

BUSTAMANTE

**INTERNATIONAL CENTER FOR SETTLEMENT OF
INVESTMENT DISPUTES**

MEDBERG CO.

CLAIMANT

v.

GOVERNMENT OF THE REPUBLIC OF BERGONIA

RESPONDENT

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

In addition to short-form references to sources and authorities defined in the Index of Authorities and List of Sources below the following abbreviations are used in this memorial:

Abbreviation	Definition
BC BIT	Treaty between Bergonia and Conveniencia Concerning the Encouragement and Reciprocal Protection of Investments, signed on 30 th May 2003.
Bergonia	Democratic Commonwealth of Bergonia
BioLife	BioLife Co.
BIT	Bilateral Investment Treaty
BT BIT	Treaty between Tertia and Bergonia Concerning the Reciprocal Encouragement and Protection of Investment signed on 1 st January 2003
Conveniencia	Sultanate of Conveniencia
ECT	Energy Charter Treaty
FSM	Minutes of the First Session of the Arbitral Tribunal held on 16 February 2009 and available at http://www.fdimoot.org/Problem2009Final.pdf (pp. 3-6)
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
MFN	Most Favored Nation
MedBerg	MedBerg Co.
MedScience	MedScience Co.
MedX	MedX Holding Ltd.
P.	Annex 3 “Uncontested Facts” , available at http://www.fdimoot.org/Problem2009Final.pdf (pp.20-21).
p.	Page
Patent	Bergonian patent No. AZ2005
RtQ	Response(s) to questions of the teams from the organizers of the competition as available at http://www.fdimoot.org/problem.php
WTO	World Trade Organization

USD

United States Dollar

¶ (¶¶)

paragraph(s)

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Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331	VCLT

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Report of the Executive Directors on the Convention for the Settlement of Investment Disputes between States and Nationals of Other States	Report of the Executive Directors

STATEMENT OF FACTS

Parties to the dispute

1. The claimant in the present case is a Bergonian company, MedBerg Co, which was incorporated in 2004. It has a single shareholder – MedX, a company incorporated in Conveniencia. There is no evidence that MedX has any significant assets in Conveniencia or that any decisions regarding the management of MedBerg are made at the level of MedX. MedX in turn has two shareholders – MedScience Co, a company incorporated in Laputa and Dr. Frankensid, a dual national of Amnesia and Bergonia. Laputa is not party to the ICSID Convention.
2. The respondent is the Democratic Commonwealth of Bergonia, which is party to the ICSID Convention.

Patent

3. Dr Frankensid has developed a breakthrough method to treat obesity (P. ¶4), while working in Laputa (RtQ 54). The expenses associated with his research were fronted by MedScience (RtQ 105). With the invention, apparently, being considered work made for hire, MedScience and Dr. Frankensid jointly assigned their right to apply for patent to this treatment to MedX, which in turn assigned the right to obtain apply for patent in Bergonia to MedBerg (RtQ 74).
4. In February 2004 MedBerg applied for a patent covering the treatment in question and in March 2005 the Patent was issued (P. ¶5).

Issue of compulsory license by Bergonian IP Office

5. In Bergonia obesity constitutes a serious health concern (RtQ 40), with more than a third of Bergonian population suffering from obesity (RtQ 65). Bergonia has implemented a consistent policy aimed at combating this situation including extensive educational programs and consideration of measures aimed at limiting consumption of products contributing to obesity (RtQ 85).
6. The treatment covered by the Patent proved to be the most effective (RtQ 68) to combat obesity, with this conclusion being confirmed by a number of published studies (RtQ 26).
7. From the outset MedBerg granted an exclusive license to produce the patented treatment to BioScience, which has been in operation since 31 March 2005 till 31 March 2007. However, after the agreement has expired MedBerg refused to renegotiate it and to enter into a new agreement with any other company (P. ¶6).

8. With the problem of obesity becoming more acute (RtQ 26), Bergonian IP Office commenced proceedings to issue compulsory license with respect to MedBerg's Patent on 1 June 2007 (P. ¶7). MedBerg was allowed to present its objections, which it did (P. ¶9), however after three months of consideration Bergonian IP Office decided to issue a compulsory license (P. ¶8) (the terms of which are summarized below). MedBerg appealed the decision to the Patent Review Board, a body consisting of Bergonian judges (RtQ 29) and providing the parties with the essential due process rights (RtQ 82), but its appeal was rejected (RtQ 29).
9. The compulsory license issued by Bergonian IP office was a non-exclusive license (P. ¶8) for a period of 48 months (RtQ 24), which provided for payment of periodic royalties to MedBerg to be collected by Bergonian IP office. Those licenses being non-exclusive, the royalty rate under them was lower than that previously provided by an exclusive license to BioLife (RtQ 25). Royalties under the compulsory license are paid in Bergonian ECU, which are fully convertible (RtQs 78,86).
10. To date 6 companies in Bergonia have invoked the compulsory license. The royalty payments have been collected by Bergonia and offered to MedBerg, however it has refused to collect them (P. ¶8). In the meantime MedBerg continues to sell the patented treatment in Bergonia on its own (RtQ 19).
11. On unspecified date MedBerg submitted request for arbitration to ICSID which was registered on 1 November 2008 (P. ¶10).

Legal framework of the dispute

12. Amnesia, Bergonia and Conveniencia have ratified the ICSID Convention and they are members of World Trade Organization and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (P. ¶3). Both Bergonia and Conveniencia are parties to the Vienna Convention on the Law of Treaties (RtQ 108). Bergonia and Conveniencia have signed and properly ratified the BC BIT. Bergonia and Tertia have properly signed and ratified the BT BIT.

ARGUMENTS

I. THE TRIBUNAL LACKS JURISDICTION TO DECIDE ON MERITS OF MEDBERG'S CLAIMS

13. For this tribunal to have jurisdiction MedBerg must establish that Bergonia consented to arbitrate and that the dispute falls within the outer limits of jurisdiction of tribunals constituted under ICSID Convention. Bergonia submits that this tribunal lacks jurisdiction both *ratione personae*, because MedBerg is a Bergonian company controlled by a Bergonian national and a national of non-party to ICSID Convention, and *ratione materiae*, because none of the claims presented by MedBerg arise directly out of its investments in Bergonia nor do the facts of the present case reveal *any* investment by MedBerg in Bergonia. Bergonia would present its submissions on those objections in turn.

1. NO JURISDICTION *RATIONE PERSONAE*, SINCE MEDBERG IS A BERGONIAN COMPANY NOT FALLING WITHIN ARTICLE 25(2)(b) EXCEPTION

14. Bergonia submits that the circumstances of MedBerg deprive this tribunal of jurisdiction. Namely, MedBerg is a Bergonian national and hence in order for this tribunal to have jurisdiction it must establish that (A) Bergonia consented to treat it as a foreign national and (B) it is objectively under “foreign control”, i.e. it is controlled by a national of ICSID Convention party-State other than Bergonia. Below Bergonia will demonstrate that MedBerg fails to meet either prong of this two-prong test.

A. Bergonia never consented to treat MedBerg as a foreign national

15. MedBerg is a Bergonian company under the terms of BC BIT (i.e. has its sit in Bergonia). According to Article 1(3) of the BC BIT the nationality of a corporate entity is determined by its’ seat. In the present case MedBerg has its seat in Bergonia, hence it is a Bergonian company under BC BIT.
16. MedBerg fails to prove in any way that Bergonia at any time consented to treat it as a foreign national. The rule by which a claim can be brought to ICSID by a Bergonian company, which Bergonia consented to treat as a foreign national, constitutes an exception from the general principle that only foreign nationals may be claimants in

ICSID arbitration.¹ As demonstrated by the decisions in prior arbitrations such consent should be either express or leave no reasonable doubt that the State has consented to treat certain company as a foreign national specifically for the purposes of ICSID Convention. Bergonia submits that in present case no such consent was ever given.

17. During the first session of the arbitral tribunal, MedBerg seemed to rely on two arguments: (i) that it may benefit of a consent given by Bergonia in BT BIT by virtue of MFN clause of BC BIT and (ii) that there was some implied consent on the part of Bergonia (FSM Sec. 14, ¶8). Below Bergonia will demonstrate that both of those arguments should be rejected by this Tribunal.

(i) MedBerg may not rely on consent given by Bergonia in BT BIT

18. MedBerg asserts that it may rely on the provision of Article VI.8 of the BT BIT by virtue of the MFN clause contained in the BC BIT. Below Bergonia will demonstrate that the said MFN clause does not apply to dispute settlement provisions contained in other BITs and in any event it does not apply to provisions extending jurisdiction of investment arbitration tribunals. Furthermore, Bergonia denied to MedBerg the advantages of BT BIT (FSM ¶14) and hence MedBerg may not rely on consent given in BT BIT.

(a) BC BIT MFN clause does not extend to dispute resolution provisions

19. The MFN clause of BC BIT (Article 3(1)(2)) reads as follows:

“(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of ... investors of any third State.

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity, in particular, though not exclusively, concerning management, maintenance, operation, enjoyment or disposal of their investments, to treatment less favourable than it accords ... to investors of any third State, whichever is more favourable to the investors.”

20. In interpreting this provision the tribunal should be guided by rules of interpretation expressed in Articles 31 and 32 of the VCLT, which represent customary international law. In particular, those rules require the tribunal to look at the ordinary meaning of the

¹ Autopista, at ¶102; Camuzzi, at ¶31; BROCHES, at 358-59; SCHREUER, at 296 ¶760.

words, attributable to them in the general context of the treaty in light of its object and purpose and the principle of good faith.

21. Bergonia will proceed below to apply those canons of treaty interpretation to the provisions of Article 3(1)(2) of BC BIT. However, one preliminary note is relevant. Bergonia accepts that the dispute resolution clauses are not required *per se* to interpreted restrictively. However, the attention should also be drawn to the fact that neither are such clauses amenable to any form of extensive interpretation.² Turning to the interpretation, Bergonia will address below first the object and purpose of BC BIT, then the context of the treaty in which the MFN clause is expressed and finally the ordinary meaning of its provisions established on such basis.
22. The object of the BC BIT is expressed in its preamble to be intensification of economic cooperation and creation of favorable conditions to the investments. It has been suggested by some tribunals that such object dictates the need to interpret the provisions of a BIT expansively. However, it is submitted that the actual practice of States provides scant support for such proposition. As demonstrated by numerous testimonies of State representatives who negotiated BITs States rarely have any intentions during the negotiations of BITs.³ In addition it is to be doubted whether boilerplate language, such as that of the preamble to BC BIT could be constructed as expressing an authorization for expansive interpretation of the whole treaty.⁴
23. Turning to the context of the MFN clause in the BC BIT, Bergonia notes that the same Article 3 contains a list of measures that are considered “less favorable treatment”, which only include measures relating to the substantive rights of investors, such as access to raw materials, marketing of products and similar measures. In addition, Article 3(5)(6) contains several carve outs from the general MFN principle, which also relate exclusively to substantive rights (taxation, land and real estate). Those provisions, it is submitted reflect the view of the parties that only substantive rights would be considered “treatment” in which MFN status is guaranteed to foreign investors.⁵ Indeed those matters bring into operation the *ejusdem generis* principle, which suggest that where a

² AMCO I, at ¶14; Mondev, at ¶41.

³ Wintershall, at ¶248.

⁴ e.g. Plama, at ¶193; SINCLAIR, THE VCLT, at 130; Renta 4, at ¶90.

⁵ Plama, at ¶¶190-191.

general phrase is followed by a list of examples all belonging to one kind, it should be interpreted as applying only to such kind.⁶ Thus, in the present case the word treatment, as used in BC BIT should be read as applying only to substantive rights.

24. It is in this context that the meaning of Article 3(1)(2) should be determined. Bergonia would proceed in this exercise in two steps: first contrast those provisions with provisions of treaties which were found to extend to MFN treatment and secondly examine the pertinent provisions of Article 3(1)(2) on the standalone basis.
25. In several cases, where tribunals concluded that MFN clauses extend to dispute resolution the relevant wording was very broad. For, example in *Maffezini* the Argentina-Spain BIT referred to “all matters”.⁷ On the other hand, the BC BIT guarantees MFN treatment with respect to certain types of investment activities by foreign investors (Article 3(2)).
26. Bergonia submits that given the context of other parts of Article 3 of BC BIT, in which the word treatment is used to refer only to substantive rights, its ordinary meaning should be held to extend to substantive rights only.

(b) In any event the MFN clause does not apply to extend the scope of Bergonia’s consent to ICSID jurisdiction

27. MedBerg is asking this tribunal to allow it to use MFN clause to obtain access to ICSID, which it does not have under BC BIT. Thus the issue in dispute between the parties is also whether a non-specific MFN clause could be interpreted to allow the scope of state’s consent to arbitration to be modified.
28. Bergonia would submit that under the prevailing practice of investment arbitration tribunals, MFN clauses, unless broadly formulated, may not be interpreted to extend to provisions of other treaties that extend the jurisdiction of ICSID tribunal. This was indeed recognized in *Maffezini*, where the tribunal noted that the application of MFN may not override significant policy choices made by the parties in the relevant BIT, notably those limiting the jurisdiction (e.g. fork-in-the-road clauses and requirement to exhaust local remedies).⁸ Similar conclusions were reached by a number of other

⁶ *Plama*, at ¶189; *Telenor*, ¶92; *Wintershall*, ¶171.

⁷ *Maffezini*, at ¶56.

⁸ *Maffezini*, at ¶¶63-64.

tribunals.⁹ In the present case, Bergonia and Conveniencia specifically agreed on the parties, which would be able to commence ICSID arbitration by providing such right to investors and defining them to mean only companies incorporated in the territory of the other contracting party. Bergonia submits that because the jurisdiction of ICSID tribunals was thus expressly defined it may not now be extended by operation of MFN clause.

(c) In any event Bergonia properly exercised its right to deny the advantages of BT BIT to MedBerg, because it is controlled by Laputan and Bergonian nationals

29. Should this Tribunal decide that MedBerg should be treated as Tertian investor under BT BIT, the provisions of Article I.2 of BT BIT that allow Bergonia to deny the advantages to MedBerg becomes applicable. This is explained by the fact that if MedBerg is to be treated as favorably as a Tertian investor the extent of such treatment should also be determined by any restrictions imposed on a Tertian investor by BT BIT.¹⁰
30. Article I.2 of BT BIT provides:
- “Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company” (underscoring added)
31. As demonstrated below (paras. 42-53), MedBerg is controlled by MedScience and Dr. Frankensid, both nationals of third States, i.e. Laputa and Amnesia (P.¶2). Hence Bergonia submits that it properly denied to MedBerg the advantages of BT BIT including the alleged right to bring claims before ICSID tribunal.
32. MedBerg may argue that Bergonia untimely exercised this right, because the denial was expressed only in response to MedBerg’s request for arbitration and rely in its support on the *Plama* decision.¹¹ Bergonia submits that reliance on *Plama* would be misplaced in the present case for two reasons: this decision does not represent *jurisprudence*

⁹ *Tza Yap*, at ¶216; *Salini v. Jordan*, at ¶¶118-119; *Wintershall*, at ¶¶173-176; *Plama*, at ¶209.

¹⁰ e.g., *Renta 4*, at ¶74.

¹¹ *Plama*, at ¶157.

constante on the subject and the circumstances of the present case are substantially different from those faced by the tribunal in *Plama*.

33. *Plama* tribunal decided that the denial of advantages may operate only prospectively, i.e. only two rights and advantages that arise after the denial was expressed by the State. To support this decision the tribunal relied on exclusively policy reasoning arguing that if the denial of benefits would be allowed to operate retrospectively the investors would be deprived of reasonable certainty of their status which will negatively affect the stability of legal framework. However, this reasoning applied to wording in ECT similar to that in Article I.2 of BT BIT finds no support in the actual text of the treaty. In fact, the treaty text does not contain any temporal limitations as to the operation of the denial hence it should be assumed that such denial may operate both prospectively and retrospectively. In addition, Bergonia submits that the underlying policy reasoning is similarly unpersuasive. Indeed, the treaty text itself serves as sufficient warning to investors that advantages may be denied to them and it is submitted that when making a decision to invest into a State a reasonable investor would already consider this factor in making his investment decision. Those conclusions are reinforced by the facts that the *Plama* restriction on retrospective application of denial of benefits was not supported by the subsequent practice of tribunals applying the same provisions of ECT¹² and was heavily criticized in the doctrine.¹³
34. However, even assuming that *Plama* decision lays down a general rule regarding non-retrospective application of the denial, Bergonia submits that the facts of the present case clearly call for an exception from this rule. Indeed, the reasoning in *Plama* is based on the necessity of reasonable notice to investor before the advantages are denied. In this case, it was impossible for Bergonia to provide such reasonable notice because at no time before MedBerg filed its request for arbitration was Bergonia aware that MedBerg considered itself to be entitled to advantages provided by BT BIT. Thus Bergonia exercised its right of denial immediately after it became aware of MedBerg's claim. In this case there was no element of reliance by MedBerg on any of the advantages provided by BT BIT, when it allegedly made and continued its investment in Bergonia given the legal uncertainty regarding whether BC BIT MFN clause would allow it to

¹² e.g. *AMTO*, at ¶¶61-64.

¹³ e.g. *WALDE*, at 731.

rely on BT BIT. This factor serves as another distinction of the present case from that which the tribunal examined in *Plama*. MedBerg may argue that Bergonia might have explicitly denied advantages of BT BIT to *all* companies controlled by nationals of third States to avoid the present situation. However, it is submitted that it was precisely the purpose of parties to BT BIT to avoid such result, i.e. total denial to all companies. On the other hand, should this tribunal decide to follow *Plama* in this case, such total denials may become common in state practice, which Bergonia submits would do much more harm to the stability of legal framework

35. Hence Bergonia submits that it property denied to MedBerg the advantages of BT BIT
(ii) Bergonia has not in any other way consented to treat MedBerg as a foreign national for the purposes of ICSID Convention or otherwise

36. MedBerg also asserted during the first session of the tribunal that there might have been some non-express agreement to treat it as a foreign national without specifying exactly what it meant (FSM Sec. 14, ¶8). Bergonia does not dispute that in certain limited circumstances the consent of the state for the purposes of Article 25(2)(b) may be implied,¹⁴ but only where the such consent may be derived from the circumstances and no other reasonable interpretation of such circumstances is possible.¹⁵ However, in previous practice such instances were very limited and the respective tribunals in those cases relied on such circumstances as: (a) inclusion into the agreement with a national company of an ICSID arbitration clause as method of dispute resolution;¹⁶ (b) approval of the application for establishment of a foreign-owned company, which application provided for ICSID arbitration as method of dispute resolution.¹⁷ The furthest to where an ICSID tribunal was prepared to go was to recognize that provision of special privileges reserved to foreign nationals (such as tax holidays) may be deemed as evidence of consent of the State to treat a company as foreign national.¹⁸

37. In the present case, MedBerg was not at any time treated by Bergonia as foreign national. It has not been required to pass any special registrations, nor granted any

¹⁴ e.g. *SCHREUER*, at 300 ¶775.

¹⁵ *Holiday Inns*, at ¶33; *Klockner*, at 16.

¹⁶ *Klockner*, *Id.*; *LETCO*, at 352; *Vacuum Salt*, at ¶31.

¹⁷ *AMCO I*, at ¶14.

¹⁸ *Cable TV*, ar ¶¶ 5.17-5.18.

privileges, nor where any special procedures applied to it when it registered the Patent (RtQ 14).

38. The only circumstance MedBerg may rely on is that its' sole shareholder is a foreign national (P. ¶2). However, were the ICSID tribunals to find that where a national company is owned by a foreign national the relevant State should be deemed to have consented to treat such national companies as foreign nationals, the requirement of consent in Article 25(2)(b) would be made redundant. In fact, the whole structure of Article 25(2)(b) suggests that it establishes a two-prong test requiring both foreign control and specific consent of the State.¹⁹ On this basis foreign nationality of shareholders *per se* could not be sufficient basis for a finding that a State has given its consent to treat a national company as a foreign national.

B. MedBerg is not under “foreign control” for the purposes of ICSID Convention

39. Bergonia submits that it is not sufficient for MedBerg to prove that Bergonia has consented to treat it as a foreign national. In addition, MedBerg should satisfy an objective criterion required by Article 25(2)(b), that is be under “foreign control”. This conclusion flows from the fact that ICSID Convention sets ‘outer limits’ of jurisdiction that may be conferred upon a tribunal by the parties, which may not be overridden by the agreement of the parties.²⁰ Requirement that a national company, which institutes proceedings under ICSID Convention, be objectively under foreign control expresses one of such ‘outer limits’, which is demonstrated by the drafting history of the Convention,²¹ previous decisions of tribunals²² and opinions of prominent scholars.²³
40. In order to be deemed to be under “foreign controlled” MedBerg needs also to establish that it is controlled by a national of an ICSID Convention contracting party. Though not expressly provided in the ICSID Convention this requirement flows from the *travaux preparatoires*²⁴ as well as subsequent practice of tribunals.²⁵

¹⁹ See, AMCO I, at ¶14; REPORT OF THE EXECUTIVE DIRECTORS, at ¶30.

²⁰ MHS (Annulment), at ¶54;

²¹ HISTORY OF ICSID CONVENTION, vol. II-2, at 871 and 881.

²² TSA Spectrum, at ¶142; Rompetrol, at ¶80; Vacuum Salt, at ¶31.

²³ SCHREUER, at 312-13, ¶¶813-814; GAILLARD, at 140.

²⁴ See, SCHREUER, at 316-317, ¶828.

41. Similarly, control by a national of Bergonia does not satisfy the requirement of being under foreign control.²⁶ In this regard Bergonia further stresses that for the purposes of ICSID Convention dual nationals are treated as nationals of the respective host States.²⁷
42. In the present case, Bergonia submits that MedBerg is being controlled by two parties: MedScience, which is a national of non-ICSID contracting State (P. ¶3) and Dr. Frankensid, a national of Bergonia. Below Bergonia will demonstrate that in assessing the existence of proper foreign control over MedBerg this tribunal should disregard MedX, a corporate vehicle Frankensid and MedScience formed, and look at the nationality of those latter parties to determine jurisdiction.
43. Bergonia further stressed that foreign control in this case is distinct from mere foreign ownership. As underlined by one of most influential scholars in this field Professor Schreuer, the tribunal when deciding whether a company is under foreign control for the purposes of Article 25(2)(b) should look at the real controllers of the company rather than owners of its stock.²⁸ His conclusion is supported by the practice of previous ICSID tribunals. For example, in *Vacuum Salt* the tribunal declining to find that a Ghanian company was under foreign control, held that effective foreign control rather than mere participation should be established in order for the company to be treated as being under foreign control.²⁹
44. Bergonia would submit there are 3 reasons why this tribunal should look behind MedX's nationality: (i) there is no presumption that MedBerg is under foreign control; (ii) MedX is a mere shell company and finally (iii) ultimate control over MedX by non-qualifying foreign nationals deprives this tribunal of jurisdiction.
45. The rule that consent of a State to treat a national company as foreign national raises a presumption that such company is under foreign control³⁰ is inapplicable in the present case. This rule was formulated in the time when it was assumed that the consent would be expressed in the form of special agreement between investor and the State and have

²⁵ e.g. *SOABI*, at ¶33;

²⁶ See, SCHREUER, at 316, ¶¶826-827; *Vacuum Salt*, at ¶¶ 42-55.

²⁷ *TSA Spectrum*, at ¶161,

²⁸ SCHREUER, at 318 para 564

²⁹ *Vacuum Salt*, ¶43.

³⁰ BROCHES, at 361; AMERASINGHE, at 237-238; *Vacuum Salt*, at ¶31

been applied in this context.³¹ In the present case, Bergonia never specifically consented to treat MedBerg as foreign investor and in fact never contemplated that MedBerg would ever invoke consent given by Bergonia in BT BIT. A general consent made in a BIT does not give rise to any sort of presumption as to existence of foreign control.³² This conclusion is reinforced by the fact that previous tribunals dealing with similar general consents never relied on such presumptions in assessing existence of foreign control³³

46. Bergonia further submits that MedX is a mere shell company, the nationality of which should be disregarded. In assessing existence of control the tribunal must look at commercial reality rather than formal structures. In previous cases tribunals formed under ICSID did not hesitate to pierce the corporate veil if they found that the direct shareholder was not the real controller³⁴. Hence, in *Banro* the tribunal looked behind the direct American shareholder of Congolese company, because claimants failed to prove that it possessed decision-making power separate from its Canadian parent.³⁵ Similarly, in *TSA Spectrum* the tribunal looked behind the nationality of a Dutch company being an indirect shareholder of Argentinian company to determine that in fact the Dutch company was controlled by an Argentinean citizen.³⁶
47. MedBerg may argue that MedX is a genuine company with separate decision making power. However, Bergonia submits this is clearly not the case. In this regard Bergonia having no access to MedX records may rely on circumstantial evidence to establish its case.³⁷ The circumstances of the case make it evident that MedX is mere shell. It has been formed as “CC123 Holding Ltd” (RtQ 45), obviously on a mass-production basis, it has only two employees, which are a lawyer and a tax advisor (RtQ 76), a significant indicator of the fact that it conducts no substantive operations, not even in the sphere of

³¹ e.g. *Vacuum Salt, Id.*

³² *SCHREUER*, at 312, ¶812.

³³ See e.g., *TSA Spectrum*, at ¶¶160-162.

³⁴ *SOABI, AFRICOM, Aguas Del Tunari, Cable TV.*

³⁵ *Banro*, at ¶14.

³⁶ *TSA Spectrum*, at ¶161.

³⁷ *Corfu Channel*, at 14.

- asset management. Though MedX rents a “small office” (RtQ 76) this can be by no way an indicator of its genuineness, since such office may be required for incorporation purposes.
48. MedBerg may try to rely on *Aguas Del Tunari* or *AMTO* cases as demonstrating that companies in similar circumstances were treated as genuine substantive companies. However, such reliance would be misplaced since those cases dealt with entirely different companies. In *Aguas Del Tunari*, the Netherlands indirect parent of Bolivian company was proved to be the center of decision making in the joint venture between Bechtel and an Italian company. This was proved by the claimant by reference to Board minutes of that company and other evidence proving that the decisions were made at the level of the Dutch company.³⁸ No similar evidence is presented by MedBerg in this case. Similarly, in *AMTO*, the Latvian parent company of Ukrainian claimant possessed significant assets in Latvia, regularly conducted business there and had projects under development in Latvia.³⁹ Again none of those facts are present in this case.
 49. On this basis Bergonia submits that MedBerg is controlled by MedScience Co. and to some extent by Dr. Frankensid and hence is not under foreign control for the purposes of ICSID Convention.
 50. Bergonia would further submit that even assuming that under normal circumstances this tribunal would not have been required to look behind the immediate parent company of the national legal entity, such inquiry is especially proper in this case, because the indirect controllers are a national of non-party to ICSID Convention and a Bergonian national. Given that it was the express intention of the contracting States to disallow such investors from instituting proceedings under the ICSID Convention, their control even indirect should disqualify MedBerg from instituting proceedings before this tribunal.
 51. Bergonia submits that this conclusion is reinforced by the circumstances of this particular case. Bergonia would be ready to acknowledge that in certain cases, where a national company is indirectly controlled by both a qualifying foreign national and a non-qualifying foreign national, it may be party to the ICSID proceedings. However,

³⁸ *Aguas Del Tunari*, at ¶330.

³⁹ *AMTO*, at ¶ 68.

this is not the case since MedBerg is controlled to 100% extent by non-qualifying persons.

52. MedBerg may try to establish jurisdiction on the basis of cases like *Tokios Tokeles*,⁴⁰ where tribunals found that *foreign companies* owned by non-qualifying foreign nationals or nationals of respondent State may be claimants in ICSID proceedings. However, in those cases ICSID jurisdiction *ratione personae* was based on a different provision of the ICSID Convention, which does not require inquiry beyond the State of incorporation. In the present case, MedBerg seeks to establish jurisdiction on the basis of Article 25(2)(b), which requires verification of ultimate control. Hence Bergonia submits that the above cases are not relevant in the present situation.
53. The tribunal should look at actual control rather than immediate parent company. On this basis Bergonia submits that this tribunal has not jurisdiction *ratione personae* in the present case.

2. NO JURISDICTION *RATIONE MATERIAE*, SINCE THIS DISPUTE DOES NOT ARISE DIRECTLY OUT OF INVESTMENT

54. Under ICSID Convention, this tribunal has jurisdiction only with respect to disputes “arising directly out of an investment”.⁴¹ This restriction of the scope of jurisdiction was intentionally included by the drafters of the Convention to limit its scope. The present dispute relates to the measures taken by Bergonia with respect to MedBerg’s patent rights. Bergonia submits that those patent rights do not constitute MedBerg’s investment into Bergonia and hence the dispute between the parties does not fall within the jurisdiction of this tribunal.
55. Bergonia would like to stress that it does not argue that the intellectual property rights may not in principle constitute investments. The position is rather that the circumstances of the present case, including the circumstances of acquisition of the patent by Bergonia prevent the Patent from being considered MedBerg’s investment in Bergonia.
56. It is generally accepted that in order for ICSID tribunal to have jurisdiction over the subject-matter of the dispute two conditions must be satisfied cumulatively: (A) the dispute should fall within the scope of the arbitration clause (BC BIT in this case) and

⁴⁰ *Tokios Tokeles*, at ¶52; *Rompetrol N.V.*, at ¶85.

⁴¹ *ICSID Convention*, Article 25(1).

(B) the dispute should be within the ‘outer limits’ of the jurisdiction of ICSID tribunals. Below Bergonia will demonstrate that neither of those conditions is satisfied in this case.

A. MedBerg’s Patent does not constitute investment under BC BIT

57. BC BIT expressly lists patents as one form of the asset that is considered as investment, however only if it is “invested in accordance with the laws and regulations of a contacting State” (Article 1(1)).
58. Bergonia would submit that the most important part of this definition is not the list of assets but the requirement that such assets should be invested in Bergonia. Indeed, the list of assets itself is open-ended and the relevant provisions in fact recognizes that “every kind of asset” is included. Hence, if one was to consider that any form of asset automatically becomes investment there would be no distinction between investment and property or, in fact, any need to provide an extensive definition of investment. However, the intention of the parties to BC BIT was to regulate specific form of assets, i.e. investments, which is evidenced by the name of the treaty and its preamble. It is thus submitted that the word “invested” in the definition of investment should be assigned as separate meaning as a dividing line between investments on the one hand and property or assets on the other.
59. For an asset to be invested in the State it must be shown that it has been transferred to the State or it has been developed within a State and retained in it. However, in the present case the Patent has not been transferred to Bergonia, but it has rather been issued by Bergonia itself (P.¶5). Hence Bergonia submits that the asset was not invested in Bergonia and therefore any dispute arising in connection with it does not fall within the jurisdiction of ICSID as provided for in the BC BIT.

B. In any event MedBerg’s Patent does not constitute investment under ICSID Convention

60. When the ICSID Convention was drafted it was envisaged that its subject matter would be limited to disputes arising out of investment.⁴² Though after considerable debate no definition of investment was included,⁴³ it was also acknowledged that certain types of

⁴² BROCHES, at 362.

⁴³ Id. REPORT OF EXECUTIVE DIRECTORS, at ¶27.

- disputes would not fall within ICSID jurisdiction.⁴⁴ Among such disputes those arising from ordinary commercial transactions were expressly mentioned during the drafting.⁴⁵
61. In subsequent practice the tribunals have developed a test consisting of several common features of typical investment at core of which are the requirement that there should be a contribution of assets by the investor and that the investor should assume at least some risks associated with its investment.⁴⁶ Bergonia does not argue that all of those conditions should be present in order for the asset to be considered investment, however, their absence would be a strong indicator that the particular operation does not constitute investment.
62. In the present case, two key features of investment: contribution of assets and assumption of risk⁴⁷ are absent. Absence of contribution of assets was addressed by Bergonia above and the lack on any risk associated with MedBerg's Patent would be addressed in this case.
63. Bergonia submits that by the time the Patent was acquired MedBerg faced no risks. The R&D was already completed and the invention in question being a "breakthrough (P. ¶4), it was safe to presume that a patent would be issued. Hence there was no uncertainty inherent for any investment activity. On this basis MedBerg submits that the Patent was not an investment by MedBerg in Bergonia and thus this tribunal lacks jurisdiction *ratione materiae*.

II. BY ISSUING COMPULSORY LICENSE TO THE PATENT, BERGONIA DID NOT VIOLATE ANY OF ITS OBLIGATIONS UNDER THE BC BIT

64. Claimant argues that the issue of compulsory license constitutes illegal expropriation. Bergonia submits that this assertion fails for three alternative reasons: (1) issue of compulsory license did not constitute expropriation; (2) the actions taken by Bergonia comply with requirements for legitimate expropriation (3) and in any event those actions are expressly authorized by virtue of Article III.4 of BT BIT.

⁴⁴ BROCHES, at 362.

⁴⁵ HISTORY OF ICSID CONVENTION, at 139 ¶120; See also Joy Mining, at 58; Fedax, at ¶42

⁴⁶ e.g., Salini v. Morocco (Jurisdiction) ¶ 37–58; LESI, at ¶ 72; Bayandir (Jurisdiction) ¶ 137

⁴⁷ Pantechniki, at ¶47.

1. COMPULSORY LICENSE IN THIS CASE IS A LEGITIMATE REGULATORY MEASURE AND DOES NOT CONSTITUTE EXPROPRIATION.

65. Article 4 (2) of the BC BIT provides:

“Investments 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.”

66. It is true that, as the Harvard Convention states, the notion of expropriation covers not only formal transfer of property but also “any unreasonable interference with the use, enjoyment or disposal of property so as to justify the interference that the owner thereof will not be able to use, enjoy or dispose of the property within reasonable period of time after the inception of such interference”.⁴⁸

67. The degree of interference is the key parameter to make distinction between expropriation and legitimate regulatory measure. In *Tecmed*, the tribunal stated it is degree of interference that “is one of the main elements to distinguish [...] between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance.”⁴⁹ Respondent emphasizes that the fact, that the rights of the Claimant are to certain extent affected by the compulsory license, does not automatically indicate that the license was expropriatory, so long as it was legitimate regulatory measure.

A. The level of interference does not reach the intensity required for expropriation

68. The jurisprudence indicates that the degree of interference is enough to form expropriation, if the investor has temporarily or permanently lost its opportunity to use,

⁴⁸ Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(5), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *Am. J. Int’l L.* (1961) 545 at 548

⁴⁹ Tecmed, ¶ 115

or to enjoy, or to dispose of the property. Thus, in *Wena Hotels*, the tribunal found expropriatory the seizure of the Wena's hotel buildings for 1 year.⁵⁰ In *Middle East Cement*, temporary suspension of import license for 4 months was treated as expropriation.⁵¹ In more general manner, tribunals in *Starrett Housing*⁵², *Metalclad*⁵³ and *Pope & Talbot*⁵⁴ stated that when the investor's rights are rendered useless as a result of the government's conduct, such conduct amounts to expropriation.

69. The main difference between this case and the cases cited above is that the Respondent has neither deprived the Claimant of the use, enjoyment or disposal of its Patent, nor has it rendered the Claimant's rights useless.
70. There is a limited amount of ways as to use patent, which comprises essentially only the direct use by the patent holder and the issuance of licenses. Both these alternatives remained intact at the Claimant's disposal after the compulsory license. The compulsory license is non-exclusive, therefore the Claimant could issue other licenses with any company of its own choice. The compulsory license, although having expanded the amount of companies producing the medicine protected under patent, has left space for sales either by the Claimant or its non-compulsory licensees, which is proved by the fact that the Claimant does currently sell obesity treatment in Bergonia (RtQ 19). Moreover, the Claimant was offered to receive royalty for the compulsory license, which the Claimant would have received, had it given the said license voluntarily (P. 8). Therefore, Claimant retained the patent and freedom to use it, it receives royalty for licensed rights and thus there is no significant interference with its rights.
71. Claimant might argue that the compulsory license terminated exclusivity of its patent, whereas in some cases⁵⁵ the deprivation of an exclusive right granted by the sovereign was deemed expropriatory. However, unlike in the case of exclusive governmental concessions hitherto considered by the tribunals, in the case of patent exclusivity does

⁵⁰ *Wena (Merits)* at ¶ 82

⁵¹ *Middle East Cement*, at ¶ 107.

⁵² *Starrett*, at 154.

⁵³ *Metalclad*, at ¶ 111

⁵⁴ *Pope&Talbot* at 102-104, pp. 36-38

⁵⁵ *Benvenuti & Bonfant* atp. 371 ¶ 4.32 and ¶ 4.37; *LETCO (Merits)*, at pp. 337-338; *Feldman*, at ¶ 152.

not play core role, and it is recognized that the patent's exclusivity may be overruled by State acting in public interest, for example in order to ensure access to medicines.⁵⁶ Moreover, the Claimant itself did previously limit its patent's exclusivity in the same way as it has been done later by Bergonia, i.e. it licensed its exclusive right to BioLife (P. 8). This presents a fundamental distinction from the exclusive non-transferable concessions vested by States in *Benventti & Bonfant*, *LETCO* and *Feldman*. Therefore, exclusivity is not terminal for the patent and its loss due to the license does not add anything to the degree of interference.

72. Respondent thus submits that there is nothing significant in the Claimant's investment that has changed as a result of the compulsory license, and therefore the degree of interference by the latter was manifestly low.

B. Regulatory non-compensable measure affecting property rights is allowed under international law

73. It is recognized that the State has a right to control property and economic resources within its territory to enhance its political, economic and other objectives.⁵⁷ This right may be exercised even to the detriment of the private owners, provided that the degree of the detriment does not reach the level of expropriation. Tribunal said in *Feldman* that "reasonable governmental regulation [...] cannot be achieved if any business that is adversely affected may seek compensation, and [...] customary international law recognizes this."⁵⁸

Most recently, in *Saluka*, the tribunal stated that

"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 regulations that are commonly accepted as within the police power of States, forms part of customary international law today."⁵⁹

⁵⁶ GIBSON, at 12

⁵⁷ SORNARAJAH, 345

⁵⁸ Feldman, at ¶ 103.

⁵⁹ Saluka, at ¶ 262

The same approach has been taken in *S.D. Myers*⁶⁰ and *Methanex*⁶¹. The doctrine as well states that general regulatory measures that substantially decrease the value of property, provided the right to use, enjoy, manage and control property are left substantially intact, do not amount to compensable expropriation.⁶²

74. Regulatory activity includes state measures in public interest in the areas of public order, safety, health and the protection of the environment.⁶³ Compulsory licensing is universally considered as a legitimate governmental measure and States often resort to it in order to protect public health.⁶⁴ The Doha Declaration of the WTO, which members are both Bergonia and Conveniencia, has specifically allowed Members “to take measures to promote public health”, which manifestly refers to the Members’ regulatory powers.
75. Respondent adopted the law on compulsory licensing in 1997 (RtQ 104), long before the compulsory license or indeed the Patent have been issued in the present case. The license has been issued in accordance with the law (RtQ 37), therefore the Claimant should have reasonably expected the law’s application in the way as it has been applied. This, in its turn, is understood as a feature of legitimate regulatory action.⁶⁵
76. The regulatory action by State may be recognized expropriatory, if it is abusive, arbitrary or discriminatory.⁶⁶ Let alone insubstantial degree of interference shown above, Respondent has offered the Claimant royalty collected from all of the six compulsory licensees (P. 8); therefore the damage has been eliminated or at the very least minimized. Respondent will show below in the section regarding compliance with requirements for legitimate expropriation that the compulsory license has been issued on non-arbitrary and non-discriminatory basis.

⁶⁰ *S.D. Myers*, at ¶281

⁶¹ *Methanex*, Part IV, Chapter D, p. 4, ¶ 4

⁶² NEWCOMBE, 74

⁶³ NEWCOMBE, 76; GARCIA-AMADOR, 47

⁶⁴ CORREA, at 3

⁶⁵ *S.D. Myers*, Sep. Op. Schwarz, 1at 09; MCLACHLAN, 307

⁶⁶ *Link-Trading*, Award, 64

77. Therefore, the compulsory license constitutes legitimate non-compensable regulatory measure.

2. SHALL THE TRIBUNAL FIND THE LICENSE EXPROPRIATORY, THE EXPROPRIATION AT HAND WAS LEGITIMATE

78. BC BIT prohibits both direct and indirect expropriation with the latter being a measure having the effect of expropriation, unless such measure is taken (i) for the public benefit; (ii) on a non-discriminatory basis; and (iii) against prompt, adequate and effective compensation. Additionally, the Claimant might argue that the measure should have been accompanied with due process in accordance with Bergonian national law, and in accordance with international law as provided in BT BIT.

79. Respondent will below demonstrate that the expropriation was (A) for the public benefit, (B) on non-discriminatory basis, (C) against prompt, adequate and effective compensation and (D) accompanied with due process of law.

A. The compulsory license was issued for legitimate public purpose

80. State is the primary judge of what measures are required to be taken and that, in principle, the tribunals should defer to the policy choice made by the State.⁶⁷ Such discretion however broad indeed has objective limits, compliance with which may be tested by international investment tribunals.⁶⁸ A high test has been given in *ELSI* case, where the ICJ stated that

“[a]rbitrariness is [...] something opposed to the rule of law [and] a willful disregard of due process of law, and act which shocks, or at least surprises, a sense of judicial propriety.”⁶⁹

It was further specified in *Noble Ventures*, that if a measure is “provided in all legal systems and for much the same reasons”, the measure is not arbitrary.⁷⁰ The deference to the State’s judgment regarding what is in public purpose within its jurisdiction, has been confirmed in *CME*⁷¹ and *Enron*⁷², where the tribunals required presence of “clear

⁶⁷ *Amoco*, at 233; DOLZER/STEVENS, 103

⁶⁸ WHITE, at 19

⁶⁹ *ELSI*, at ¶76

⁷⁰ *Noble Ventures*, at ¶178

⁷¹ *CME*, at ¶162

intention”⁷³ to deprive the investment. Finally, in *Thunderbird*, the tribunal specifically emphasized that what is prohibited is “manifest arbitrariness falling below acceptable international standards”.⁷⁴

81. As was stated above, compulsory licensing is widely used for protection of public health.⁷⁵ Moreover, 153 WTO Member States decided in the Doha Declaration that they are empowered not only to use this measure, but also to freely determine the ground within the public health interest.⁷⁶ Therefore, the Respondent meets the test of *Noble Ventures*, whereas the Claimant has to demonstrate why compulsory license is opposed to the rule of law.

82. Absent the cases of manifest bad faith and arbitrariness, there is no case, where State’s regulatory action has been found not in that State’s public purpose. Even such aim as complete nationalization of oil industry has been regarded in public purpose of Iran in *Amoco*.⁷⁷

83. Therefore, the compulsory license was issued in public purpose.

B. The compulsory license has been issued on non-discriminatory basis.

84. Claimant could argue that it was discriminated against other companies holding identical patents or working in the same industry and were not subjected to compulsory license.

85. It is true that there are other companies in Bergonia operating in the same business sector as Claimant and no measures similar to the ones conducted in case of Claimant’s patent have been conducted in relation to them (RtQ 84). It is equally true that Bergonian IP Office has not issued compulsory licenses with regard to any other patented technology similar to Patent AZ2005 (RtQ 84).

86. Nevertheless, the compulsory license has been issued on non-discriminatory basis, since none of the companies operating in the same sector and holding similar patents were in “like circumstances” with the Claimant.

⁷² Enron, at ¶281.

⁷³ CME, at ¶162

⁷⁴ Thunderbird, at ¶ 194

⁷⁵ CORREA at 3

⁷⁶ Doha Declaration.

⁷⁷ Amoco, at ¶233

87. First, when in cases of discriminatory proceedings there is no information regarding any other ongoing comparable proceedings, the Claimant bears a burden of proof to demonstrate that the disputed proceedings were initiated on the basis of the Claimant's nationality.⁷⁸ On the other hand, it is known that compulsory licenses been issued in the past by Bergonia in relation to the patents of undisputedly domestic companies (RtQ 83).
88. Second, the test for determining "like circumstances" should be "sensitive to the particular circumstances of each case with the analysis focusing on the specific nature of the measure under challenge".⁷⁹ Thus, in *UPS v. Canada*, the tribunal considered whether the difference in delivery mechanism between UPS and Canadian domestic delivery company was important for the choice made in favor of the latter.⁸⁰ In *Corn Products*, the tribunal considered whether there was any distinction between synthetic sweetener as opposed to cane sugar important for the decision to impose tax on the former.⁸¹ The same logic has been applied in *Methanex*⁸².
89. Under this test, the decision to issue a compulsory license with respect to the Claimant is necessarily dictated by uniqueness of the Claimant's technology. It is because no other existing variants of obesity treatment proved to be as efficient as the Claimant's Patent (RtQ 68), that the Respondent decided to issue compulsory license on the said patent.
90. Therefore, the compulsory license was issued on non-discriminatory basis.

C. The license was issued against prompt, adequate and effective compensation

91. Respondent submits that it has provided to the Claimant prompt, adequate and effective compensation for the compulsory license. The facts show, that 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 (P. 8). Furthermore, the royalty is payable yearly (RtQ 87), in freely convertible Bergonian currency (RtQ 86).

⁷⁸ Noble Ventures, at ¶180

⁷⁹ Corn Products at ¶ 118

⁸⁰ UPS, at ¶¶173-81

⁸¹ Corn Products, 126

⁸² Methanex, at ¶28

92. The standard of prompt compensation may be interpreted as requiring payment without unreasonable delay, but not necessarily an up-front payment.⁸³ It is possible to pay compensation (if any) for a compulsory license through periodic royalty.⁸⁴
93. As an argument concerning both the standard of prompt compensation and that of adequate and effective compensation, the Respondent refers the Tribunal to the common practice of States to compensate the losses of patent holder in cases of compulsory licensing; in such cases States pay the patent holders the royalty based on sales by the compulsory licensees.⁸⁵ Moreover, it is specifically recommended to pay remuneration in the form of royalty for non-voluntary use in accordance with the TRIPS Agreement.⁸⁶
94. In such circumstances, shall the Claimant contend that the royalty mechanism did not fully compensate its losses, it would be the Claimant that will bear the burden of proof that this case entails need for unusual or exceptional mechanism of compensation.⁸⁷
95. Shall the Claimant contend that while the mechanism of royalty is admissible, the royalty rate is less than it was under the exclusive License Agreement with BioScience, the Respondent would submit that the facts do not reflect any losses of the Claimant.
96. Both the royalty offered by the IP Office and that paid previously under the License Agreement are based on sales of the licensees (RtQ 13, 86). The sales under compulsory license increased by 155 % as opposed to what took place under the License Agreement (RtQ 19). The compulsory license is non-exclusive, so the Claimant is free to license the patent to any other third parties and gain additional profit, unlike during the period when the exclusive license was granted to BioScience and the only profit Claimant received from its rights was the royalty from BioScience. In short, it is reasonable that the the royalty under a non-exclusive license is lower than the royalty under an exclusive one. Meanwhile, the royalty rate has become only “moderately” lower compared with that under the Agreement (RtQ 88). Merriam-Webster Dictionary defines “moderate” as “average or less in dimension”.⁸⁸ It would be thus reasonable to

⁸³ CORREA at 3.

⁸⁴ GIBSON, at 36

⁸⁵ CORREA, at 3

⁸⁶ J. Love, at 1-2.

⁸⁷ See e.g., Eastern Greenland, PCIJ, Ser. A/B No. 53 (1933) , at 49

⁸⁸ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 11th ed., (2003)

presume that the biggest percentage that the moderate decrease could mean is 50 % or lower.

97. Compulsory license compared with the License Agreement thus demonstrates a substantial profit on the part of the Claimant, and it is for the Claimant to prove otherwise.
98. Therefore the compulsory license has been accompanied with prompt adequate and effective compensation.

D. The decision on compulsory license has been taken and reviewed in the due process of law

99. Respondent submits that the procedure of taking the decision on compulsory license and of its review of the Patent Review Board was in accordance with both Bergonian and international law.
100. Article 4 (3) of the BC BIT states that
“the legality of [any such] expropriation and the amount of compensation shall be subject to review by due process of law according to the respective national legal system”.
101. The decision was taken by the IP Office in accordance with the law on compulsory licenses adopted in Bergonia and was subsequently recognized lawful by the Patent Review Board (RtQ 21, 37). Therefore, as regards the national Bergonian law, due process was provided to the Claimant.
102. Shall the Claimant apply Article III (2) of the BT BIT under MFN treatment, the Respondent would submit that the procedure established in Bergonia complies with the international standards referred to in the said Article. Article III (2) of the BT BIT provides for the investor’s right to prompt review by the appropriate judicial or administrative authorities of the host State to determine whether any such expropriation has occurred.
103. Respondent accordingly will show the standard of appropriate judicial or administrative authority under international law. First of all, it is noticeable that the BT BIT admits the review by an administrative authority. Therefore, irrespective of whether judicial or administrative, the authority should be by its composition and procedure appropriate under international law. Due process obligation, or obligation not to deny justice, arises from customary international law.⁸⁹ A denial of justice could be pleaded if the relevant

⁸⁹ Rumeli at ¶ 651

courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way, or committed the clear and malicious misapplication of the law.⁹⁰ Nothing of any kind of denial of justice are present in this case; the proceedings before the Patent Review Board do in general offer due process guarantees (i.e. safeguards for the independence of judges, right to oral hearing, right to respond to any filings made by the other party) (RtQ 82). Therefore, there is no violation of due process in the case.

3. THE COMPULSORY LICENSE ISSUED BY BERGONIA COMPLIES WITH THE TRIPS AGREEMENT.

104. Respondent issued compulsory license in pursuance of public health in full accordance with the TRIPS Agreement. Specifically, the Respondent has complied with Article 31 of the TRIPS Agreement setting forth the requirements for the use of patent rights without authorization of the patent holder, i.e. compulsory license.⁹¹
105. Article 31 provides that: (a) each authorization be considered on the merits of every individual case, (b) the user exhaust all ordinary measures to obtain authorization by the patent holder on reasonable commercial terms, provided that the attempts thereto are unsuccessful within a reasonable period, (c) the scope and duration be limited to the purpose of the license, (d) the license be non-exclusive, (e) the license be non-assignable, (f) the license be issued predominantly for the supply of domestic market, (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur, (h) adequate remuneration be paid, (i) judicial review be accorded for the decision and amount of remuneration.
106. Respondent submits that the burden of proof in the argument that the Respondent violated the TRIPS Agreement shall be born by the Claimant. The Doha Declaration in para 4 states “the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.” The only way as to give effect to such statements in treaty sources in the light of Article 31 of the VCLT, within the logic

⁹⁰ Azinian, at ¶¶102-3

⁹¹ GIBSON, at 5

proposed by Professor Dolzer, is to establish presumption in favor of the person to whom the statement defers.⁹² Therefore, so long as the State demonstrates that the compulsory license is issued in protection of public health, it is reasonable to presume *prima facie* case of the license compliant with Article 31 of the TRIPS Agreement. In this case, the Respondent has specifically stated that it issued the license “for domestic medical needs” (P. 7). The commentators recognize such ground as within public health imperative.⁹³ Therefore, the Respondent has *prima facie* complied with TRIPS Agreement and it is for the Claimant to prove otherwise.

107. Since there is no information as to whether the compulsory license was exclusive and assignable and whether it was possible to terminate the license before the term in case when the circumstances cease to exist, the Claimant may not reasonably argue that the Respondent violated the respective conditions of Article 31 of the TRIPS. The Claimant equally cannot rely on inadequate remuneration or inadequate review of the IP Office’s decision in the light of what has been demonstrated above in the section regarding compensation and due process of legitimate expropriation.

108. Article 31 (a) of the TRIPS provides:

“Authorization of such use shall be considered on its individual merits.”

109. Respondent’s IP Office has considered the Claimant’s case on its own merits, the Claimant had an opportunity to present its response to the IP Office (RtQ 2), and the IP Office’s decision has been reviewed by the Patent Review Board (RtQ 21, 37). Therefore, the Respondent has given to the Claimant’s case an individual consideration.

110. Article 31 (b) of the TRIPS provides the following with regard to the compulsory license:

“Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time....”

111. When the Claimant terminated the License Agreement with BioLife, the latter complained that upon receiving notice of termination it had sought to renegotiate the terms of the License Agreement, but that Claimant ended these negotiations after only

⁹² DOLZER, at 74

⁹³ CORREA at 3

three days (P. 6). It is also known, that the Claimant did not have immediate intention to license its patent to anybody in Bergonia (RtQ 6). Meanwhile, the problem of obesity, always being serious nationwide in Bergonia, has at the time of termination become more acute (RtQ 19). Whereas on 3 April 2007 all the negotiations regarding the new license have been terminated, it was not until 1 June 2007 that the IP commenced the proceedings of compulsory licensing and the license was issued on 1 November 2007 (P. 6, 7, 8). Therefore, the Claimant was given nearly 8 months to rearrange the access to the patented drug even after the proposed user has lost any opportunity to obtain authorization on commercial terms. Consequently, Article (b) has been manifestly complied with.

112. Finally, the Respondent has complied with the Article 31 (c) and (f), i.e. the scope and duration of compulsory license is limited to the purpose of the license and it is issued predominantly for the supply of domestic market.
113. The purpose of the license is specified by Bergonia as “domestic medical need” (P. 8) to treat obesity that became mass disease in Bergonia. The scope of the license includes the Patent AZ2005, which is regarded as the most efficient medicine to treat obesity (RtQ 68). The duration of the license is 48 months, which is regarded by the Respondent “as minimum period sufficient to determine the efficacy of Patent No. AZ2005 in reducing obesity among Bergonians and whether the impact of the compulsory license on the market for the product will enable sufficient numbers of Bergonians to use the product” (RtQ 66). Respondent submits in this respect that it had a wide margin of appreciation under both the TRIPS Agreement interpreted in accordance with the Doha Declaration and the BC BIT, as a matter of public purpose, the scope of its domestic medical need. Therefore, the scope and duration of the license were within its purpose, i.e. domestic medical need, as determined by the Respondent.
114. The requirement of predominant supply of domestic market means that “compulsory license may not be granted as a response to the interests of a foreign territory or a foreign country” and “the main purpose [...] must be to supply domestic market”.⁹⁴ Compulsory license does not contain allowance to export the medicine to the third states (RtQ 15). Indeed, the compulsory licensees do export the medicine abroad, however the exports constitute only a “significant” portion of the activity (RtQ 61). Meanwhile, “predominant” means “preponderant”, or “superior in weight, force, influence, numbers

⁹⁴ PIRES DE CARVALHO, at 240-1.

etc.”⁹⁵ Such definition creates at least a *prima facie* case, that the ratio of exports did not reach “predominant” character, in conditions of absence of concrete numbers. Therefore, the Claimant would fail to prove violation of Article 31 (f).

Respectfully submitted
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of the Democratic
Commonwealth of Bergonia

⁹⁵ Ibid., 241