument is without merit as the treaties made by Bergonia with third countries are in respect of Convenencia *res inter alios acuta*. The same was observed in the dispute between U.K and Iran, where it was observed that- *A third-party treaty,*

⁴⁷ *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 44 I.L.M. 573 (2004), available at <http://www.worldbank.org/icsid/cases/salini-decision.pdf>.

⁴⁸ *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 44 I.L.M. 721 (2005), available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>.

⁴⁹ *Supra note 20*

*independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is res inter alios acta.*⁵⁰

74. It is further to be noted that under the principle of *ejusdem generis* the MFNC can only be applied in respect to the same matter and cannot be extended to other matters different from those envisaged under the treaty. This means that the reference in the most favoured nation clause of the Bergonia-Conveniencia BIT to “matters” can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions. Thus, Article 3 of the Bergonia – Tertia treaty cannot be invoked in this particular way.
75. The decisions of *Maffezini* and *Siemens* resulted in the numerous difficulties of applying MFN clauses to dispute settlement provisions in practice. While these practical concerns do not put in question the general interpretive position, they should raise concerns to place limits on how and when dispute settlement provisions can be invoked through an MFN clause.
76. As with any treaty provision, however, MFN clauses must be understood first in terms of the words actually used. The most common formulation requires "treatment not less favorable" than that accorded to a third party. This wording places the burden on a Claimant to show that the third-party treatment is, in fact, more favourable.
77. In the present case the Claimant has particularly failed to consider the intention and reason behind the ‘automatic consent’ provided in the Tertian BIT. The automatic consent resulting in recognition of all Tertian controlled companies as ‘foreign nationals’, undoubtedly allows Tertian companies to gain access to international dispute resolution directly. However the international dispute resolution mechanism with regard the Tertian BIT is- conciliation. Conciliation is an absolutely different mechanism when compared to arbitration. Moreover an order in conciliation is not binding per se (unless turned into a written agreement).
78. An agreement to arbitrate in a BIT constitutes a waiver of sovereign immunity and consent to the jurisdiction of a forum that would otherwise be without power to issue a judgment binding on the **host** state. In every instance if such consent was made available to Convenencian persons unconditionally, it would imply that the

⁵⁰ CHARLES CALVO, *Le Droit International* §715, at 671 (Georges Jacob Orleans 1880)

Respondent would be subjected to a range of binding judgments in lieu of the waiver of sovereign immunity through such automatic consent. Therefore the burden on the Claimant in establishing that the treatment accorded to Tertia was a more favourable one has not been met and is hence the contention of violation of MFN is unfounded.

79. Parties are expected to express the intended scope of their **MFN** Clauses as clearly as possible. The Respondent has met the above condition duly by incorporating Article 1.2 of the Bergonia- Tertia BIT which reads as follows:

80. “Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.” This clearly bars Bergonia from trying to extend the intended scope and application of the MFN clause to the Claimant.

81. Thereby it is respectfully submitted that in the present case the Claimant cannot be allowed to invoke Art.VI.8 of the Bergonia-Tertia BIT as *firstly* MFN cannot be invoked in cases in which its application is explicitly denied. *Secondly* the Claimant has failed to prove that it has been meted out ‘treatment less favorable’. *Thirdly* consent of host state is crucial when establishing nationality of a state incorporated company as foreign. Providing such consent is the sole prerogative of the host state and MFNC cannot be utilized to negate such prerogative.

D. CONCLUSION ON JURISDICTION

82. In light of the above submissions, it is concluded that Medberg is a Bergonian national and therefore does not qualify to invoke jurisdiction to ICSID.

PART TWO: MERITS

ISSUE 2: WHETHER CLAIMANT'S EXPLOITATION OF ITS INTELLECTUAL PROPERTY IN BERGONIA CONSTITUTED AN INVESTMENT UNDER APPLICABLE INTERNATIONAL LAW

1. The objective of the BIT between Bergonia and Convenencia states as follows

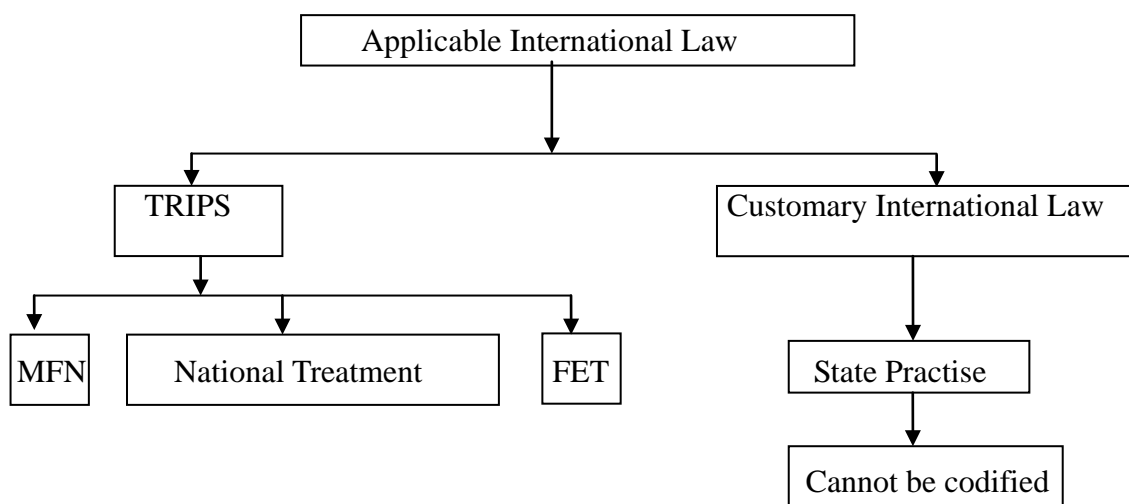
[d]esiring to intensify economic co-operation between both countries and create favourable conditions to increase investments by investors of one of the Contracting States in the territory of the other Contracting State,

2. Further,

[r]ecognizing that the encouragement and contractual protection of such investments are apt to increase the prosperity of both nations through their positive effects, such as the stimulation of business initiatives and transfer of capital and technology between the two countries.

3. Both Convenencia and Bergonia are members of WTO. By virtue of being a WTO member and having an inferior economy than Convenencia, Bergonia entered into this BIT with an intention of fostering economic prosperity, through providing conducive environment to the Convenencian Investors. This legitimate expectation of investors however comes along with host countries' concerns and duties towards its national interest. The enforcement of the enacted International law depends solely on the capabilities of the concerned state.
4. With the inclusion of definition of investment in Article 1 (d), Respondent understands that it has an obligation as a developing country to treat IP similar to all other kind of recognised investments.
5. The covered investment is a means by which the host states are obligated to offer similar protection to all investments, explicitly or implicitly covered in its definition of 'investment'. Such protection is sought to be extended through measures such as Most Favoured Nation Clause, National Treatment, Fair and Equitable Treatment etc.
6. However this obligation arising out of the parent BIT needs to be viewed in context of the applicable International laws too. The applicable International law in the present context are

- i. Customary International Law
 - ii. Provisions of TRIPS
7. A thorough perusal of the relevant principles and provisions of the abovementioned applicable International laws; highlights such circumstances under which, host countries obligation to extend protection to IP investments can be mitigated.
8. The above condition can be expressed by the following graph



A. WHETHER SUCH EXPLOILATAION IS COVERED BY TRIPS

9. Because **IPRs** are granted on a territorial basis, subject matter excluded from protection in a country belongs to the public domain there. It cannot be deemed an asset owned or controlled by a juridical or natural person.⁵¹ However, the treatment so mandatory to provide to a foreign investor is guided through TRIPS and additional documents thereof.
10. When it comes to the protection and treatment of IP, fairness and equity arises only in relation to enforcement and not as a standard of treatment. There is no reference to the fair and equitable standard of treatment for IP under TRIPS, though it relies expressly on national treatment and MFN.⁵²

⁵¹ CARLOS M. CORREA, *“Investment Protection In Bilateral And Free Trade Agreements: Implications For The Granting Of Compulsory Licenses”*, 26 Mich. J. Int’l L. 331

⁵² UNCTAD (1999), *op. cite.* 48, p.23.

11. BIT is most humbly submitted that the relevant International principles like National Treatment, most favoured treatment and fair and equitable treatment are not applicable to the present dispute.

12. *National Treatment* since is not contented by the claimant and since it is not applicable here the detailed appreciation of standard of treatment under 'national treatment' is beyond the subject matter of the dispute.

13. The contention of the claimant to avail principles of Fair and Equitable Treatment and Most Favoured Nation has to be discussed in length.

i. MOST FAVORED NATION CLAUSE

14. The Most Favoured Nation (MFN) clause was not present in pre-TRIPS International conventions on **IPRs**. It was incorporated in Article 4 of the TRIPS Agreement with a number of exceptions.⁵³ This provision means, for instance, that should most-advantageous conditions be granted to the members of a regional agreement (established after the entry into force of the WTO Agreement), such conditions must be extended, automatically and unconditionally, to all WTO Members.

15. The MFN clause in the context of investment agreements obliges the host country to extend to investors from the contracting party treatment no less favourable than it accords to investors from other countries. Different formulations of this clause may be found in investment agreements. While the MFN clause aims at creating equality of competitive opportunities between investors from different foreign countries, it limits host countries' room for manoeuvring with respect to future investment agreements, as it obliges a host country to extend unilaterally to investors from treaty partners any additional rights that host country grants to third countries in future agreements.⁵⁴

16. The TRIPS Agreement provides that members are free to determine the appropriate method of implementing the agreement within their own legal system and practise as

⁵³ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81 (1994) Article 4, [hereinafter TRIPS Agreement].

⁵⁴ *Supra note 33*

opposed to adhering to an International standard. TRIPS further require that national procedures concerning the enforcement of IP shall be fair and equitable, not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.⁵⁵

17. Further, Article 3(3) of the BIT between Convenencia and Bergonia incorporates this principle through

[N]either Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State.

18. Clearly laying down the details of the state action as treating any International investor less favorable under Article 4(3) of the BIT clearly shows that the Respondent are acting within the knowledge and the wordings of the sections runs as follows

[T]he following shall, in particular, be deemed “treatment less favourable” within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of this Article.

19. Basically, the promotion of an International minimum standard eliminates the TRIPS flexibility with respect to the method of implementation and the design of the national procedures for enforcement.

20. The TRIPS Agreement defines “protection,” in relation to national and MFN treatment, as including matters affecting *the availability, acquisition, scope, maintenance and enforcement* of IP as well as those matters affecting *the use* of IP specifically addressed in the Agreement.⁵⁶ The proprietary interest protected under the investment agreements is broader than TRIPS. The U.S. model BIT (2004), the FTAs negotiated recently and some of the European BITs provide for national treatment with respect to *the establishment, acquisition, expansion, management,*

⁵⁵ TRIPS Article 1:1 and 41:2.

⁵⁶ WTO, TRIPS Agreement, [emphasis added].

conduct, operation, and sale or other disposition of investments.⁵⁷ There are also BITs that provide for national treatment with respect to associated activities defined as including:

*[T]he organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including IP; the borrowing of funds; the purchase, insurance and sale of equity shares and other securities; and the purchase of foreign exchange for imports.*⁵⁸

A. As a result, under investment agreements, the proprietary interest to be protected as IP is wider than those recognised under TRIPS. Accordingly, the national treatment provisions, and the MFN provisions of investment agreements provide for expanded protection of IP of covered investment.

ii. FAIR AND EQUITABLE TREATMENT

21. The MFN clause sets forth a contingent, relative standard of investment protection. Many investment agreements also contain absolute standards,⁵⁹ such as “reasonable” or “fair and equitable” treatment,⁶⁰ generally with regard to the post-establishment phase.

⁵⁷ USTR (2004), Model BIT of the U.S., *op cite* note 16, Article 3:1, CAFTA, II: 3 : 1&2, US-Chile FTA , UK-India BIPP (1974), Article 4.3 (emphasis added).

⁵⁸ UNCTAD, U.S.-Sri Lanka BIT (1993), Article I.1 (e), See also the US BITs with Ecuador (1993), DRC (19 93) Tunisia (1993), Argentina (1995), Bangladesh (1986).

⁵⁹ For a distinction between "relative" and "absolute" standards, see UNCTAD, *supra* note 4, at 182. See UNCTAD World Investment Report 1996: Investment, Trade, and International Policy Arrangements at 174, U.N. Sales No. E.96.II.A.14 (1996). Some agreements, however, are limited to foreign direct investments. See, e.g., the agreement between EFTA and Mexico of 2000, which applies to "investment" for the purpose of establishing lasting economic relations with an undertaking such as, in particular, **investments** which give the possibility of exercising an effective influence on the management thereof." Free Trade Agreement Between EFTA and Mexico, Nov. 27, 2000, EFTA-Mex., art. 45, available at <http://www.sice.oas.org/Trade/mexefta/mexefta.asp>.

⁶⁰ For example, the United States-El Salvador BIT provides that "each Party shall at all times accord to **covered investments** fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law." Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador for the Encouragement and Reciprocal

22. Though the wording of this standard is ambiguous and may allow different interpretations, the standard provides a rule against which the policies and regulations of contracting parties would be judged. In some cases, the provisions relating to “fair and equitable” treatment in investment agreements are supplemented by an obligation not to impair investments by “unreasonable” and/or “discriminatory” measures.
23. Under the U.S. Model BIT, this principle is also meant to include the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings “in accordance with the principle of due process embodied in the principal legal systems of the world.”⁶¹
24. Furthermore, in the interpretation of fair and equitable standard of treatment as part or equivalent to International minimum standard, the investment agreements will require that:
- i. IP of covered investment receive fair and equitable treatment recognised as arising from the International minimum standard of treatment under customary International law that is evolving and developing through consistent practice of States;
 - ii. Where the investment agreements refers to the “highest International standard” or “International law” in general, IP of covered investment to receive fair and equitable treatment arising from the International minimum standard that are developing through harmonisation processes, such as the harmonisation process at WIPO;⁶² and,
 - iii. More importantly, in addition to state-to-state dispute Settlement, disputes on the grounds of fair and equitable standard of treatment or the expanded interpretation as arising from International minimum standard and as applied to IP of covered

Protection of Investment, Mar. 10, 1999, El Salvador-U.S., art. II.3(a), available at <http://www.sice.oas.org/bitse.asp#ESV>.

⁶¹ See, however, the U.S. Model BIT of 2004, which applies the national treatment principle to the establishment of foreign investors. Update of U.S. Model Bilateral **Investment** Treaty (released Feb. 5, 2004), art. 3, available at <http://www.state.gov/e/eb/rls/othr/38602.htm> [hereinafter U.S. Model BIT].

⁶² VIVAS-EUGUI, DAVID, “*Regional and Bilateral agreement and a TRIPS plus world: The Free Trade Area of the Americas (FTAA)*,” TRIPS Issues Paper 1, Quakers United Nations Office (QUINO), Geneva. p.8 (2003).

investment could be subjects of investor-to-state dispute settlement. In this regard, it is important to note that the fair and equitable treatment standard is among the most commonly used grounds for claims in investment disputes.

25. It is to be noted that differentiation in legal treatment is not the same as discrimination, and that WTO members can adopt different rules for particular areas, provided that the differences are adopted for bona fide purposes. A WTO panel held in this regard that:

[A]rticle 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than frustration of purpose.⁶³

26. The Doha Declaration on the TRIPS Agreement and Public Health⁶⁴ may be considered as authorizing differentiation in intellectual property rules if necessary to protect public health.⁶⁵ And in its reasoning for compulsory licensing, Respondent has opined that the condition of obesity was critical and this action is in confirmation with TRIPS.

27. Lastly, Article 31 of TRIPS which enshrines

[T]his requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable.

⁶³ See Panel Report, Canada - Patent Protection for Pharmaceutical Products: Complaint by the European Communities and Their Member States, Mar. 17, 2000, WTO Doc. WT/DS114/R 7.92.

⁶⁴ See, e.g., Declaration on the TRIPS Agreement and Public Health, Ministerial Conference, Fourth Session, Doha, Nov. 9-14 2001, WT/MIN(01)/DEC/2 (Nov. 20, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf, which confirmed the right to issue compulsory licenses and determine the grounds thereof.

⁶⁵ See, e.g., CARLOS CORREA, "Implications of the Doha Declaration on the TRIPS Agreement and Public Health" 9, 18, 41 (2002).

28. Article 4(2) of the parent BIT similar avenue is availed and through

[I]nvestments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as "expropriation") in the territory of the other Contracting State except, in accordance with the applicable laws of the latter Contracting State for the public benefit, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation has become publicly known.

29. In the dispute, Respondent has used the discretion so available to any developing country to apply any principle of International law in accordance with its domestic laws. However, this covered investment categorization would qualify the claimant to avail treatments like MFNC, National Treatment and Fair and Equitable Treatment.

30. It is most humbly submitted that in this regard the decision of the Respondent to work under the ambit of public purpose is duly justified and moreover it complies with TRIPS.

B. WHETHER SUCH EXPLOITATION IS COVERED BY THE EVER PREVAILING CUSTOMARY INTERNATIONAL LAW

31. States have existed for over ten centuries now and thus today there exist clear and well established International state practises, which the states duly follow and perform as and when required. Nations enter into agreements to treat other nations in a specific manner or to conduct themselves in a particular manner when dealing with such other nation. These agreements further the time immemorial practice of International cooperation and give rise to economic developments.

32. Sovereign in nature, Respondent understands itself to be a developing country. Now, with this intent the Respondent has discretion to follow International obligations as far as they are in conformity with its sovereign stature.

33. Customary International law is recognised as a state practise and has been observed in the following rulings

34. Therefore, there is no reason for deviating from such respected and observed source of International law.
35. However, the recent treatment in the zeal of concluding a BIT very quickly, some developed countries limit the scope and rights of a developing country thereby they mitigate the application of TRIPS. And this recognized principle is accepted by both US, EU and Australia and deviated towards a debate of TRIPS Plus.
36. The term ‘*TRIPS plus*’ is used to cover two different types of consequences, TRIPS confers on its Members a discretion to implement “more extensive protection” than is conferred by TRIPS standards (see Article 1.1). TRIPS also allow members to qualify the operation of some standards, to choose amongst standards or to choose when to adopt standards (‘option-creating standards’). So, for example, Article 27.3 allows Members to qualify the standard of patentability in Article 27.1 by excluding some subject-matter from patentability and Article 27.3(b) gives Members a choice as to how to protect plant varieties. The transitional provisions in Articles 65 and 66 create entitlements for developing countries, former centrally planned economies and least-developed country members as to the timing of the adoption of TRIPS standards.⁶⁶
37. The claimant’s claim of treating patent under the shell of protected investment would mean for the claimant to deny some of the accepted principles of public International law.
38. Further, **NAFTA Free Trade Commission (FTC)** issued a binding interpretation on July 21, 2001. According to this interpretation:⁶⁷

[A]rticle 1105 (1) prescribes the customary International law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary International law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate International agreement, does not establish that there has been a breach of Article 1105 (1).

⁶⁶ Accessed from http://www.bilaterals.org/article.php3?id_article=1999 on 10th August 2009

⁶⁷ *Supra note 33*

39. In considering the meaning and implications of the FTC interpretation, in the context of the NAFTA case *ADF Group Inc. v. United States of America*⁶⁸ the **United States** expressed the view that the customary International law referred to in NAFTA Article 1105 (1) is not “frozen in time” and that the minimum standard of treatment does evolve. The FTC interpretation in the view of the United States refers to customary International law “as it exists today”.
40. The above being the best example of pre defining what does actually a state means to specify when they try to invoke customary International law. Respondent realises that the right to act in accordance with the customary International law can never be legally bound as it is an uncodified and a continuing state practise. The extension of this interpretation of customary International law would mean the violation of sovereign rights of the county and this is legally guaranteed under Article 31 of TRIPS.
41. In the same context, *Mexico*, corrected the interpretation of its submission by the *Pope & Talbot* Tribunal. Although the test in *Neer* does continue to apply and “the conduct of government toward the investment must amount to gross misconduct, manifest injustice or in the classic words of the *Neer* claim, an outrage, bad faith or the wilful neglect of duty”, Mexico also agrees that “the standard is relative and that conduct which may have not violated International law [in] the 1920s might very well be seen to offend Internationally accepted principles today”.⁶⁹
42. In the light of the above mentioned submissions, it is most humbly contented that the attempt to include patent as such under the ambit of customary International law would in itself mean to violate the special treatment a country offers in a state- state dispute. Extending this to the class of investor state dispute would mean compromising its own stand in the International relations. So it is most humbly submitted that patent as such cannot be included under protected investments as far as customary International law is considered.

⁶⁸ The North American Free Trade Agreement, Jan. 1, 1994, Can.-Mex.-U.S., art. 1101.2, 32 I.L.M. 289 at Art. 1103.

⁶⁹ UNCTAD, *Most-Favored-Nation Treatment*.

43. A valid dispute before the Tribunal would be a discrimination against the investor as compared to a placed in the similar situation. However, in this particular case, there has been no discrimination and the relevant domestic law is applicable to all the similarly placed investors in the identical matter. Therefore The MFNC and National Treatment clauses In the BIT are not attracted. Further, domestic policy of a county is a matter of sovereignty and that cannot be challenged in any other forum except the national Courts.

44. Therefore it is most humbly submitted that Claimant's exploitation of its intellectual property in Bergonia does not constitute an investment under applicable International law and patent as such does not constitute a protected investment.

ISSUE THREE: WHETHER THE COMPULSORY LICENSE AMOUNTS TO EXPROPRIATION OR DISCRIMINATION, OR OTHERWISE VIOLATES GENERAL PRINCIPLES OF INTERNATIONAL LAW.

A. PATENT RIGHTS ARE RIGHTS CONFERRED BY THE STATE AND NOT INHERENT IN NATURE.

45. **In understanding** the relationship between compulsory licensing and intellectual property rights, it is important to understand it in its legal context. Compulsory licensing is certainly an interference with intellectual property rights. Whether it is justified or not depends on the facts of each case. However, to understand such interference in its legal context, we need to understand the exact nature of the rights interfered with. This is where a jurisprudential understanding of intellectual property rights and limitations thereon assumes significance. The first question to be answered is, whether a patent right is a right conferred by the State or it is an inherent right merely recognized by the State.⁷⁰ If the former is the case, State's interference will amount only to a limited withdrawal by the State of a right which is its own creation. In the former case, the usurpation is completely legal and justified. In the latter case, though there may be moral justifications and mitigating circumstances, the legality of the action is, to say the least, questionable.

46. It is important to note that 'patent holders rights' are not recognized as inherent or fundamental rights even in the most prominent and specific modern treaties and international laws addressing IPR. IPR(s) are always looked upon as rights conferred by the state on a person in order to form a due incentive. It is not a natural or fundamental right that a person is born with or acquires inherently. Jurisprudentially speaking the right is a form of reward for the labor of a person which he has invested in creation of a 'property', a manner of acknowledging his creativity and allowing him to bear the fruits of the same exclusively for some period of time.

⁷⁰DEEPAK RAJU AND AYESHA ALI KHAN, "Hurdles in way of Compulsory Licensing by Developing Nations: Multilateral Murder or Bilateral Suicide? : An Empirical Analysis of Bilateral Investment Treaties of India, Bangladesh and Pakistan." 2 NUJS L. Rev. (2009).

47. Further, if patents were inherent or natural rights, every person would be born with them, they wouldn't be the possession of a selected few and one wouldn't have to apply to state for their due acknowledgement and procurement. The grant of the patent is an approval or authorization made by the Government only after the inventor has followed a set of procedures to apply for the patent.⁷¹ The investor thus acquires a specific legal right after approval from the state. Also, an essential characteristic of an inherent right is that it never be alienated from the person and can never cease to exist after a certain period, unlike patent rights.

48. In addition, rights that are inherent are natural and can be held only by a natural person, but patent rights are often even held by juridical personalities an example being pharmaceutical companies.

49. Thus, a due consideration of above facts clearly illustrates that a patent right is a right conferred by the State and thus the State's interference will amount only to a limited withdrawal by the State of a right which is its own creation.

B. THE ISSUANCE OF COMPULSORY LICENSE BY BERGONIA IS IN CONFORMITY WITH PROVISIONS OF TRIPS AND THE DOHA DECLARATION.

50. Compulsory licensing is an extraordinary legal instrument where an administrative or a judicial body authorizes a licensee to exploit the patent without the consent of the patent holder.⁷² The purpose of the Compulsory License (CL) is to provide a safeguard against lack of use of a patent or misuse of the patent holder's monopoly rights in order to protect the public interest.⁷³

⁷¹ See also MICHAEL EWING-CHOW, "Thesis, Antithesis and Synthesis: Investor Protection in BITs, WTO and FTAs" 30:2 UNSW L. J. 548, at 556 (2007).

⁷² See generally, ROBERT BIRD, DANIEL R. CAHOY, "The Impact of Compulsory Licensing on Foreign Direct Investment: a Collective Bargaining Approach", American Business Law Journal Vol. 45, Issue 2, summer (2008).

⁷³ EDMUND W. KITCH, "The Nature and Function of the Patent System", 20 J.L. & ECON. 265, 266 (1977) (restating the basic notion historically agreed upon by economists: The patent is a reward that enables the inventor to capture the returns from his investment in the invention, returns that would otherwise (absent secrecy) be subject to appropriation by

51. The term “compulsory license” refers to circumstances in which a Government intervenes to compel the owner of an intellectual property right, normally a patent, to grant *use* of that right to the state or to other third parties. The Government authorization, whether by an executive, administrative or judicial authority, is given without the consent of the intellectual property owner and normally on an *ex post* basis in response to some emergent need or to concerns of anti-competitive use of patent rights.⁷⁴ The CL does not revoke the patent as such but it revokes the right of the patent holder that allows him to control how the patent may be used.

52. The most prominent and specific modern treaty to address compulsory licensing is the Trade-Related Aspects of Intellectual Property (“TRIPS”) agreement,⁷⁵ which came into effect in 1995 as part of the Uruguay Round of trade discussions.⁷⁶ TRIPS Agreement was the first comprehensive international treaty on intellectual property rights.⁷⁷ It sets forth minimum standards for worldwide intellectual property regulations, including patents.⁷⁸

53. Under the TRIPS Agreement, a patent owner is entitled to an exclusive right, for a limited time, to exclude third parties from making, using, offering for sale, selling, or importing the patented invention.⁷⁹ A patentee’s right to exclude others, however, is not absolute under the TRIPS Agreement.⁸⁰ Exclusive rights are therefore central to

others).

⁷⁴CARLOS M. CORREA, “*Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights?*” Aug (2004).

⁷⁵See KEITH MASKUS, “*Intellectual Property Challenges for Developing Countries: An Economic Perspective*”, Uill L Rev. 457, 464-66 (2001).

⁷⁶CHRISTOPHER MAY & SUSAN K. SELL, “*Intellectual Property Rights; A Critical History*” 161-62 (2006). The Uruguay Round was also significant for creating the World Trade Organization (“WTO”), which as the co overseer of TRIPS with the World Intellectual Property Organization (“WIPO”) provided significant enforcement powers.

⁷⁷See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]; see also JAYASHREE WATAL, “*Intellectual Property Rights in the WTO and Developing Countries*” 2-3 (2001) (commenting on breadth of TRIPS Agreement).

⁷⁸MICHAEL BLAKENEY, “*Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the Trips Agreement*” 1 (1996) (negotiating history of the agreement).

⁷⁹*Ibid.*

⁸⁰SARA M. FORD, “*Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents*”, 15 AM. U. Intl. L. Rev. 941, 949 (2000) (noting TRIPS Agreement does not explicitly mention term “compulsory license”); see also THOMAS A. HAAG, “*TRIPS Since Doha: How Far Will the WTO Go Toward Modifying the Terms for*

the intellectual property system, yet this is precisely where the compulsory license operates. It enables the Government concerned – which may have (through its intellectual property office) registered the IPR for the owner in the first place – to override that exclusivity by authorizing use of the privately owned IPR for itself or for one or more third parties, usually in face of an emergency, while dictating any relevant terms or conditions to the license.

54. The provisions for CLs were among the most contested in the TRIPS negotiations.⁸¹

In fact, it has been an intensely debated provision in the negotiating history of the TRIPS agreement. Article 31 of the TRIPS Agreement, one of its most detailed provisions containing “a splay of conditions,”⁸² does not actually use the phrase “compulsory license,” instead referring to “use without authorization of the right holder.” The Article nonetheless permits the grant of a compulsory license by WTO member states, so long as certain procedures are followed and terms fulfilled.

55. Article 31 of the Agreement, entitled “Other Use without Authorization of the Right Holder,” provides for compulsory licensing of patented inventions.⁸³ Under TRIPS, compulsory licensing is defined as the unauthorized use of a patented invention under a Government granted license to the member state or to a third party.⁸⁴ The resulting Article 31 of the TRIPS does not define a CL, nor does it specify when CLs may be granted.⁸⁵ It merely sets out the procedures that must be followed and some procedures that ought to be fulfilled. Certain special and additional requirements have been laid down for compulsory licensing in certain specific circumstances.

Compulsory Licensing?” 84 J. Pat & Trademark Off. Soc’y 945, 952-53 (2002).

⁸¹ See REICHMAN & HASENZHAL 2003 for a negotiation history.

⁸² WILLIAM R. CORNISH, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*, 4th ed. (1999).

⁸³ HAROLD C. WEGNER, “*Injunctive Relief: A Charming Betsy Boomerang*”, 4 Nw. J. Tech. & Intell. Prop. 156, (2006) (explaining meaning of compulsory license).

⁸⁴ ALLISON CYCHOSZ, Case Comment, “*The Effectiveness of International Enforcement of Intellectual Property Rights*”, 37 J. Marshall L. Rev. 985, 991-95 (2004).

⁸⁵ “*The WTO Decision on Compulsory Licensing*”, Kommersekollegium, http://www.kommers.se/upload/Analysarkiv/Arbetsomr%C3%A5den/WTO/Handel%20och%20skydd%20f%C3%B6r%20imateriella%20r%C3%A4ttigheter%20-%20TRIPS/Rapport%20The_WTO_decision_on_compulsory_licensing.pdf (Last accessed on 15th August 2009)

56. Article 31 does make reference to several potential reasons for authorizing a compulsory license: *First*, there is recognition in Article 31(b) that a national emergency or circumstances of extreme urgency could justify authorization of a compulsory license; *second*, Article 31(b) refers to cases of public (Governmental) non-commercial use; *third*, Article 31(k) recognizes that a compulsory license may be issued to remedy anti-competitive practices; and *fourth*, Article 31(l) recognizes that a compulsory license may be needed to permit the exploitation of an important “second” patent (i.e., “dependency patent”), which cannot be exploited without infringing on the patent that is the subject of the compulsory license. It is to be noted, that Article 31 in itself places no restrictions on the grounds that a member state may use in order to authorize a compulsory license.⁸⁶

57. As Article 31(b) of the TRIPS, explicitly states that the Government is authorised to issue a compulsory license in cases of public purpose, national or extreme urgency, the present case clearly falls within the ambit of this clause as the compulsory license was issued by the Bergonian IP office to address urgent domestic medical needs. The state of Bergonia was facing a serious health crisis in the form of obesity and the drug in question was seen to be a definitive cure for the same.

58. The developing countries, advocated for a broad reading of the compulsory licensing terms under the TRIPS agreement.⁸⁷ This led to the Doha Ministerial Declaration on the TRIPS Agreement and Public Health (Doha Declaration)⁸⁸, adopted by the WTO in 2001 which attempted to clarify ambiguities in the TRIPS Agreement related to public health concerns in developing nations.⁸⁹ The Doha Declaration affirmed that

⁸⁶ See also JAYASHREE WATAL, *“Intellectual Property Rights in the WTO and Developing Countries” 2-3 (2001)* (describing no restrictions for granting compulsory license in final text of agreement). Various provisions of the TRIPS Agreement refer to specific circumstances where compulsory licenses may be granted, including national emergencies, anti-competitive practices, dependent patents, and public non-commercial use; however, these circumstances are not intended to be limiting.

⁸⁷ *Ibid.*

⁸⁸ See TRIPS Agreement, Arts. 7, 8, 31 (referring to specific grounds for granting compulsory licenses).

⁸⁹ See World Trade Organization, *Ministerial Declaration* of 14 November 2001, WT/MIN (01)/DEC/1, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration] (affirming interpretation of TRIPS Agreement to promote public health). The Doha Declaration was in response to particular concerns raised by developing nations, namely the AIDS/HIV, malaria, and

“the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health.”⁹⁰ The Doha Declaration further affirmed that:

[E]ach Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licences are granted.”⁹¹ Finally, the Doha Declaration clarified that a member state did not need to declare a national emergency prior to granting a compulsory license.⁹²

59. The Doha Declaration however did not settle the contentions rose against Article 31(f). Rather, the TRIPS General Council resolved the issue in August 2003 when it waived the provision requiring that compulsory licenses predominantly supply the domestic market, thereby allowing members to export products made under a compulsory license to countries lacking production capabilities.⁹³ This stand of the General Council clearly establishes that there exists no legal provision or condition under TRIPS or any other International Law that requires the State of Bergonia to place a ban on, or otherwise restrict exportation of the medicines during the period of CL. There is no legal or moral obligation whatsoever on part of Bergonia that demands that the concerned medicine be primarily supplied to the domestic market in such a manner that makes exportation an inaccessible option.

60. The Contention of the Claimant is that – ‘absence’ of absolute supply to domestic market and restriction on exports, is sufficient basis for doubting the severity of a health problem such as obesity, that authorities of Bergonia duly recognise as a ‘serious condition’. This contention of Claimant is not only without any merit, but also has no legal backing. In fact the observation of the General Council regarding Art 31 (f) highlights the futility of such a contention of Claimant.

tuberculosis epidemics in these nations.

⁹⁰See *Doha Declaration*, (declaring TRIPS Agreement does not prevent measures to protect public health).

⁹¹See *World Health Organization, the Doha Declaration on the TRIPS Agreement and Public Health*, http://www.who.int/medicines/areas/policy/doha_declaration/en/print.html. Last accessed on July 21st 2009) (summarizing compulsory licensing terms in TRIPS Agreement). A broad interpretation of ARTICLE 31 allows compulsory licenses related to “non-working of patents, public health, or public interest.”

⁹²The Doha Declaration confirmed that *[e]ach Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency . . . including those related to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.*

⁹³General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm (detailing amendments made to TRIPS Agreement).

61. The thrust of the compulsory licensing debate centered on the licensing of pharmaceutical products to treat public health epidemics in developing nations.⁹⁴ The Doha Declaration on TRIPS and Public Health 2001, concerning pharmaceutical patents and public health,⁹⁵ recognized the gravity of the public health problems afflicting many developing and least developing WTO Members, especially those resulting from HIV/AIDs, tuberculosis, malaria and other epidemics. This can also be seen to include any such medical condition or health hazard that is recognised by the concerned nation as a serious threat or problem. This makes it abundantly clear that TRIPS does not prevent WTO Members from taking measures to protect public health.⁹⁶ This should further be interpreted and implemented in a manner supportive of Members' right to promote access to medicines for all.
62. Furthermore, as mentioned above there exists no requirement of a national emergency being declared prior to granting a compulsory license. Therefore when such 'public purpose, national emergency or extreme urgency' relates to a medical condition, a declaration of the medical condition as an 'epidemic' or 'serious problem' need not be made through official channels in advance. The state of Bergonia has thus issued the CL in conformity with the above legal position. The CL was issued for the public purpose of 'catering to urgent medical needs' arising out of the grave condition of obesity in Bergonian population. The stand of MedBerg-refusing to grant license to 'any' Bergonian company for six months aggravated the crisis. This further justified the grounds and need for the issuance of a compulsory license. The DOHA declaration illustrates the importance of a state's duty and prerogative to handle a public health problem afflicting its nationals.
63. DOHA declaration acknowledges the responsibility of the state to take measures to protect public health as being one of paramount nature. Thus, providing for relaxation and exceptions to facilitate productive and effective handling of 'public health

⁹⁴SARA M. FORD, "*Compulsory Licensing Provisions under the TRIPs Agreement: Balancing Pills and Patents*", 15 Am. U. Int'l. L. Rev. 946 (2000) (articulating issues central to compulsory licensing debate).

⁹⁵Adopted in the Ministerial Conference of the WTO in November 2001 (WT/MIN (01)/DEC/2).

⁹⁶See also SANDRA BARTELT, "*Compulsory Licenses Pursuant to TRIPS Article 31 in the Light of the Doha Declaration on the TRIPS Agreement and Public Health*", 6 J. World Int'l Prop. 283

emergencies'. CL is such an exception that plays a very important role in addressing such crisis as being faced by the state of Bergonia. The issuance of CL in an hour of need is recognised as a legitimate and necessary step by DOHA declaration and TRIPS; therefore the actions undertaken by the State of Bergonia solely for securing the public health of its citizens is not only a part of its duty but also its right to protect its nationals from any injury, harm or loss. It is a prerogative and right that cannot be denied to any Sovereign State under the principles of International law.

64. It is respectfully submitted to this Honorable Tribunal that the provision for compulsory licensing allows any national Government or third party to avail of the flexibility in certain circumstances, such as in the case of national emergency to deal with public health emergency or public non-commercial use by the patent holder, as laid down in the TRIPS agreement. It is a common fallacy that a country can issue compulsory license only in the case of an emergency, but the Doha declaration on public health confirms that countries are free to determine the grounds for issuing compulsory license.⁹⁷

C. COMPULSORY LICENSE ISSUED BY THE STATE OF BERGONIA FALLS UNDER THE LEGAL POSITION OF THE “EMINENT DOMAIN OF INTELLECTUAL PROPERTY”.

65. The Government's grant of patent rights confers a legal monopoly within the host state that is specific to the invention covered by the particular patent. Although the rights conveyed by a patent may vary somewhat from country-to-country, in general, the patent is a specific legal property right that the Government grants to the inventor in exchange for the inventor's agreement to share the details of the invention with the public.⁹⁸ As mentioned above, the rights conferred on the patent holder are exclusive and therefore should be exercised cautiously, keeping in mind the interest of the host state and its nationals.

⁹⁷*Compulsory licensing of pharmaceuticals and TRIPS*, http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm. Last accessed on 4th September 2009.

⁹⁸ See ANDREW NEWCOMBE, “*The Boundaries of Regulatory Expropriation in International Law*”, 20:1 ICSID Review FILJ, 8-9 (2005).

66. Compulsory licensing is often called the “*eminent domain of intellectual property*”.⁹⁹

This position presupposes the State as the giver and protector of intellectual property rights and therefore attributes to the State an inherent power to interfere with these rights where a public purpose requires to be fulfilled. The requirements of the society at large are weighed against the rights of the patent holder and where there are pressing public requirements, a compulsory license is issued to meet such requirements. Hence, most patent legislations recognise some form or the other of compulsory licensing. As emphasized previously, in the multilateral framework of TRIPS, compulsory licensing is recognised as flexibility available to the Members for attaining purposes such as those relating to public health goals.¹⁰⁰

67. CL is a recognised method that allows the parent state to effectively handle an extreme emergency or crisis. In the present case this was seen to be a medical emergency that needed to be addressed by the State immediately. International instruments, international laws and even the provisions of the Bergonia-Conveniencia BIT, namely Art. 4(2) recognise ‘public purpose’ as a legitimate ground for issuance of CL.

68. When the lives and health of people of a state is evaluated against the temporary withdrawal of certain rights of a patent holder, the former is bound to be considered more important. Unrestricted enjoyment of a right cannot be practised at the cost of human lives and health. The sanctity of the latter cannot be waived away for protection of commercial monopoly of the former. Patents are rights granted by Governments and the principle of eminent domain emphasises that, in a situation of an emergency the state has every right to revoke what it had granted in the first place. The same principle has been adhered to in the present circumstances.

69. On the facts of the matter, a meagre production of 15% by MedBerg and its explicit denial to grant licence to any Bergonian company, in the face of a serious medical problem, amounts to exploitation of its exclusive right in manner that is sure to harm

⁹⁹TAMSEN VALOIR, “*Compulsory Drug License Proposed: States Taking Drugs under Eminent Domain*”, US Healthcare and Pharmaceutical Newsletter, (June 2006), available at <http://www.bakernet.com/NR/rdonlyres/1E185790-6BDD-47E0-80BD-BAB95484DF4A/0/NAHealthcare0606.pdf>.

¹⁰⁰*Supra note 70*

the people of the state of Bergonia and abuse of power of the monopoly granted by the patent to MedBerg. Thus, CL is used as an instrument to gain access to drugs which otherwise would be scarce.

70. Countries can indicate, according to domestic interests, the hypotheses for granting compulsory licensing. *Carlos Correia*¹⁰¹ points out that developing countries should use compulsory licensing to promote access to medications in the following situations:

- a. Refusal to accept, which occurs whenever the patent-holder refuses to grant the required voluntary license in reasonable terms, when the non-granting of the license affects the availability of a product or the development of a new activity;
- b. A declared state of national emergency, as in cases of natural catastrophes, wars or epidemics;
- c. When there is a public health crisis, to ensure the population's access to essential medications, or situations of public interest, including those of national security.

71. In the present case, MedBerg adamantly refused to grant a license to any Bergonian company on the basis of flimsy apprehensions, while knowing that such acts would lead to paucity in the availability of the essential drugs that were dearly required for effectively dealing with the serious health crisis. Such actions on the part of the Claimant form a strong ground for the developing nation of Bergonia to resort to issuance of the CL as stated above. Further the extent of the condition of obesity in the people of Bergonia was declared to be a serious crisis¹⁰², with 34% males and 38% females affected. Thus the access to essential medication in such circumstances was all the more necessary to preserve public health and interest. Therefore recognized method or measures undertaken to achieve the same were required.

¹⁰¹CARLOS M. CORREA, *"Integrating public health concerns into patent legislation in developing countries"*, Geneva: South Centre, October (2000) http://www.southcentre.org/publications/publichealth/publichealth-12.htm#P1449_146569. Last accessed on 21st July 2009.

¹⁰² "Clarification to Question 65"

72. Therefore, Claimant cannot be allowed to use the garb of patent rights granted to it, as a means to deny the Bergonian nationals access to an essential medicine. Bergonia is a developing country¹⁰³ and the proportion of its medical needs to its sources is insufficient; unlike that of a developed country. Thus, in the present case the issuance of compulsory license was the only resort the State of Bergonia had, to address the grave condition it had been faced with. Thus, public purpose ought to be realised even at the cost of temporary withdrawal of patent rights.

D. THE STATE OF BERGONIA UTILISED THE COMPULSORY LICENSE FOR THE REALISATION OF PUBLIC PURPOSE.

73. TRIPS Article 8 (Principles) provides that:

[M]embers may, in formulating and amending their law and regulations, adopt measures necessary to protect public health... Appropriate measures... may be needed to prevent the abuse of intellectual property rights by right holders and the resort to practices which unreasonably restrain trade.

74. The measures adopted by Bergonia are compatible with Article 8 of TRIPS which clearly specifies that members can adopt measures necessary to protect public health and the same was done in the present situation. Countries have the right to regulate the exercise of the rights granted by the patent in order to fulfil the public good.¹⁰⁴ In this context, compulsory licensing appears as an important instrument to increase the supply of medicines at reasonable prices. Compulsory license is granted in case of national emergency, or when a state wants the invention to have public use on non-commercial grounds. The license should not be exclusive and should predominantly be used for the aim for which it was issued.

75. The facts of the present case illustrate that the condition stabilised promptly after the CL was issued. If the CL in question would have been used for any ulterior purposes, diverting from the basic aim, the stable condition would not have been achieved. Further considering that the condition stabilized even when exportation was being

¹⁰³ GDP USD 7535.

¹⁰⁴ PHILIPPE CULLET, *Patents and Health in Developing Countries in Law and development: Facing Complexity in the 21st Century*, Cavendish Publishing, London, p.82 (2003).

practised it can be safely concluded that the exports had no detrimental effect on the availability whatsoever. The facts of the case are silent on the percentage and purpose of the exportation. Therefore to deduce that the exports were huge or that they were commercially directed would be an unfair presumption to make.

76. In fact in this regard, it can be suggested that during the issuance of a CL, it is a general practice to export to such other countries that lack production capabilities. It is unreasonable to assume that the exportation by State of Bergonia is a commercial one in absence of any fact or evidence collaborating to the same. Such a one sided presumption will in fact allow the Claimant's to cast unwarranted doubts on the intention of State of Bergonia behind the CL.

77. On the facts of the matter, the main goal of supplying the medicine to the domestic market, in lieu of the crisis, is being duly met. Also, the CL is not exclusive in nature (so as to create any monopoly) but is in fact awarded to a group of six companies. The *modus operandi* of Bergonia in itself is sufficient to reflect that there has been no diversion from the aim sought to be achieved.

78. The State of Bergonia patiently waited for a period of six months after MedBerg and Biolife's contract was terminated. Neither did MedBerg change its stand of 'denying license' to all Bergonian companies, nor did it make any attempts to increase production from a meagre 15%. The above situation demanded prompt and effective redressal that could make up for the lack of availability of medicine while simultaneously controlling the situation.

79. Thus issuance of CL was a vital and necessary measure. The need of the CL coupled with the precaution taken by Bergonia to ensure that a monopoly is not established, clearly reflects that the sole aim was to cater to the urgent medical need and to stabilise the situation. None of the above facts therefore reveal any such act that can be said to be of a commercial nature or against the said aim.

E. STATE OF BERGONIA HAS FULFILLED ITS OBLIGATIONS UNDER THE BERGONIA-CONVENENCIA BIT.

80. Bergonia will establish numerous of ways in which the State of Bergonia and the IP office complied with the BIT in its efforts to accommodate the Claimant. It will demonstrate that it met its obligations towards the Claimant.

i. THE FAIR AND EQUITABLE TREATMENT PRINCIPLE: NOT VIOLATED.

81. Bergonia treated the investment fairly and equitably, and therefore, did not violate Article 2(2) of the BIT. The fair and equitable treatment clause, located in Article 2(2) of the BIT, guarantee “fair and equitable treatment” of investors’ investments “at all times.” The Claimant has the burden of proof to show that Bergonia violated Article 2(2). The burden falls on the Claimant to prove that the host state’s acts or omissions “had a direct negative impact” on its investments, as well as establishing a clear link of causation between the two.¹⁰⁵ In addition, the Claimant must establish that the host state’s actions were “wilfully wrong, actually malicious, or so far beyond the pale that [the State] cannot be defended among reasonable members of the international community.”¹⁰⁶

82. The Tribunal in the NAFTA case of *SD Myers v. Canada*¹⁰⁷ held that when interpreting the minimum international standard of treatment under NAFTA, a Tribunal:

[D]oes not have an open-ended mandate to second-guess Government decision making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.

¹⁰⁵IOANA TUDOR, *The fair and equitable treatment in the International law of foreign investment*, Oxford, New York, 138 (2008)

¹⁰⁶*Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, at para 290.

¹⁰⁷*SD Myers Inc v. Canada*, First Partial Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, 13 November 2000, para 262.

83. But the Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.¹⁰⁸

84. In the present case, there was nothing to prove or establish that the acts of Respondent were in fact malicious or wilfully wrongful. It was the prerogative of the Government to protect its citizens from falling victim to the serious health crisis. In doing so, the issuance of compulsory license was of utmost importance and thus the same was implemented. This by itself does not constitute denial of the FET standard as it was the obligation of the state to take adequate measures to address the urgent medical needs of its citizens.

85. Finally, the host state stated in *Ronald S. Lauder v. Czech Republic*, that there is no exact definition of the fair and equitable treatment obligation.¹⁰⁹ As the obligation is concerned with the state's conduct rather than the result of the investment, the fact that the investor loses money does not indicate a breach of obligation.¹¹⁰ Applying this framework to the facts of the case, it becomes clear that the Claimant has failed to carry its burden of proof of showing causality between the state's action or omission and the harm to its investment, as well as showing that the state's actions were unreasonable. Therefore, the Tribunal should dismiss its claims under Article 2(2) of the BIT against Bergonia.

86. The Respondent submits that it is necessary to seek a harmonization of the applicable norms and to find a balance between the investors' rights and the powers of the State. This harmonization, for instance, could mean that, in the case concerning the standard

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ronald S. Lauder v. Czech Republic* UNCITRAL, Award of September 3, 2001, at para 291.

¹¹⁰ *Ibid.* See also CHARLES OWEN VERRILL, Jr., "Are WTO Violations Also Contrary to the Fair and Equitable Treatment Obligations in Investor Protection Agreements?," 11 ILSA J. Int'l & Comp. L. (2005)

of fair and equitable treatment, what is fair and equitable in ordinary times is not the same as what is fair and equitable in an emergency. Therefore, it is clear from the facts that the measures were taken by the Respondent in the context of an unfolding crisis. They may have contradicted commitments made to the Claimant but each one of them provided the reasons why it was taken.

ii. LEGITIMATE EXPECTATIONS: NOT VIOLATED

87. It was observed in the award in *Saluka*, that the practice of investment, involves balancing the investors “legitimate and reasonable expectations” with the host state’s “legitimate regulatory interests.”¹¹¹ As for what constitutes a reasonable expectation, the *Saluka* Tribunal indicated that it is not reasonable to expect circumstances “prevailing at the time the investment is made remain totally unchanged” and to not take into account the host states’ legitimate right to regulate domestic matters.¹¹²

88. The recent award in *Parkerings v Lithuania* expressly recognizes the importance of protecting the policy space of host states.¹¹³ The Tribunal confined an investor’s legitimate expectations with respect to host states’ policy space:

*[T]he investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.*¹¹⁴

89. However, in present context, contrary to the Claimant’s assertions, the Bergonian Government has not acted inconsistently over the term of the investment. There had been no change in Bergonia’s economic policy or laws that affected the investment environment or the Claimant’s investment. The investor expects the host state to act consistently¹¹⁵ and in conformity with legitimate expectation. In the present case, the

¹¹¹*Saluka Investments BV (The Netherlands) v. Czech Republic* UNCITRAL, Partial Award of March 17, 2006, at para 306.

¹¹²*Ibid.*

¹¹³*Parkerings-Compagniet AS v Lithuania*, Award on jurisdiction and merits, ICSID Case No ARB/05/8, award 14 August 2007.

¹¹⁴*Ibid.*, para 333.

¹¹⁵*Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (“Tecmed”)*, ICSID

issuance of the compulsory license was done to meet an emergent public purpose which is a serious medical crisis. Therefore, it becomes clear that this was a measure to address an urgent need, which was not perceived by the State itself and therefore the principle of legitimate expectation cannot be applicable to the present scenario as such expectations cannot be attached to exceptional circumstances such as this.

90. Allowing such a claim in unforeseeable situations, would create an unfair strict liability standard for Governments. The Tribunal in *AAPL v. Sri Lanka*¹¹⁶ declined to extend the full protection and security clause beyond the physical destruction of property because it did not want to create a strict liability standard. **Such a standard would make the Government liable for any harm to the investment even if it occurred under circumstances beyond the state's control.**

91. In addition, allowing the implementation of a strict liability standard would open the flood gates to arbitration, and investors worldwide may try to impugn Governments for losses in investment value. It is a well-known principle that there are inherent risks that the investor takes in the arena of foreign direct investment. These inherent risks would include factors such as *force majeure* and other unavoidable and unforeseen situations. If investors are not pleased with the results of their risks, they may try to hold Governments accountable for changes in the investment environment. If Governments were held liable for losses in investment value which are beyond their control, they would likely change their policies to deter foreign direct investment. This could have a disastrous effect on the economies of the host state and investors' states. This would run counter to the goals of achieving cooperation and peace between countries, which is the primary objective that is sought to be realized by a BIT.

Case No. ARB(AF)/00/2,
Award of May 29, 2003, at para.154
¹¹⁶*Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of June 27, 1990 at para 45.

iii. ISSUANCE OF COMPULSORY LICENSE DOES NOT AMOUNT TO AN EXPROPRIATION.

92. Consistent with the notion of territorial sovereignty, the classical rules of international law have accepted the host state's right to expropriate alien property in principle. Indeed, state practice has considered this right to be so fundamental that even modern investment treaties (often entitled agreements 'for the promotion and protection of foreign investment') respect this position. Treaty law typically addresses only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected. Law on expropriation relates to the conditions under which a state may expropriate alien property. The classical requirements for a lawful expropriation are a public purpose, non-discrimination as well as prompt, adequate, and effective compensation. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, does not constitute indirect expropriations.

93. It is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required. A very significant factor in characterizing a Government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognized "social purpose"¹¹⁷ or the "general welfare"¹¹⁸ by regulation. "The existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'".¹¹⁹ The public health crisis in the present case is a recognized social purpose.

¹¹⁷ See B. WESTON, "Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", Virginia Journal of International Law, Vol. 16, p. 116.

¹¹⁸ G. CHRISTIE "What Constitutes a Taking of Property under International Law?" British Yearbook of International Law, 1962

¹¹⁹ M. SORNARAJAH, "The International Law on Foreign Investment" p. 283, Cambridge University Press (1994).

94. The Tribunal in the *Lauder*¹²⁰, case said about the interference with property rights that, “Parties to [the Bilateral] Treaty are not liable for economic injury that is the consequence of bonafide regulation within the accepted police powers of the State”.

95. In the case of *Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*,¹²¹ although the Tribunal found an expropriation, it has stated that:

[T]he principle that the State’s exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.

96. Thus the reflection on above points gives rise to a credible reason that can be instrumental in sufficiently establishing that the question of expropriation arises in the present scenario at all as there never was any ‘taking’ as such.

97. A question of prime importance both for the host state and for the foreign investor is the role of general regulatory measures of the host country under the rules of indirect expropriation. Emphasis on the host state's sovereignty supports the argument that the investor should not expect compensation for a measure of general application. One way to identify a taking may indeed be to clarify whether or not the measure in question was taken in the exercise of functions that are generally considered part of the Government's powers to regulate the general welfare.¹²²

98. It must be acknowledged that it is one of the essential duties of the Government of any state to cater to the medical need of the people and effectively deal with public health crisis. The handling of such subject matter is well within Government’s power and in fact forms an essential part of the Government’s functioning to regulate general welfare.

99. Therefore, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general

¹²⁰*Lauder (U.S.) v. Czech Republic* (Final Award) (September 3, 2002) available at www.mfcr.cz/scripts/hpe/default.asp

¹²¹*Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*, ICSID Award Case No. ARB (AF)/00/2.

¹²²R DOLZER, “*Indirect Expropriation of Alien Property*” 1 ICSID Review-FILJ 41(1986)

regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today. There is ample case law in support of this proposition. *Newcombe* reviews international law authorities for the proposition that no right of compensation may arise for bona fide Government regulations that are reasonably necessary and enacted for the “protection of public health, safety, morals or welfare” or that are “non-discriminatory and within the commonly accepted taxation and police powers of states.”¹²³

100. Thus in the present case, Respondent is not liable to pay any compensation as there was no expropriation and the measure arose from bonafide Governmental regulation that was necessary for the protection of public health.

F. THE STATE OF NECESSITY DEFENCE LEGITIMIZES BERGONIA’S ISSUANCE OF A COMPULSORY LICENSE.

101. The conditions set forth in Article 25 of the International Law Commission's Articles on State Responsibility, are invoked in support of this conclusion. For the admissibility of the necessity defence are:

- The Respondent should not have contributed to the state of necessity.
- That the measures taken were the only way to address an essential interest in the face of an emergency.
- That no essential interest of other States beneficiaries of the obligation or of the international community as a whole has been seriously impaired.

102. Addressing each of the conditions, *firstly*, the Respondent alleges that it did not contribute to the state of necessity. The Respondent had no participation in these developments and clearly had no intention to provoke a crisis of which the state of Bergonia is the main victim. There is no evidence to suggest that the present public health crisis was in anyway a result of inadequate, irresponsible or lethargic

¹²³ See ANDREW NEWCOMBE, “*The Boundaries of Regulatory Expropriation in International Law*”, 20:1 ICSID Review – FILJ, 8-9 (2005).

functioning of the State of Bergonia as the condition of obesity is a natural occurrence and is fuelled by the Bergonian life style, and the State of Bergonia can do little or nothing to alter the same.

103. *Secondly*, the Respondent argues that the measures it took were the only way to address an essential interest in the face of serious and imminent danger. The Respondent adduces that CL was the right manner to address the crisis, the same has been sufficiently substantiated by continuous reference to the Articles of TRIPS , the observation of learned scholars on the subject, the essential jurisprudence behind , 'legitimate expropriation' of aliens property and also the relevant provisions of the BIT. The measures taken were proportionate and reasonable in the context of the emergency suffered by the country and since Claimant explicitly refused to grant the license to any Bergonian company based on irrational apprehensions, the only feasible alternative in the present scenario was to issue a compulsory license. *Thirdly*, the present issue is purely bilateral in nature with no relation to the international community and therefore any effect on the same is inconceivable.

104. Further, no permanent harm or injury has been caused to the Claimant as the revocation of patent rights is a temporary measure undertaken to deal with the emergent situation and will be redeemed to the Claimant once the purpose is met. In addition, the Bergonian IP office had collected royalties from the six Bergonian companies and had offered these to the Claimant. However, the Claimant has refused to accept the same.

105. The Respondent argues in particular that it has not contributed to the situation of necessity as most of the intervening factors were exogenous; that the measures adopted were the only means to safeguard an essential interest against a grave and imminent peril because otherwise the situation would have gone out of control; that no essential interest of other States beneficiaries of the obligation or of the international community as a whole have been impaired.

G. CONCLUSION ON MERITS

106. It is submitted that Respondent has fulfilled all its obligations under the Parent BIT and has caused no breach to International Instruments, Laws and Standards.

PART THREE: RELIEF REQUESTED

In light of all the above, Respondent respectfully requests this Tribunal to adjudge the following:

- 1) That this Tribunal does not have jurisdiction over this dispute;
- 2) That Claimant's allegations of contractual and international breaches by Respondent are meritless;
- 3) That this arbitration is subsequently dismissed.

RESPECTFULLY SUBMITTED ON 21ST SEPTEMBER 2009

BY

-----/s/-----

Team Ago

On Behalf of Respondent

The Government of Republic of Bergonia.