

IN THE ARBITRATION UNDER THE CONVENTION ON THE SETTLEMENT OF
INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

Frankfurt International Arbitration Center, Börsenplatz 4, 60313 Frankfurt Am Main, Germany

MEDBERG CO.

Claimant

v.

THE GOVERNMENT OF THE REPUBLIC OF BERGONIA

Respondent

ICSID Case No. ARB/X/X

MEMORIAL FOR RESPONDENT

Respectfully submitted,
The Respondent
The Government of the Republic of Bergonia
By its attorneys,
Team Cordova
21 September 2009

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I. STATEMENT OF FACTS

1. Respondent, the Republic of Bergonia (“Bergonia”), and the Sultanate of Conveniencia (“Conveniencia”), and Amnesia are all ICSID Contracting States and all have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). They are all also Members of the World Trade Organisation (WTO) and parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”). Laputa is neither an ICSID Contracting State nor a Member of the WTO.¹
2. Bergonia and Conveniencia entered into a bilateral investment treaty (“BIT”) Concerning the Encouragement and Reciprocal Protection of Investments (the “B-C BIT”) on 30 May 2003.² The Government of Tertia and Respondent entered into a bilateral investment treaty (the “B-T BIT”), on 1 January 2003.³
3. Claimant, MedBerg Co. (“MedBerg”) was established and incorporated in Bergonia on 30 January 2004. Claimant’s administrative seat is also located in Bergonia.⁴ MedBerg is owned by MedX Holdings Ltd. (“MedX”), a Conveniencian holding company, 50% of which is owned by MedScience Co. (“MedScience”), a Laputan company, and 50% by Dr. Frankensid, a national of Amnesia and Bergonia.⁵
4. MedX was originally owned by Conveniencian Companies SARL (“CCS”) and duly incorporated in Conveniencia on 1 January 2003 under the name “CC123 Holding Ltd.”⁶ On 1 December 2003, CCS transferred ownership of CC123 Holding to MedScience and Dr. Frankensid.⁷ The company was renamed MedX Holdings Ltd.⁸

¹ Annex 3-Uncontested Facts, para. 1 & 2.

² Annex 1, art. 12, para. 4.

³ Annex 2.

⁴ First Round Clarification, A. 11.

⁵ Annex 3, para. 3.

⁶ First Clarification, A. 2.

⁷ *Id.*

⁸ *Id.*

5. Dr. Frankensid is employed by MedScience. He is credited with Bergonian Patent No. AZ2005, at issue in this case before the ICSID Tribunal (“the Tribunal”).⁹
6. Claimant applied for a patent in the territory of Bergonia in relation to Dr. Frankensid’s invention on 5 February 2004. The government granted Claimant Bergonian Patent No. AZ2005 on 15 March 2005.¹⁰
7. Patent AZ2005 covers technology that is used to produce a treatment and related products that combine a lipid absorption retardant with glycogen/lipid metabolism optimization.¹¹ Certain medical experts believe the technology is useful for treatment of obesity.¹² Obesity is a considerable problem in Bergonia as 34% of Bergonia’s males and 38% of its females are obese.¹³ Genetic makeup and traditional diet are credited with causing the obesity problem of the population.¹⁴
8. Claimant licensed BioLife Co., a Bergonian company, to utilize Bergonian Patent No. AZ2005 on 31 March 2005 through a privately negotiated Licensing Agreement. MedBerg terminated the License Agreement in accordance with the License Agreement’s notice and termination provisions on 31 March 2007. BioLife 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 three days.¹⁵
9. On 1 June 2007, the Bergonian Intellectual Property Office (“IP Office”) commenced proceedings for the issuance of a compulsory license with respect to Patent No. AZ2005, stating that the technology covered by this patent is needed to address important domestic

⁹ Id., para. 4.

¹⁰ Id., para. 5.

¹¹ Second Clarifications, Request 73.

¹² First Clarifications, Request 40.

¹³ Second Clarifications, Request 65.

¹⁴ First Clarifications, Request 40.

¹⁵ Annex 3, para. 6.

medical needs, specifically the dire obesity crisis afflicting over a third of Bergonians,¹⁶ whose medical needs Respondent contends were becoming more acute.¹⁷

10. The Bergonian IP Office issued a 48-month compulsory license for Patent No. AZ2005 on 1 November 2007. As of 1 January 2009, BioLife and five other Bergonian entities had invoked the compulsory license. These companies are using the technology covered by Patent No. AZ2005 to produce certain health-related products. Three of these companies have exported some of the products to other countries.¹⁸

11. 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 without offering any explanation or justification.¹⁹ While the percentage royalty rate offered was somewhat lower than the rate negotiated for by Claimant in the terms of the License Agreement between MedBerg and BioLife, the exact royalty offered by Bergonia is unknown.²⁰

12. In 2006, the gross domestic product (GDP) for Bergonians per capita was \$7,535 USD.²¹ Prior to the issuance of the compulsory license, the annual treatment cost to people using the product was \$300 USD²², or approximately four percent of the average per capita GDP of Bergonian citizens.

13. Bergonia's IP Office's decision to issue the compulsory license was reviewed by an administrative tribunal on X and was found to be in compliance with the national laws on compulsory licensing.²³

14. On 1 November 2008, the ICSID Secretary General registered the dispute for arbitration between Claimant, MedBerg, and Respondent, Bergonia.²⁴

¹⁶ Id., para. 7.

¹⁷ First Clarifications, Request 26.

¹⁸ Id., para. 8.

¹⁹ Id.

²⁰ First Clarifications, Request 25, Second Clarifications, Request 88.

²¹ First Clarifications, Request 44.

²² Second Clarifications, Request 109.

²³ Clarification

15. The Parties have stipulated that the only issues to be addressed at this time are: 1) whether the Tribunal has jurisdiction in view of the nationality of those parties controlling Claimant; 2) whether Claimant's utilization of its intellectual property in Bergonia is an investment; and 3) whether the compulsory license is expropriation and discrimination, or otherwise violates international law or any applicable treaties.²⁵

²⁴ Annex 3, para. 10.

²⁵ Record, para. 14.

II. JURISDICTION

a. Standards of review and Kompetenz-Kompetenz

16. The Tribunal does not have jurisdiction to hear this case. Claimant does not meet the jurisdictional requirements of (1) the ICSID Convention nor, (2) those of the Bergonia-Conveniencia bilateral investment treaty, (the B-C BIT).
17. Only when there is consensus on the facts is there a *prima facie* presumption that Claimant's contentions are true for the limited purpose of proving jurisdiction.²⁶ As in *Maffezini*, *SGS v. Pakistan*, *Salini v. Morocco* and *Joy Mining v. Egypt*, in this case, the *prima facie* approach is not appropriate as there exists a wide divergence of views as to the specific circumstances of the case, and the meaning of the dispute.
18. If, as in the present case, the parties have such divergent views about the meaning of the dispute in light of the Contract and the Treaty, the Tribunal necessarily must examine the contentions in a broader perspective, including the views expressed by Respondent, so as to reach a determination on jurisdiction before it can proceed to examine the case on the merits.²⁷
19. Jurisdictional analysis mandates a two pronged approach. First (1) the ICSID Convention establishes a threshold test that, for the limited purpose of proving jurisdiction, the dispute must arise directly out of an investment between Contracting State and a national of another Contracting State.²⁸ Claimant does not meet this threshold requirement because it is a Bergonian national. The Convention further stipulates that (1), a national of a foreign state can be one due to foreign control.²⁹ The definition of foreign control is left for the contracting states to decide. The relevant BIT between Bergonia and Conveniencia demands that, for the purposes of determining foreign control, the investor

²⁶ *Joy Mining Machinery Ltd v. The Arab Rep. of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004) para 7.

²⁷ *Id.* para 7.

²⁸ ICSID Convention Article 25(1).

²⁹ ICSID Convention Article 25(2)(b).

must have its ‘seat’ in Conveniencia.³⁰ Claimant does not have its seat in Conveniencia but rather in Bergonia, the host state.

20. In case the Tribunal applies the objective standard of consent as to the facts, Claimant must nevertheless prove that the alleged actions pertain to an investment and that the legal dispute arises out of such actions pursuant to Article 25 of the Convention. In addition to lacking jurisdictional standing Claimant has failed to show that its business dealings are an investment as defined by the Convention. See section III.1 and 2. Neither does the B-C BIT incorporate sufficiently precise definitions of “investment” or “investor” which would grant this Tribunal jurisdiction over this case. Furthermore, Claimant has made no showing that the dispute arises out of activities relating to investments covered by the Convention or the applicable BIT.³¹
21. Lastly, even if the Tribunal asserts jurisdiction over the case, as it is entitled to do under the well established principle of Kompetenz-Kompetenz,³² Respondent submits that it will show that any and all actions Respondent has taken are in full compliance with international law and applicable treaties. See section IV.

b. Subject matter does not fall under purview of Tribunal review

22. Even if an international dispute existed in these circumstances, the Tribunal lacks jurisdiction over the subject matter of the dispute. The dispute in question involves compulsory licensing under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPs Agreement”). The ICSID Tribunal lacks authority to arbitrate disputes arising out of a disagreement over patent licensing, which should be reviewed under the dispute resolution mechanisms of the WTO. See section IV. This is evidenced by the stark absence of any Tribunal decisions on expropriation of intellectual property rights (“IPRs”) to date. See sections III and IV. The Tribunal would lastingly alter the jurisdictional landscape for arbitration under the Convention and possibly have

³⁰ See BC Bit article I 1.3(a)

³¹ See sections II.1(b) and section III.1(b).

³² Compare New York Convention of 1958 art V.1

an adverse impact on the credibility of future ICSID Tribunals because legitimacy is contingent upon foreseeability and consistent application of international law. See further section II.2(b.)(ii) and III.2(a). Even if the Tribunal elected to adjudicate a licensing dispute, this dispute is not one that arises directly out of an investment. Claimant has not carried out any foreign direct investment in Respondent's territory and Claimant has not contested that they are, in fact, a Bergonian company and hence not an investment by a foreign investor.³³ By utilizing Bergonian law for incorporation, corporate governance, control and exploitation of the markets in Bergonia, Claimant has made clear its intention of not consenting to, or desiring to adhere to, any bilateral investment treaties ("BITS"). Subsequent attempts to exploit such BITs should not be entertained by this Tribunal. The alleged dispute arises out of a Bergonian company doing business in Bergonia, with Bergonian nationals.

1. NATIONALITY UNDER THE ICSID CONVENTION

23. The parties to a dispute before an ICSID tribunal must satisfy requirements of nationality under Article 25(1) of the ICSID Convention. Respondent argues that this requirement is not met on three separate grounds: (a) This dispute fails to meet the elements of nationality in regards to the citizenship of Claimant. Jurisdiction under Article 25 is also improper because, (b) the conflict arises out of a domestic contract dispute and hence not "directly out of an investment ... of a national of a foreign state."³⁴ Specifically, jurisdictional limits of tribunals constituted under the ICSID Convention are constrained to disputes "directly arising from an investment by a foreign national in the territory of the host state."³⁵ Lastly, (c) Bergonia has not consented to jurisdiction for domestic companies. There is consequently no dispute within the scope of the ICSID Convention.

³³ Annex 3, Statement of Facts para., 3.

³⁴ ICSID Convention Art. 25(1).

³⁵ *Id.*, Art. 25(2).

a. Claimant is a Bergonian national

24. The ICSID Convention was “designed to facilitate the settlement of disputes *between States and foreign investors*” and establishes the foundation for jurisdiction in Article 25.³⁶ The undisputed facts show Claimant is both incorporated and has its seat in Bergonia.³⁷ Claimant is incorporated under the laws of Bergonia and hence does not meet the requirements of Article 25. Unlike in *Tokios*, Claimant is not incorporated in a foreign state with a subsidiary in the host state.³⁸ Following *Tokios*, where the domestic subsidiary was removed by the claimant, the Tribunal should deny jurisdiction. Should the Tribunal elect to forego the reasoning in *Tokios*, Respondent asks the Tribunal to apply the standards agreed to by the States party to the B-C BIT, which mandates that a foreign investor must, at minimum, have its “seat”³⁹ in a foreign state; which Claimant does not.⁴⁰ See further section 2.

b. Conflict arises out of solely domestic dispute

25. The dispute at issue arises out of a purported ‘investment’. The alleged investment in this case however, is merely a contract between two Bergonian companies, MedBerg and BioLife. As will be discussed in section below, this is not an investment dispute in the context envisioned by the drafters of the ICSID Convention. A Bergonian company was created to sell a Bergonian product in Bergonia. Upon review Bergonian courts would find that Claimant created a dependency in the market and subsequently revoked the license in a probable attempt to increase profits. Therefore, the alleged dispute is rooted in anti-competitive behavior, discussed further in section IV.2(a)(ii), which Claimant pursued after Claimant had created market dependency for its products. This highly technical issue, tied intricately to local market conditions and domestic policy, should not be subject to private international review. The courts of Bergonia are not only better

³⁶ Report of Executive Directors, para 9. See also Dissent *Tokios*.

³⁷ First Clarification Request 11.

³⁸ *Tokios Tokelès v. Ukraine (ICSID Case No. ARB/02/18)*, Procedural history, decision at 3.

³⁹ B-C BIT Article 1.1(3)(a) and (b).

⁴⁰ First Clarification Request 11.

equipped to determine the merits of the dispute, but should also maintain jurisdiction for an equitable settlement under the principle of sovereignty.

26. Furthermore, as a Bergonian company, Claimant has not made any investment in a foreign state, has not derived benefits from a foreign state, and has instead availed itself the privileges and immunities of Bergonia by utilizing its position on the domestic market. This should subject Claimant to domestic courts.⁴¹ Claimant entered into the licensing agreement with another domestic company, BioLife Co., and elected to participate in Bergonia's markets. By availing itself of the privileges and immunities of Bergonia, Claimant consented to Bergonia as a proper venue for this dispute. Respondent's role, in this context, is merely to facilitate the enforcement of established agreements between two Bergonian companies.

27. Due to the domestic character of the business agreements at issue and the contractual nature of the claims, the dispute does not fall within the purview of the ICSID Convention. Disputes arbitrated by ICSID tribunals are governed by wholly different domestic and international treaties such as applicable BITs, the ICSID Convention, and the Vienna Convention. For domestic disputes, Bergonian corporate and contract law offer remedies for disputes.

c. Bergonia has not consented to jurisdiction for domestic companies

28. Begonia has not consented to ICSID arbitration for alleged disputes between Begonia and its nationals or for disputes arising out of domestic commercial transactions. Jurisdiction rests squarely within the sovereignty of the State and any attempt to exercise extraterritorial jurisdiction would upset international law and seriously undermine the legitimacy of future ICSID Tribunals. See II.2(b.)(ii) on implications of overriding domestic interests and policy.

⁴¹ Fouchard, Gallard et al., *On International Arbitration*, Kluwer Law International, 1999 p 387.

29. It is undisputed that the object and purpose of the ICSID Convention and the procedures provided therein are not provided to settle disputes between a state and its own nationals.⁴² Respondent has not consented to treat the Bergonian company as a foreign national, especially considering the absence of any proof that the "seat" of MedBerg is actually in Conveniencia. Interpreted in light of Article 25(2)(b) of the ICSID Convention, the claim of foreign nationality must be supported by *actual* foreign control.⁴³ The Tribunal must therefore, as a separate requirement, demand proof of actual foreign control.⁴⁴ Claimant has not made any attempt at showing the control of the company lies in Conveniencia. As was determined in *Vaccum Salt*, the Tribunal in this case can only find that no such control exists as, by Claimants own statements and based on the facts, the seat is in Bergonia.⁴⁵
30. "The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke the same no matter how devoutly they may have desired to do so."⁴⁶
31. Respondent asks the Tribunal to consider the facts, applicable treaties and arguments above and deny jurisdiction to Claimant. Should the Tribunal elect to forego the settled principles set forth above the Tribunal's review of nationality under the B-C BIT becomes paramount. For the reasons discussed below, Respondent maintains that jurisdiction for this Tribunal would still be improper as it is not allowed under the BIT.

2. REQUIREMENTS OF THE BERGONIA CONVENIENCIA BIT

32. In addition to not meeting the requirements for jurisdiction under the ICSID Convention, Claimant does not meet the jurisdictional requirements under the Bergonia-Conveniencia

⁴² See dissent, *Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18), at para. 19.

⁴³ *Klöckner v Cameroon* 2 ICSID Rep 16 (1983).

⁴⁴ *Vaccum Salt v Ghana*, 4 ICSID Reports 329 (1994) at 89.

⁴⁵ First Clarification Request 11.

⁴⁶ *Vaccum Salt v Ghana*, *supra* note 44.

BIT. The dispute does not relate to an investor-state dispute or to an investment as defined under the BIT as (a) Claimant does not meet the requirements of nationality as defined in the BIT and (b) the Most Favoured Nation clause does not allow for incorporation of provisions not in the contemplation of the parties when the States entered into the particular bilateral investment treaty. Furthermore, as will be discussed in section III, the dispute does not pertain to subject matter covered by the B-C BIT.

a. Nationality

33. Correct venue for a Bergonian company, like MedBerg, seeking remedy for actions within the state of Bergonia, is a court of proper jurisdiction within Bergonia. As will be shown, this general principle of State. Three additional and highly compelling reasons to deny jurisdiction, are also apparent in the B-C BIT. Firstly (i.), a subsidiary lacks standing when a BIT is used to access ICSID arbitration under international law. Second, when looking at the plain language of the BIT (ii.), the seat of the corporation is not in a foreign state and lastly (iii.), third party control prohibits jurisdiction. All three factors are independent grounds for denying jurisdiction and taken together they provide overwhelming support for Respondents view.

i. Subsidiary lacks standing under international law

34. The first step in any judicial proceeding is to determine which parties have a right to bring claims. Under ICSID arbitration the rule is clear and well established.⁴⁷ Lacking specificity as to what, as Claimant asserts in this case, constitutes “foreign control” under 25.(2)(b), the Tribunal would look at the applicable BIT to determine how the States party to the BIT have elected to define nationality in regards to investors and investment. When, as in this case, a company [MedBerg] claims to be a subsidiary and attempts to

⁴⁷ See ICSID Convention Article 25.

gain access to ICSID arbitration, the Tribunal must first ascertain the nationality of the purported subsidiary. As is stated in the facts, MedBerg is Bergonian national.⁴⁸

35. The issue of a subsidiary's standing was settled in *Tokios*,⁴⁹ where the Tribunal interpreted nationality in light of a Ukrainian – Lithuania BIT. In *Tokios*, a Lithuanian company was forced to remove its Ukrainian subsidiary as a claimant because it was *not* considered a Lithuanian national under Article 25 (2)(b) of the ICSID Convention and hence the applicable BIT. The often cited and highly held opinion is coupled with a powerful dissent by the chairman, Professor Proser Weil. The Decision and the Dissent are in complete agreement on one fact which is directly applicable to this case. A subsidiary established in a state cannot be a Claimant against the same state. That part of the Decision is widely held as a correct application of jurisdictional analysis.⁵⁰

36. Furthermore, where the company is a true subsidiary, Tribunals rarely elect to forego the wording of the BIT in preference to the much more ambiguous ICSID terms: “Undoubtedly, the promotion and protection of investment is an object or purpose of the BIT but that promotion and protection in the ... BIT is to be “on the basis of an

agreement” (i.e. on the basis of the terms of the Treaty – the BIT) ... If the object and purpose had been to have an immediate unrestricted direct access to ICSID arbitration, then inclusion of [the Article] would have been otiose and superfluous. Therefore, the assumption ... that since the object and purpose of a BIT is to protect and promote investments, unrestricted direct access to ICSID must be presumed, is contrary to the text (and context) of this BIT....”⁵¹ [Underline added]

37. Likewise, as was expressed in *Autopista*, and will be discussed further below, jurisdiction for a true subsidiary is contingent upon express agreement.⁵² No such agreement or consent is present in this case and MedBerg has made no showing that they are in fact a

⁴⁸ First Clarification Request 11. and Annex, Uncontested Facts para 3.

⁴⁹ *Tokios Tokelés v Ukraine*, 20 ICSID Rev. 205 (2005) p 4.

⁵⁰ Cambell, *International Investment Arbitration*, Oxford, 2007 at 147. See also *Wena Hotels Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999).

⁵¹ *Wintershall Aktiengesellschaft v. Argentine Republic*, (ICSID Case No. ARB/04/14), para. 155; *C.f. Aguas del Tunari SA v. Bolivia* (AdT), ICSID CASE No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 Oct. 2005) Para 219 -223

⁵² See below under (ii).

subsidiary and Claimant has made no showing why these widely accepted principles should not apply in the present case. Hence, Respondent asks this Tribunal, in line with well established principles, to respect previous Decisions and the intent of the Contracting States and find that a subsidiary lacks standing to bring action against the State where it is incorporated.

ii. Seat of corporation is not in a foreign state

38. The seat of the corporation is in the sovereign state of Bergonia and thus limits Claimant's actions to review under domestic law as expressed in the B-C BIT.⁵³ The B-C BIT specifically excludes any other interpretations by electing to limit the scope of the BIT to exclude foreign corporations with a seat in the state of Bergonia. As will be discussed, this was done to maintain jurisdictional authority over clearly domestic disputes. A company with its seat in Conveniencia is a Conveniencian investor. Claimant does not have its seat in Conveniencia and is therefore not a Conveniencian investor.
39. The very foundation of a nation's legal system must be that it maintains the ability to adjudicate domestic disputes. Any other reasoning would go against the very principle on which sovereign states exist. In reviewing the definition of 'seat' under the B-C BIT the Tribunal therefore need only rely on well-established principles clearly within the contemplations of the States of Bergonia and Conveniencia when they entered into the Treaty.
40. Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be interpreted so as to give it a meaning rather than so as to deprive it of meaning.⁵⁴ This is an application of the wider legal principle of effectiveness, which requires favouring an interpretation that gives to every treaty provision an *effect utile*. An investor under the B-C BIT is defined as a judicial person with its *seat* in the territory of Conveniencia. Claimant does not have its seat in Conveniencia. The seat of Claimant is in

⁵³ First Clarification Request 11.

⁵⁴ See *AAPL v. Sri Lanka* (ICSID/ARB/87/3), 542.

Bergonia.⁵⁵ A long line of cases has defined the seat or *siege social* as where management takes place or control is effectuated.⁵⁶

41. If the Tribunal examines what factors allow for governance over a corporate form, the Tribunal should look to what constitutes control as defined in the applicable Treaty; which equates control to *seat*.⁵⁷ Because ‘control’ is equated to seat in the applicable Treaty the facts clearly show that control, as defined in the BIT, was in Bergonia.⁵⁸

42. Furthermore the word “seat” is not ambiguous. The word is clear and makes sense as used by the Contracting States in the context of the BIT and, as stated by the ICJ:

*“If the relevant words in their natural and ordinary meaning make sense in their context; that is the end of the matter.”*⁵⁹

43. If the Tribunal was to entertain Claimant’s contention that jurisdiction is proper, this Tribunal would have to find that the seat is in a state other than Bergonia but it would clearly be the epitome of logical error to presume that the seat of Claimant’s company is in Conveniencia, simply because it is not in Bergonia. The Tribunal would instead have to ascertain where such seat, or control, is effectuated. Ventures to evaluate other forms of control unfortunately lead the Tribunal to set sail on a sea of doubt. The complex corporate structures commonplace in today’s global economy mandates a practical, rather than theoretical, approach. As was stated in *Autopista*: “The thicket into which [looking beyond the uncontested facts and terms of the agreement] would lead the Arbitral Tribunal is precisely what the drafters of the ICSID Convention decided to avoid. Finding the “ultimate”, or “effective”, or “true” controller would often involve difficult and protracted factual investigations, without any assurance as to the result.”⁶⁰ (*[...] Brackets and remark added.*)

⁵⁵ First Clarification Request 11.

⁵⁶ See *Autopista v Venezuela*, 6 ICSID Rep 419 (2001); *SOABI v Senegal*, 2 ICSID Rep 175 (1984); *Yaung Chi Oo v Myanmar*, 8 ICSID Rep 463 (2003).

⁵⁷ B-C BIT Article I.1.3(a) and (b).

⁵⁸ *Id.*

⁵⁹ *Guinea – Bissau v. Senegal*, Judgment of November 12, 1991.

⁶⁰ *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5

44. The complexity of modern corporate structures was made apparent in *Aguas*.⁶¹ In *Aguas* the issue in regards to jurisdiction was how to extract the meaning of “controlled directly or indirectly”.⁶² Unlike the present case there had been no objection to the nationality, but rather where control was effectuated. In this case no such exploration is necessary because, unlike the vague terms differing little from the ICSID definition in Article 25, the applicable BIT in this case defines foreign control as equated to seat.⁶³

45. In the present case Claimant has made no showing that the seat is anywhere but in Bergonia. Claimant was incorporated in Bergonia, the management is effectuated in Bergonia and the contested transactions are with other Bergonian nationals.⁶⁴ Setting out on a ‘fact finding safari’ of the type opposed in *Autopista* to assess “true” control would necessitate a review of the intent of the signatories to the B-C BIT. For the reasons stated below, should the Tribunal entertain such exploration, the Tribunal should find no reason to depart from established precedent by previous tribunals and therefore deny jurisdiction.

iii. Third-party control precludes jurisdiction

46. The Tribunal should find that the seat, as defined by the parties, is in Bergonia. Looking beyond the definitions agreed upon by the States party to the BIT the Tribunal would need to look at the underlying facts and, as discussed below, this only allows the Tribunal to conclude that control is not effectuated by parties to the BIT or the ICSID Convention.

47. The ownership, and hence control, is divided between a Bergonian national, Dr. Frankensid, and a third party national, MedScience, who is not party to any treaties or the ICSID convention. This issue has been addressed eloquently by previous Tribunals.⁶⁵ The facts regarding ownership in *Vacuum Salt* mirror the facts of this case. In *Vacuum Salt* a

⁶¹ *Aguas del Tunari SA v. Bolivia* (AdT), ICSID CASE No. Para 219 -223.

⁶² Id. para. 221.

⁶³ B-C BIT Article I.3(a) and (b).

⁶⁴ Annex 3, para. 6.

⁶⁵ Compare *Chapman Trading v Egypt* 19 ICSID Rev 275 (2004).

national of the host state owning a 50 % interest attempted to gain jurisdiction in the same manner as Claimant in this case. The ownership was decisive when the Tribunal elected to deny jurisdiction. As in *Vacuum Salt* this Tribunal should, for the foregoing and the additional reasons stated below, deny jurisdiction.

48. The baseline for assessment of a precise definition of ‘seat’ is that ‘seat’ is tantamount to some form of control. Control mandates some level of discretion or decision-making. In a corporate entity, such discretion is within the purview of equity stakeholders. The equity in this case resides within the statutory confines of a third party, MedX Holdings Ltd., for the benefit of yet two more parties Dr. Frankensid and MedScience Co.
49. The third party holding the Bergonian equity, MedX, is an entity in Conveniencia. The third party is, however, limited to a function similar to a bank security box or, more literally, a filing cabinet. The business entity does not and cannot effectuate any control, governance or derive profits, benefits, or be subject to liabilities from the Bergonian equity interest. This is instead the sole privilege of the controlling ownership interest in that entity; Dr. Frankensid and MedScience Co. The Conveniencian entity is thus merely a vessel with no decision making power. The power rests solely with two parties exercising control. In essence, the entity is simply an agreement between two parties, which are not, by themselves, corporate entities as defined by the BIT. Instead they have elected to register an entity which, unlike a management-run corporation, cannot function without the partners. The partners maintain complete discretion, exercise absolute control, and the liability rests with the partners. As such, MedX does not, on any level, exercise control or management over Claimant. Hence, under international law, Bergonian law, and the corporate laws of Conveniencia, the control is effectuated by the parties to the agreement; partners Dr. Frankensid and MedScience.
50. Unlike in *Autopista*,⁶⁶ where the parties explicitly agreed to address the issue of majority shareholders as a requirement for effectuating control, the B-C BIT contains no such

⁶⁶ *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, para 83, 84 f.

definitions. Respondent asks the Tribunal to respect the intent of the signatories to the B-C BIT and their express exclusion of any such language.

51. If Claimant's assertions, that control is effectuated in Conveniencia, were to be entertained; who could execute managerial decisions for the Bergonian company? The only logical conclusion is that Dr. Frankensid or MedScience have sole discretion over all decisions since the Conveniencian entity lacks managerial capacity in and of itself. Following Claimant's own assertions as to interpretation of control, if these two parties were removed, control over the Bergonian company would be lost.
52. Summarily, Respondent asks the Tribunal to reach the conclusion that since Dr. Frankensid is a national of Bergonia the Tribunal would need to deny him jurisdiction. MedScience is a national of a state not party to the ICSID Convention and as such, lacks standing other than in the courts of Bergonia or perhaps the domestic courts of Laputa.

a. The MFN Clause does not encompass Dispute Settlement Clauses

53. For the reasons stated below the MFN clause should not be read to create new substantive rights or alter the scope of the BIT. The MFN clause provided in the B-C BIT⁶⁷ (i.) does not extend to dispute settlement provisions as applied to the facts of the case. Claimant's stipulated interpretation would not only extend gratuities not intended in the original agreement, but would provide substantively differing terms to be applied, thereby altering the very foundation of the Treaty. Altering the original treaty would (ii.) frustrate and distort the intent of the Contracting Parties. Lastly, (iii.) incorporation of Article VI.8 of the B-T BIT necessitates that Article I.2 also be incorporated.

i. Article 3 of the B-C BIT does not extend to dispute settlement provisions

54. An MFN Clause should not replace one means of dispute settlement with another. The States party to this agreement specifically selected the provisions which they deem best

⁶⁷ B-C BIT, Art. 3.

further the goals and aims of the treaty at issue.⁶⁸ This is a common canon as is seen in other model BITs:

*“for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT”*⁶⁹

55. Upholding the intent of the contracting States by enforcing the specific provisions they deemed appropriate creates foreseeability and hinders investors from selecting at will from assorted options provided in other treaties, negotiated with other parties, for other reasons and under different circumstances. This approach is beneficial to the overall investor climate as it creates a stable environment for investors and legitimacy of proceedings. If investors were permitted to shop for clauses among all treaties it would not only undermine the very premise and purpose of the treaty, but could eradicate it entirely.⁷⁰ States could become hesitant to enter into treaties should the precedent created by this Tribunal allow for results which were contradictory to the terms initially agreed upon by signatories to a treaty. Respondent therefore asks this tribunal to respect previous Decisions which, as described below, unequivocally state that an MFN clause should not alter the meaning of the original BIT or the intent of the signatories to said BIT.

56. Furthermore, Article 3 of the B-C BIT should be viewed in the context of a long line of precedents, including *Maffezini v. Spain*,⁷¹ where the Tribunals addressed the question of granting jurisdiction based on the MFN clause. But unlike *Maffezini* and its progeny, which attached dispute settlement clauses relating to waiting periods, Claimant in this case is attempting to attach Respondent’s specific agreement made with another party that treats that party as a foreign national for 25(2)(b) purposes. Claimant is not simply asking for a shorter waiting period, but is instead seeking to gain access to ICSID arbitration by altering the very definition of “investment” and thus attempting to substantively alter the Treaty. This is not within the scope of the *Maffezini* Decision as

⁶⁸ Annex 1, B-C BIT Introductory paragraphs.

⁶⁹ See UK Model BIT Article 3(3)).

⁷⁰ *Wintershall Aktiengesellschaft v. Argentine Republic*, (ICSID Case No. ARB/04/14), para. 182. See also *Telenor v. Hungary*, Award of September 13, 2006, on “treaty shopping”.

⁷¹ *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000).

this is not a question of “investor’s rights” but strikes at the very core definitions governing the applicability of the Treaty governing the dispute. *Maffezini* did not create jurisdiction for parties who did not have it under the original BIT, but guaranteed certain rights to parties whom the host state had already consented to. Such is not the case here. Claimants interpretation of the BC and Bergonia- Tertia BIT does not, as in *Maffezini*, relate to a mere difference in waiting period or rights of parties whom have already been granted jurisdiction. These issues have no bearing on the eventual jurisdiction of the Tribunal, as is the case here.⁷² A similar conclusion can also be drawn from *Siemens v. Argentina*.

ii. *The intent of the Contracting Parties would be frustrated and distorted should the MFN clause be considered to extend the scope of the Treaty*

57. As was argued in *Salini v Jordan*, the BIT does not extend to “all rights” or “all matters covered by the agreement.”⁷³ The parties specifically elected to omit such wide language to avoid over-inclusion and forum shopping. The relevant provision relates to “investors” of third-party states. Under any conditions, the definition of “investor” must be considered to be the core of a bilateral investment treaty and goes to define the very scope of the treaty and therefore consent to arbitration by the parties. To therefore assert that the core term of the MFN clause, “investor”, as defined specifically by the Treaty, should be disregarded, is a gross misinterpretation of applicable law and governing conventions. The *Plama v. Bulgaria* Decision went so far as to state that the standard in *Maffezini* was only suited for exceptional circumstances and:

*“an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them”*⁷⁴

⁷² *Id.*, para. 52-67.

⁷³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13) Decision on Jurisdiction, para 118.

⁷⁴ *Plama Consortium Ltd. v. Rep. of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) para. 221 and 223.

58. Wholly dissimilar from the BC Bit is the B-T BIT relied upon by Claimant. In the B-T BIT the States elected to allow for a different definition of foreign companies. This is because in the B-T BIT, the parties contemplated a different scope and framework for the treaty and chose to allow for a much wider definition of investor and investments. It is the sole discretion of the parties to a treaty to formulate the provisions which are to govern the scope of the treaty. The parties created a treaty which best suits the intent of the contracting parties, considering things like local corporate climate, history and socio-economic considerations. In both the BT and B-C BIT, such contemplations were made and clearly expressed. Due to differing aims, intentions, and purposes, the four corners of the Treaty spell out different limitations – limitations that the parties specifically selected in order to best serve the interests of the Contracting States. Claimant in this case is attempting to alter the original Agreement, something the Tribunal should not entertain.
59. Respondent asks the Tribunal to consider the intent of the parties and to view the express limitations set forth therein. Construction of intent was addressed in *Maffezini* where the Tribunal stated:

*“As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case.”*⁷⁵

60. If the Tribunal were to find that the nationality provision is to be interpreted under the B-T BIT, the B-C BIT, in large, would become superfluous and take on a different application which the parties did not intend. This approach would be a gross infringement on a domestic matter falling within the sovereignty of the States who elected to enter into the treaties. It is not the role of Tribunal to alter agreements between sovereign states.
61. For the reasons stated above Respondent asks the Tribunal to respect the contracting States discretion in finding suitable avenues for the furtherance of commercial interests and disregard Claimants attempts to alter the Treaty.

⁷⁵ *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000) para., 62.

iii. Incorporation of Art VI 8 of the B-T BIT necessitates that Article 1.2 also be incorporated.

62. Claimant contends that the MFN clause incorporates Article VI.8 of the B-T BIT. This would not be proper for the reasons stated above. Furthermore such interpretation would mandate that article VI be considered in light of the entire Agreement, the B-T BIT. The BIT elected to provide a wider framework for the purpose of determining jurisdiction. A condition for this was the parties' express limitation to such rights manifested by Article 1.2. As jurisdiction, and right to seek ICSID arbitration, could be seen as having a wider scope under the B-T BIT the Parties, in Article 1.2, granted the right to the States to refuse national treatment to companies controlled by third-party nationals. Claimant, as has been shown, is a third party national. If the B-T BIT is applied, Claimant does not have standing to bring a claim under the ICSID Convention because Respondent elects to exercise its right to not consent to arbitration. Furthermore Claimant has made no showing that it is not controlled by third-party nationals. In fact, MedBerg is wholly-owned by third-party nationals. Consequently, if Claimant is permitted to incorporate dispute resolution provisions from the B-T BIT by using the MFN clause of the B-C BIT, Respondent must be permitted to invoke the adjoining Article 1.2 of the B-T BIT and refuse the Treaty's advantages to a company controlled by third-parties. Any other interpretation would frustrate the intent of the contracting States and would not afford Bergonia the rights it deemed appropriate in conjunction with entering into the B-T BIT.

III. CROSSOVER JURISDICTIONAL AND SUBSTANTIVE ISSUES

63. Jurisdiction is contingent upon both the nationalities of the parties and appropriate subject matter of the dispute. In the present case, Claimant, MedBerg Co., asserts that its business activities and mere possession of a Bergonian patent constitute an investment that should be afforded protection under the B-C BIT and the ICSID Convention, and potentially also under the TRIPs Agreement and general international law. However, Respondent maintains that MedBerg has not only failed to satisfy the jurisdictional prerequisites of nationality and compliance with the definition of an “investor,” as discussed earlier, but also the requirement that the dispute directly arise out of an investment. The interpretation of an individual patent as constituting an investment is a novel concept that requires careful analysis of the specific BIT and IPR in question before coming to a conclusion.⁷⁶

64. In order for intellectual property rights (“IPRs”) mentioned in BITs to qualify as covered investments, they must also fulfill the other requirements, especially that they “have the characteristics of an investment,”⁷⁷ as interpreted by tribunals in various investor-state arbitrations. Here the asset in question, the patent or the exploitation thereof, does not constitute a protected investment because, (1) the inclusion of IPRs in BITs is insufficient to warrant a finding that the patent constitutes a protected investment without (2) a finding that the asset possesses the necessary characteristics of an investment, and (3) consideration of this patent as a protected investment would be contrary to public interest. Consequently, Respondent requests that the Tribunal deny jurisdiction and refuse to consider this case on the merits.

⁷⁶ Gibson, A Look at the Compulsory License in Investment Arbitration (May 2009), 1, 2.

⁷⁷ Rachel A. Lavery, *Coverage of IP Rights in Int’l Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements*, August 2009, 3.

1. CLAIMANT’S PATENT DOES NOT CONSTITUTE A PROTECTED INVESTMENT

65. The issue of whether IPRs constitute an investment is relevant in two circumstances, (a) in “applying the bilateral investment treaty (“BIT”) provisions defining the categories of property interest that are covered in the BIT’s substantive guarantees,” and (b) under the jurisdictional provision of Article 25 of the ICSID Convention.⁷⁸ The ICSID Convention limits the jurisdiction of an ICSID Tribunal to:

“any legal dispute *arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State...”⁷⁹ [emphasis added].

66. Although the Convention did not explicitly define an investment and left the particular determination up to the consent of the parties, the parties are not free to include matters that are beyond the scope of the Convention.⁸⁰ The tribunal in *Joy Mining* addressed this notion and explicitly stated “the fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention.”⁸¹ To permit otherwise would contradict the very nature and purpose of the Convention, which is to protect and promote international investment. The tribunal in *CSOB* also noted that “an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment... is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre’s

⁷⁸ Mortenson, 4; UNCTAD, Intellectual Property Provisions in International Investment Arrangements, UNCTAD/WEB/ITE/IIA/2007/1 (2007); Y.G.L. Wolters, 2007. ‘The Meaning of “Investment” in Treaty Disputes: Substantive or Jurisdictional? - Lessons from *Nagel v Czech Republic* and *S.D. Myers v. Canada*’. 8 *JWIT*, 175-185.

⁷⁹ ICSID Convention, Art. 25(1).

⁸⁰ Report of Executive Directors on ICSID Convention, 1 ICSID Reports, at 28

⁸¹ *Joy Mining*, 49.

jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment.”⁸²

a. The Inclusion of IPRs in the B-C BIT is Insufficient to Warrant a Finding that the Patent Constitutes a Protected Investment

67. The Bergonia – Conveniencia BIT (“B-C BIT”) includes IPRs in the definition of “investments,” and specifies “patents” as a particular form.⁸³ However, many other BITs currently in existence have a far more expansive definition of investment and include thorough enumerated lists to support the notion that IPRs are meant to be included in the general definition of a covered investment.⁸⁴ For instance, the Netherlands-Thailand BIT, guarantees protection to “the investments, goods, rights and interests of *nationals* [emphasis added] of the other Contracting Party,”⁸⁵ which is not the case in the B-C BIT.

68. As the B-C BIT is not nearly as inclusive as many other BITs, it should be interpreted more narrowly, in line with the parties’ intentions, than some of the other BITs might be interpreted in different circumstances. Where the BITs succinctly define investment and merely mention IPRs in a list, an individual interpreting the BIT may have to turn to other sources, particularly the Vienna Convention on the Law of Treaties as well as other materials in order to discern the meaning of the intellectual property inclusion in an investment agreement.⁸⁶ The B-C BIT also includes language that in order to be covered an investment must be “invested in accordance with the laws and regulations of a Contracting State,”⁸⁷ which supports the notion that if an asset violates the laws and regulations of the host state, it may not be considered a protected investment.

⁸² *Joy Mining*, 68.

⁸³ B-C BIT, Article 1.

⁸⁴ *See Lavery*, 4-5, 12.

⁸⁵ Mortenson, 6; Netherlands-Thailand BIT, Art. VII (6 June 1972).

⁸⁶ Lavery, 5; Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331.

⁸⁷ B-C BIT Article 1.

b. The Patent Does Not Possess the Required Characteristics of a Protected Investment

69. In determining whether to consider the merits of the claim, the Tribunal should assess not only whether the parties have included IPRs in the definition of investment in the relevant BIT, but also whether the dispute arises out of an investment within the meaning of the Convention.⁸⁸ In making this determination tribunals have focused on several factors and determined that in order to qualify as an investment, an activity should have certain duration of the activity or asset; a regularity of profit and return; an element of risk; a substantiality of commitment and should constitute a significant contribution to the host State's development.⁸⁹

70. The “mere possession of a registered patent, without its exploitation as an investment subject to risk and with the expectation of gain or loss,” should limit its consideration as an investment.⁹⁰ Here Claimant fails to prove any of these qualities, but particularly cannot demonstrate that the patent or its exploitation thereof through the licensing agreement represents a substantial commitment or significant contribution to the host state's economic development.

71. Generally, when tribunals face a situation in which “one or more activities might not be considered to be an investment it is the overall operation that has to be taken into account, assessing the various factors globally.”⁹¹ In this case the Tribunal should be mindful of the fact there are no other activities to consider as Claimant only had one lone patent licensed in Bergonia and no other assets or capital. Thus while “investment is frequently a rather complex operation, composed of various interrelated transactions,

⁸⁸ *CSOB*, 68.

⁸⁹ *Joy Mining v. Egypt*, Award on Jurisdiction, ICSID Case No. ARB/03/11 (6 Aug. 2004), 52; Schreuer, *The ICSID Convention: A Commentary* (2001), at 140; *E.g., Salini Costruttori S.P.A. v. Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (23 July 2001); *Malaysian Historical Salvors v. Malaysia*, Decision on Jurisdiction, ICSID Case No. ARB/05/10 Para. 112 (17 May 2007); *Patrick Mitchell v. Congo*, Decision on Annulment, ICSID Case No. ARB/99/7 (1 Nov. 2006); *CSOB v. Slovak Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/4, Para. 64 (24 May 1999); *Fedax v. Venezuela*, Award on Jurisdiction, ICSID Case No. ARB/96/3, Para. 22.

31 (11 July 1997); U.S. Model BIT 2004.

⁹⁰ Gibson, CP in IA, FN 4.

⁹¹ *Joy Mining*, 40.

each element of which, standing alone, might not in all cases qualify as an investment... provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment” it should be considered so, but cannot be here as there are no other assets to assess.⁹²

72. In this situation, the government of Bergonia granted the patent for a period of 20 years, as required under TRIPs, but the licensing agreement between MedBerg and BioLife was for an uncertain duration, subject to future negotiations by the parties, and in fact only lasted two years before Claimant chose to unreasonably terminate the license.⁹³ The profits and returns on the licensed patent were also not certain as they were dependent on market demand and not guaranteed for any established period of time. The risk involved was also insignificant as demonstrated by the fact that Claimant had no physical assets, such as an office or manufacturing plant in Bergonia. The lack of risk evidences the insubstantiality of MedBerg’s commitment of capital and resources in the territory of Bergonia. Without a substantial commitment, there cannot generally be a significant contribution to the host state’s development. Claimant exploited its position as a supplier of an important medical product and reaped the benefits. There is no evidence that Claimant’s actions have otherwise benefitting Bergonia through the creation of jobs, promotion of innovation, expansion of manufacturing capabilities, or any other noteworthy addition to Bergonia’s development.

73. This is not to say that there are no possible circumstances which would justify a finding of an arbitral tribunal that a patent or other IPRs constitutes an investment, if it were “legally employed on an ongoing basis by an investor, with active economic ties in the host country,”⁹⁴ or otherwise an “integral part of the foreign investment,”⁹⁵ but that is not the case here and consequently the Tribunal cannot find that the patent qualifies as an investment.

⁹² *CSOB*, 72, citing *Fedax*, 24.

⁹³ Cite facts.

⁹⁴ *Mortenson*, 4, 9.

⁹⁵ *Gibson*, 16.

2. THE TRIBUNAL SHOULD NOT CONSIDER THIS PATENT TO BE AN INVESTMENT

a. The Tribunal's Consideration of This Patent as an Investment is Contrary to Public Interest

74. The inclusion of IPRs, which are already governed by an existing international legal regime, as covered investments in BITs, especially in ambiguous circumstances such as these, would result in TRIPs-Plus protections for these intangible rights to the potential detriment of social welfare.⁹⁶ The Tribunal should not overreach to find support for the argument that “any form of intellectual property that is sufficiently important to motivate recourse to international arbitration, will also involve a substantial commitment by the rights-holder.”⁹⁷

75. As in *Joy Mining*, where the tribunal explained that “to conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do,” to consider a single patent as constituting an investment would overreach the concept as interpreted in light of other arbitral decisions and would threaten the international investment arbitration regime.⁹⁸

76. Previous disputes involving definitions of investments have included “construction, water and sewage services, telecommunications concessions, banking and financial services, hotel management, television and radio broadcasting, hazardous waste management, textile production, gas and oil production, and various forms of mining.”⁹⁹ All of these industries have the fact that their assets are tangible in common, albeit to varying extents.

⁹⁶ Bernieri, 13-14; E. Biadgleng, 2006. ‘IP Rights under Investment Agreements: The TRIPs-Plus Implications for Enforcement and Protection of Public Interest’. *South Centre Research Paper No. 8*. Available at SSRN: <http://ssrn.com/abstract=943013>; Anderson, 8-9, 13; David Vivas-Eugui, 2003. ‘Regional and Bilateral Agreements and a TRIPs-Plus World’, 2. *TRIPs Issues Papers*, Quaker United Nations Office & International Center for Trade and Sustainable Development. Available at <http://homepages.3-c.coop/tansey/pdfs/ftaa-a4.pdf>; Vadi, 20; Correa, 1.

⁹⁷ Mortenson, 8.

⁹⁸ *Joy Mining*, 45.

⁹⁹ UNCTAD, *Investor-State Disputes and Policy Implications*, TD/B/COM.2/62 (8/2006).

and are distinguishable on that ground from IP rights, which are particularly different to quantify and thus would pose a challenge when assessing damages if there is no other investment within which these rights can be included. Fairly recently, an ICSID tribunal found a “wholesale seizure of a law firm’s office space, papers, and physical assets- and the resulting elimination of the firm as a going concern- did not constitute injury to a cognizable investment.”¹⁰⁰ Consequently, a single patent held by Claimant should not be considered to be an investment without any showing of physical property or other tangible or substantial intangible assets on the territory of the host state. Those tribunals that have considered intangible assets have only done so with stocks, shares, dividends, bonds, contractual rights, goodwill and market shares, but never IPRs standing alone.¹⁰¹

77. Furthermore, if, as Claimant alleges, MedBerg itself, as the company in which Dr. Frankensid and MedScience are shareholders through the holding company MedX, is to be considered the investment, it could only be regarded as such under the B-C BIT inclusion of “shares” in the definition of investment.¹⁰² If that were the case, Respondent maintains that the shareholders’ “investment” is still viable and no steps have been taken to undermine or limit rights associated with MedBerg, such as access to dividends and continued free exercise of corporate governance. No steps have been taken to impede rights conferred to holders of shares or on managerial discretion and the investment in Claimant remains viable.

78. Given Claimant’s negligible involvement and lack of foreign direct investment on Bergonian territory, the Tribunal should not take this opportunity, perhaps of first instance, to deem this meager asset a protected investment and set the stage for future exploitations by private investors at great cost to developing nations. Consequently, the Tribunal should reject jurisdiction over this essentially domestic dispute, as discussed in section 1 and refuse to proceed to analyze the substantive claims. However if the Tribunal does proceed to examine the merits of the dispute, Respondent contends that it

⁴⁰ *Mitchell v. Congo*, Decision on the Application for Annulment of the Award, Case No. ARB/99/7 (1 Nov. 2006); Mortenson, 4.

¹⁰¹ See *Amoco Int’l Finance Corp. v. Iran*, Award N° 310-56-3 of 14 July 1987, 15 Iran-U.S. Cl. Trib. Rep. 189; Methanex; Bernieri, 16; Biadgleng, 31.

¹⁰² B-C BIT, Article 1.

has not violated any standards of international law found in the relevant BITs and WTO treaties.

b. An ICSID Tribunal Is Not the Proper Forum to Consider a Claim of Expropriation Involving Intellectual Property Rights

79. Issues concerning compulsory licenses are generally considered in the multi-lateral framework of the World Trade Organization and the applicable dispute resolution mechanisms for trade-law related disagreements.¹⁰³ So far, and for good reason, the principal international legal recourse for corporations suffering IP injury by foreign governments has been to lobby their home governments to bring claims on their behalf through the WTO dispute resolution under the TRIPs Agreement.¹⁰⁴ “For IP owners whose grievances are directed at private parties rather than governments, the World Intellectual Property Organization (WIPO) also offers a set a dispute resolution options for these private parties.”¹⁰⁵ The proper forum for this dispute is thus the WTO and state parties should be in control of determining how to treat alleged violations of IPRs, not private investors and especially not in a forum that does not rely on binding legal precedents.

80. The current uncertainty about how to apply expropriation standards set forth in bilateral investment treaties to resolving disputes centered around IPRs suggests that private institutions, even those as highly respected as ICSID, should not be the first to address such contentious issues, but rather that guidance be first provided by domestic courts or through the existing dispute settlement mechanisms of the World Trade Organization or the World Intellectual Property Organization. The “potential complications arising from overlapping and possibly competing international legal frameworks, in particular, obligations arising under an IIA, and their possible intersection with multilateral disciplines under the TRIPs Agreement” further support allowing states to formulate

¹⁰³ Gibson, CP in IA, 4; Vadi, 6-8.

¹⁰⁴ Agreement on TRIPs, Part II, Para. 1, 2, & 5, 15 April 1994, 33 I.L.M. 1197; WTO DSU article 1-4; Julian Davis Mortenson, *Intellectual Property as Transnational Investment: Some Preliminary Observations*, June 2009, 1-2, Footnote 3.

¹⁰⁵ Mortenson, 1-2, Footnote 3.

policy and clarify how these frameworks should be interpreted in relation to one another before private parties become entrenched in the debate.¹⁰⁶

IV. ARGUMENT ON MERITS

81. Claimant, MedBerg, contends that Respondent's issuance of a compulsory license with respect to Claimant's intellectual property (Bergonian Patent No. AZ2005) violates its rights in accordance with general international law and applicable treaties, in particular Article 4 of the Bergonia- Conveniencia BIT. Claimant also alleges discrimination and violations of fair and equitable treatment, all of which Respondent reject in their entirety because (1) the TRIPs Agreement and Doha Declaration are applicable law and the dispute should be interpreted in light of this law, (2) the Respondent did not commit expropriation, and (3) Respondent did not discriminate against or fail to afford Claimant fair and equitable treatment.

1. TRIPs AGREEMENT AND DOHA DECLARATION ARE APPLICABLE LAW

82. The ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."¹⁰⁷ In this situation, the inclusion of the TRIPs Agreement and Doha Declaration is proper applicable or persuasive law.

83. Where both states are members of the WTO, as in this case, either party may reference the standards set forth in Article 31 of TRIPs, in the context of other relevant provisions, including Articles 7, 8, 40 and 42, and in light of the Doha Declaration, to justify or

¹⁰⁶ Gibson, 6.

¹⁰⁷ ICSID Convention, Art. 42(1).

challenge the issuance of a compulsory license and make a substantive determination with regard to whether Respondent's actions meet WTO standards.¹⁰⁸ In making that assessment, the Tribunal should either regard the TRIPs Agreement as part of the applicable law or at least refer to the provisions for interpretive guidance.¹⁰⁹ If the Tribunal decided that the compulsory license is TRIPs compliant, then it would have to dismiss Claimant's allegations of expropriation and if it decided that the government's issuance of the compulsory license was improper, nevertheless, no indirect expropriation has occurred.¹¹⁰

84. The Vienna Convention on the Interpretation of Treaties also provides guidance on the issue of applicable or persuasive law and specifically provides that “[t]here *shall* be taken into account, together with the context...any relevant rules of international law applicable in the relations between the parties.”¹¹¹ “When considering an investment dispute involving a compulsory license, brought by an investor from a WTO member country against a host state that is also a WTO member, Article 31(3)(c) of the VCLT provides grounds for interpreting the TRIPs Agreement “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹² Thus Article 31 provides international standards of conduct with respect to the host state's procedures for the issuance of the compulsory license, and minimum terms and limits for such a license.”¹¹³

85. Lastly, the language of the B-C BIT also supports the inclusion of the TRIPs Agreement and Doha Declaration. Specifically, Article 8(2) of the B-C BIT states that “each contracting state shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.” Article 9(5) of the B-C BIT also requires that the tribunal “shall decide on the dispute in accordance with regard to the provisions of this Treaty and the principles of international law,” which

¹⁰⁸ See Gibson at 34, 43-46; Biadgleng at 18, 26; Lin at 159; and Taubman at 964.

¹⁰⁹ Id.; Gaetan Verhoosel, *The Use of Investor-state Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. Int'l Econ. L. 493 (2003), 503-506; Gibson, 36.

¹¹⁰ Gibson, 35.

¹¹¹ VCLT, Article 31(3)(c); Gibson, 46-47; Verhoosel, 503; Vadi, 13-14.

¹¹² Id.

¹¹³ Gibson, 47.

requires looking to TRIPs for guidance on how to determine whether a compulsory license was properly issued by a state.

86. So far, only one investor-state dispute, filed between two subsidiaries of Shell Corporation against Nicaragua, alleging a violation of trademark protections under a BIT has proceeded to arbitration.¹¹⁴ Particularly since the parties to the Shell-Nicaragua dispute settled before any decision was issued, the contours of BIT arbitration as a mechanism for enforcing IP rights are still largely unexplored.”¹¹⁵ Consequently there are no known publicly available arbitral decisions pertaining to the protection of IPRs in investment treaties as enforced by investor-state arbitration that would guide the Tribunal in resolving the present dispute.

87. Claimant here clearly does not have standing to bring a claim through the dispute resolution mechanisms provided by the WTO, and is seeking to circumvent the existing procedures and means of dispute resolution currently provided under TRIPs through the WTO and instead gain the advantages available to proper parties before an ICSID tribunal.¹¹⁶ If Claimant were so concerned that the compulsory license will damage their investment in the state of Bergonia, it should petition the government of the Sultanate of Conveniencia and seek to have the compulsory license revoked, not seek damages that may end up being prohibitively difficult to determine due to constant fluctuations in market pricing and resulting profits.¹¹⁷

88. Consequently, the Tribunal should interpret the dispute and the issuance of the compulsory license under TRIPs and find that Respondent (a) complied with the terms of

¹¹⁴ *Shell Brands Int'l vs. Nicaragua*, ICSID Case No. ARB/06/14 (proceeding discontinued 12 Mar. 2007); See Notice of Arbitration, *Apotex v. United States* (10 Dec. 2008), available at http://www.naftaclaims.com/disputes_us_apotex.htm.

¹¹⁵ Gibson, 3, FN 8; See also *Apotex Inc. v the Government of the United States of America*, Notice of Intent to Arbitrate, 21 September 2007; *Signa v Canada*, Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, New York, 4 March 1996.

¹¹⁶ See Mortenson, 6; ICSID Convention, Articles 53-54; Martín Molinuevo, *Can Foreign Investors in Services Benefit from WTO Dispute Settlement? Legal Standing and Remedies in WTO and International Arbitration*, NCCR Trade Working Paper No. 2006/17, at 11-12.

¹¹⁷ See Bernieri, 12.

TRIPs and (b) did not commit expropriation because it only acted in response to an existing public health crisis and in response to Claimant’s anti-competitive practices.

a. Respondent’s Issuance of a Compulsory License was Valid Under TRIPs and Consequently Does Not Constitute an Expropriation

89. The TRIPs Agreement permits the grant of a compulsory license by WTO member states, so long as each compulsory license is “considered on its individual merits;” after efforts have been made – and failed – to obtain authorization from the right holder on reasonable commercial terms and conditions (this condition can be waived in case of a national emergency or other circumstances of extreme urgency, as in the present case); the compulsory license must be non-exclusive and non-assignable, with a scope and duration limited to the purpose for which it was issued, and it must cease if and when the conditions change to eliminate that purpose; the license must be used “predominantly for the supply of the domestic market” of the authorizing state; and the right holder must be “paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.”¹¹⁸

90. Furthermore, requirements of prior efforts to obtain a license on reasonable commercial terms and the limiting use thereof predominantly to the domestic markets might be waived by member states when compulsory licenses are applied as a remedy to correct anti-competitive practices which have been determined after judicial or administrative procedures.¹¹⁹ The requirement of domestic market supply can also be waived “in the case of export of medicines to countries that are either completely without or that have insufficient manufacturing capacity in that field.”¹²⁰

91. TRIPs “provides member countries with the discretion of incorporating their own standards and procedures regarding how to implement the TRIPs standards within their

¹¹⁸ TRIPs, Article 31(a-f); Gibson, 11-12; Bernieri, 9.

¹¹⁹ Bernieri, 9.

¹²⁰ Correa, 13 *citing* Decision of the WTO General Council adopted on 30 August 2003.

jurisdictions,”¹²¹ which is exactly what Respondent has done in this situation.¹²² The compulsory licensing regime of the TRIPs Agreement is often viewed as a provision that aims at balancing the interests at stake in IPR regulations and particularly as a tool for developing countries to cope with the technology gap with respect to developed countries.¹²³ In this situation, the Government of the Republic of Bergonia, a developing nation, complied with Article 31 in issuing the compulsory license over Claimant’s patent for two reasons: (i) in response to a dire public health situation and (ii) to remedy anti-competitive behavior. In light of Respondent’s proper exercise of discretion, the Tribunal should find that the issuance of the compulsory license does not constitute a direct or indirect expropriation under international law.

i.) Respondent Issued the Compulsory License in Response to a Existing Public Health Crisis

92. As required by the terms of TRIPs, Respondent invoked its right to seek a compulsory license in response to exigent public health circumstances after renegotiation of the terms of the licensing agreement failed. The issued license is clearly limited to the purpose for which it was authorized, which is to control the obesity level of the Bergonian population primarily, and to a more limited extent, similarly afflicted populations in third countries. Furthermore, the government, though the Intellectual Property Office, sought to adequately compensate Claimant by offering royalty payments, which Claimant inexplicably refused without further consideration.¹²⁴

93. The Doha Declaration stands for the proposition that each member nation has the freedom to determine what constitutes a national emergency or other circumstances of extreme urgency and to identify the grounds upon which compulsory licenses may be granted and specifically that the “TRIPs Agreement does not and should not prevent

¹²¹ Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview*, May 2009, 3.

¹²² Cite facts.

¹²³ Taubman, 2008. ‘Rethinking TRIPs: “Adequate Remuneration” for non-voluntary patent licensing’. 11 *J. Int’ Econom. L.* 927.

¹²⁴ Cite facts.

members from taking measures to protect public health.”¹²⁵ Compulsory licensing in trips is meant to promote the public interest in protecting health and nutrition, and promoting the public interest in areas of vital importance to national socioeconomic and technological development.¹²⁶ In this situation, Respondent qualifies as a least developed country that is struggling to deal with a burgeoning epidemic, obesity, and should not be thwarted in its quest to provide necessary medicine for its citizens by Claimant’s pursuit of pharmaceutical profits within its borders and in the customs zone.

94. In light of these factors, Respondent acted properly in exercising its right to issue a compulsory license for the patent that had been at the heart of the terminated licensing agreement.¹²⁷ The Doha Declaration recognized the “gravity of public health problems afflicting many developing and least developed countries, especially-- but not limited to – those resulting from HIV/AIDS, tuberculosis, malaria, and other epidemics, and recognized that 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.”¹²⁸

ii.) Issuance of the Compulsory License was Proper in Response to Claimant’s Anti-Competitive Practices

¹²⁵ Doha, para. 5(b).

¹²⁶ Kirpapuri, Reasoned CP: Applying U.S. Anti-trust’s Rule of Reason to TRIPs CP Provision, 36 New Eng. L. Rev. 669, at 676.

¹²⁷ See also 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 (2004); Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 Am. Bus. L.J. 283 (2008); Tsai-Yu Lin, *Compulsory Licenses for Access to Medicines, Expropriation and Investor-State Arbitration Under Bilateral Investment Agreements – Are There Issues Beyond the TRIPs Agreement?*, 40 Int’l Rev. Int’l Prop. L. 152 (2009); Antony Taubman, *Rethinking TRIPs: ‘Adequate Remuneration’ for Non-Voluntary Patent Licensing*, 11:4 J. Int’l Econ. L. 927, 934-935 (2008); Emias Tekeste Biadgleng, *IP Rights Under Investment Agreements: The TRIPs-Plus Implications for Enforcement and Protections of Public Interest*, Research Paper No. 8, South Centre (Aug. 2006).

¹²⁸ WTO, *The Doha Declaration on the TRIPs Agreement and Public Health*, adopted on 14 November 2001, WT/MIN(01)/DEC/2, 20 November 2001. See also Decision of the General Council of 30 August 2003, Implementation of Para. 6 of the Doha Declaration on the TRIPs Agreement and public health, WTO document WT/L/540 and Corr. 1 (Sept. 2003); See the General Council Decision, 6 December 2005, Amendment of the TRIPs Agreement, WT/L/641 and also the General Council Decision, WT/L/711, 18 December 2007 available at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm; Correa, 36 Case W. Res. J. Int’l L. 79, 91; Report by the World Health Organization Commission on Innovation, Intellectual Property and Public Health, 2007. Available at: <http://www.who.int/intellectualproperty/report/en/index.html>.

95. Claimant terminated the licensing agreement it had with BioLife, a Bergonian company, without providing any explanation or justification. MedBerg unreasonably refused to renegotiate the terms of the agreement. It was in response to Claimant's actions that Respondent was forced to take action for public health considerations and issued a compulsory license over Claimant's patent.
96. The alleged dispute consequently arises out of anticompetitive behavior, which Claimant subsequently pursued after creating a market dependency. Respondent asserts that Claimant did not view its patent as a commitment or investment, but rather as an opportunity to exploit a vulnerable, poorly developed country suffering from a dire medical situation. It is clear from the record that certain anticompetitive actions by Claimant have been a detriment to the state of Bergonia, and are wholly at odds with the definition and purpose of an investment. (put cite elsewhere) ¹²⁹

2. RESPONDENT DID NOT COMMIT EXPROPRIATION

97. Alleging expropriation is a serious claim to make against a state and even though private investors have characterized government action in this form in the context of compulsory licensing, a private party has yet to bring a successful claim challenging the action as expropriation in any international forum.¹³⁰ In this situation, Claimant should not prevail on its allegations because Respondent took action in accordance with its domestic laws and the TRIPs Agreement for the issuance of a compulsory license, for a clear public benefit, on a non-discriminatory basis, and the government also offered prompt, adequate and effective compensation, which Claimant unreasonably refused to accept. Consequently, the Tribunal cannot find that Respondent committed direct or indirect expropriation in violation of the B-C BIT.

¹²⁹ Second Clarifications, Request 106.

¹³⁰ Gibson, 3; Tsai-Yu Lin, *Compulsory Licenses for Access to Medicines, Expropriation and Investor-State Arbitration Under Bilateral Investment Agreements – Are There Issues Beyond the TRIPs Agreement?*, 40 Int'l Rev. Int'l Prop. L. 152, 171 (2009).

a. Respondent Did Not Commit Direct or Indirect Expropriation in Violation of the B-C BIT

98. While Respondent maintains that the single patent licensed in Bergonia does not constitute an investment in the host state, the Government of the Republic of Bergonia nevertheless did not take any direct or indirect measures that would amount to nationalization or expropriation of the IPR in violation of the B-C BIT which prohibits direct or indirect expropriation, nationalization or other measures tantamount, 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.”¹³¹ The requirement of compensation should also be broadly interpreted.

99. The Tribunal should consider that “the standard of prompt compensation...may be interpreted as requiring payment without unreasonable delay, but not necessarily an upfront payment.”¹³² Furthermore, if the Tribunal were to find that the level of compensation is inconsistent with the TRIPs Agreement, then the potential claim under the law of expropriation should be limited to the degree to which the compensation fell short of the TRIPs standard, in order to “safeguard against forum shopping and erosion of the multilateral system” of public international law by private investors.¹³³ The Tribunal should also look to how adequate compensation was determined in other compulsory licensing cases, where remuneration ranged from 0.5% to a maximum of 4% of the value of the products produced under the license.¹³⁴ Customary compensation rules requiring promptness, adequacy and effectiveness, may be modified or limited in the context of intellectual property disputes.¹³⁵

¹³¹ B-C BIT, Art. 4(2).

¹³² Correa, 351; Correa, 10.

¹³³ Taubman, 964.

¹³⁴ Correa, 3-4; J. Love (2006). ‘Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technologies’. WHO/TCM/2005.1, Geneva.

¹³⁵ Vadi, 11.

i. Respondent Did Not Commit Direct Expropriation

100. Direct expropriation requires that a state transfer legal title of the private property in question to itself or to a third party. With respect to intellectual property, the ownership right does not transfer actual title to the state and thus direct expropriation cannot be said to have occurred.¹³⁶ Consequently, Claimant could only allege indirect expropriation, in violation of the B-C BIT.

101. In the cases where expropriation was found “the investor has suffered a deprivation and there has been a corresponding acquisition of use or control of the investment by the state,” and even where “there was no state acquisition; there was extreme and arbitrary interference with property rights.”¹³⁷ Here not only is Claimant not a proper investor under the Convention, the patent should not be considered a protected investment and the government of Bergonia cannot be said to have acquired actual control over the property right itself, just its use, nor has it interfered with Claimant’s property rights in an extreme or arbitrary manner to rise to the level of expropriation.

ii. Respondent Did Not Commit Indirect Expropriation

102. With regard to the issue whether regulatory measures to protect public health can be considered to constitute *indirect expropriation*, as the arbitral tribunal held in *Feldman Karpa v. United Mexican States*, “not every business problem experienced by a foreign investor is an indirect or creeping expropriation.”¹³⁸

103. There are two primary stages of analysis for an indirect expropriation: first, “the analysis should focus on the nature or magnitude of the interference to the investor’s property interests in its investment caused by measures attributable to the Host State to determine whether those acts amount to a taking.” Second, “there should be a determination of

¹³⁶ Gibson, 8, 19; Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20:1 ICSID Review – FILJ (2005), at 8.

¹³⁷ Gibson, 21, citing Newcombe, at 9-11.

¹³⁸ Vadi, 21 *citing* Feldman Karpa.

whether this taking or interference rises to the level of an expropriation by reference to the relevant treaty standard.” In this second stage, the focus is on specific undertakings or representations to the investor made by the state, and legitimate expectations or reliance on the part of the investor, which are then disappointed by the state interference.¹³⁹ The determination of whether a measure constitutes an indirect expropriation requires consideration of three factors: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.¹⁴⁰ Several ICSID cases have examined claims of indirect expropriation using these factors, and thus this Tribunal should look to these and other cases as persuasive authority or for guidance.¹⁴¹

iii. *The Economic Impact of the Compulsory License on Claimant’s Patent is Negligible*

104. With regard to the economic impact of the government action, “the extent the compulsory license may diminish the value of the patent will depend on a variety of factors. Loss of value will not be automatic, and may not occur at all if compulsory licenses increase the global demand for the patented product, or if the royalties received compensate for the losses originated by the compulsory licensee’s competition... In fact, the market share that compulsory licenses may obtain may be small and even insignificant, on account of the reputation and dominant presence of the patent owner in the market.”¹⁴² Consequently, the “mere fact that a compulsory license may have an adverse economic effect on an investment, standing alone, does not establish that it amounts to a *de facto or indirect* expropriation.”¹⁴³

¹³⁹ Paulsson and Douglas, *Indirect Expropriation in Investment Treaty Arbitration*, 148; Gibson, 22.

¹⁴⁰ 2004 United States Model Bilateral Investment Treaty (U.S. Model BIT), Annex B, at www.ustr.gov; Gibson, 22.

¹⁴¹ Metalclad Corp. v. the United States of Mexico; Marvin Feldman v. Mexico; Methanex; Pope & Talbot v. Canada; Starrett Housing;

¹⁴² Correa, 351-52 (Gibson cite).

¹⁴³ Correa, IPRs as Investment, 9.

iv. *The Government of Bergonia Did Not Interfere With Any Reasonable Investment-Backed Expectations*

105. The extent to which the government of Bergonia may have interfered with distinct, reasonable investment-backed expectations in this situation can be analogized to that in the *Feldman* case. In *Feldman*, the tribunal found that a change in the tax code did not constitute an indirect expropriation because the investor could not rely on the tax code remaining status quo for the duration of its investment in Mexico and it would not be reasonable to expect that such regulations would never change. With regard to compulsory licensing of IPRs, the existence of compulsory license provisions in the patent law system of a host state means that that the “investor should be in position to be able to foresee that the compulsory license is applicable and will have associated effects,” such that investors “should have reasonably expected” that the compulsory license law “will created associated effects and should take this into consideration before making any investment decisions.”¹⁴⁴

106. A foreign government’s grant of patent rights to an inventor for a particular invention does not necessarily qualify as the type of representation, authorization or undertaking to the inventor that is cognizable within the indirect expropriation analysis set forth above. It is also not necessarily legitimate and reasonable for the inventor to rely on the foreign government’s grant of patent rights throughout the length of the patent’s term, even in association with a decision to exploit the patent’s rights as an integral part of a foreign investment.¹⁴⁵

v. *The Public Purpose of Bergonia’s Actions Outweighs Any Economic Impact or Investment-Back Expectations*

107. The character of the government’s purpose is important to assess and may result in a finding that no right of compensation may arise for *bona fide* government regulations that

¹⁴⁴ Lin, 157.

¹⁴⁵ See Gibson, 25.

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.”¹⁴⁶ The public interest purpose behind authorization of the compulsory license, such as to meet the needs of a public health emergency, may pull markedly to support the notion that the compulsory license does not constitute an expropriation.¹⁴⁷ Specific facts such as the “availability and pricing of certain patented technologies or drugs, scientific evidence as to their efficacy, the length and terms of the compulsory license, as well as information about the health crisis and market-based factors, may need to be considered in relation to a compulsory license addressing urgent health concerns that has an impact on a patent-based foreign investment.”¹⁴⁸

108. Indeed there is some growing support for the use of compulsory licenses by developing countries battling public health epidemics, such as those actions taken in the last decade by Malaysia, Mozambique, Zambia, Indonesia, Thailand and Brazil.¹⁴⁹ With regard to the patented anti-HIV drug, Efavirenz, which was in the “public interest” in light of the need to ensure the viability of the government’s HIV/AIDS treatment program, the compulsory licenses were permitted, as should be the license in this situation considering the serious obesity epidemic in Bergonia.¹⁵⁰ Thailand recently issued three compulsory licenses, one of which was a drug shown to be promising in combating heart disease, arguably not an emergency on its face until considered in light of medical data indicating the prevalence and seriousness of heart disease in populations around the world.¹⁵¹ Interestingly, scholars have studied the effects of compulsory licensing and of credible threats to apply a compulsory license and had not found that such measures cause any significant harm to innovation, the primary argument of private investors against countries issuing compulsory licenses; even countries without IP protections until fairly recently

¹⁴⁶ Newcombe, 23.

¹⁴⁷ Gibson, 30.

¹⁴⁸ Id.; Correa, 348.

¹⁴⁹ Correa, 13-14; Gibson, 10, 14; Swedish National Board of Trade, *The WTO Decision on Compulsory Licensing: Does It Enable Import of Medicines for Developing Countries with Grave Public Health Problems?*, Kommerskollegium 2008:2.

¹⁵⁰ Zolotaryova, *Are We There Yet? Taking “TRIPs” to Brazil and Expanding Access to HIV/AIDS Medication*, 33 Brooklyn J. Int’l L. 1099.

¹⁵¹ Bernieri, 11, FN 29.

nevertheless experienced thriving innovation.¹⁵² One researcher even stated that “all in all, the substantial amount of evidence now available suggests that compulsory patent licensing, judiciously confined to cases in which patent-based monopoly power has been abused . . . would have little or no adverse impact on the rate of technological progress.”¹⁵³

109. Lastly, while the B-C BIT itself does not make explicit reference to compulsory licenses or TRIPs, if Claimant also seeks to invoke substantive articles of the Bergonia – Tertia BIT (“B-T BIT”) through the use of the MFN clause in Article 3 of the B-C BIT, then Claimant should also be mindful of the fact that such incorporation may bring in Article III.4 of the B-T BIT, which specifically excludes compulsory licenses from being considered as an expropriatory measures and makes moot the foregoing arguments.¹⁵⁴

110. Consequently, in light of the fact that Respondent properly issued a compulsory license in accordance with domestic and international law, for a clear public benefit, on a non-discriminatory basis, and even offered prompt, adequate and effective compensation the Tribunal should find that Respondent did not commit expropriation in violation of the B-C BIT.

3. RESPONDENT DID NOT OTHERWISE VIOLATE INTERNATIONAL LAW

a. The Bergonian Government Did Not Discriminate Against Claimant

111. The B-C BIT provides several specific provisions which protect against discrimination in Articles 2 and 3, but also explicitly states that “measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favorable within the meaning of this Article,” and that “such treatment shall not relate to privileges which either Contracting State accords to investors of third

¹⁵² Anderson, 3, *citing* Sanya Reid Smith, 2007. ‘Intellectual Property in Free Trade Agreements’. 5, 45 *UNDP Regional Trade Workshop: Doha and Beyond*, December. Available at <http://www.twinside.org.sg/>.

¹⁵³ Bernieri, 11, *citing* F. M. Scherer, 1980. *Industrial Market Structure and Economic Performance* 456-57, 2d ed.

¹⁵⁴ B-T BIT, Article III.4.

States on account of its membership of, or association with, a customs or economic union, a common market, a free trade area as well as any form of regional economic integration or by virtue of any agreements on avoidance of double taxation or other agreements regarding matters of taxation.”¹⁵⁵

112. As discussed earlier, the B-C BIT allows for Respondent to not afford a third-party private investor the same treatment it affords foreign investors and national investors of states that are party to a BIT with the host state. Furthermore, Article 30 of the TRIPs Agreement also permits member states to provide exceptions to rights conferred by patents “provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.” Here Respondent’s use of the compulsory license and even its export of the product into other countries that are part of the same customs union does not cause significant harm to Claimant as it does not preclude Claimant from registering its patent in those countries and entering those foreign markets directly.

113. It must also be noted that there can be no discrimination if a patent or set of patents are singled out for the granting of a compulsory license because, by its very essence, a patent covers a unique product or process.¹⁵⁶ Discrimination complaints may be raised, however, with regard to due process and payment of compensation, which in Claimant does not appear to have alleged in this case and there are no facts to support any contention that Respondent has not afforded MedBerg due process and as the government did offer Claimant compensation in the form of royalties, which Claimant refused, that allegation also fails.

¹⁵⁵ Cite.

¹⁵⁶ Correa, 350.

b. The Bergonian Government Did Not Fail to Afford Claimant Fair and Equitable Treatment

114. The B-C BIT specifies in Article 2(2) that “each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty. Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy the same treatment and protection as the investment under the Treaty.” Respondent maintains that it consistently afforded fair and equitable treatment in keeping with general principles of international law throughout the duration of the licensing agreement and with respect to the compulsory license.

115. “Fair and equitable treatment” is a classic formulation of international law, the precise meaning of which, in any specific situation, is open to varying interpretations. The broad purpose of a fair and equitable treatment clause is to provide a basic and general standard which is detached from the host country’s domestic law. This principle includes 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.”¹⁵⁷ Fair and equitable treatment may not prohibit treatment by the host country to deal with issues that may exist only in certain intellectual property product areas or issues implicating important national policies such as public health,¹⁵⁸ as was the case here where Respondent issued the compulsory license in response to the dire public health situation.

116. The Tribunal should consider fair and equitable treatment in light of the good faith principle established by international law, which requires the Contracting Parties to provide BITs that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and

¹⁵⁷ See U.S. Model BIT.

¹⁵⁸ White, 5-6.

regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations, as was discussed earlier with regard to Claimant's expropriation claim.¹⁵⁹

117. However, Claimant should not be permitted to seek greater protection for its IPRs than that currently provided under the WTO and the applicable public international legal regime.¹⁶⁰ Furthermore, the BIT does not require fair and equitable treatment "in accordance with international law," and thus should not be interpreted as incorporating international law, such as the TRIPs Agreement, in assessing the validity of this specific allegation.¹⁶¹ However, if the Tribunal does choose to rely on TRIPs in analyzing whether Respondent afforded Claimant fair and equitable treatment, it should only do so to the extent that the answer does not go beyond the standards established by TRIPs, especially in light of the Doha Declaration.¹⁶²

V. CONCLUSION

118. If the Tribunal exercises jurisdiction over this dispute, it could potentially destabilize the existing international legal framework surrounding intellectual property disputes and set a dangerous signal to private investors that they can engage in anti-competitive behavior or entirely disregard the concerns of governments dealing with acute public health crises and only focus on their bottom-line. The appropriate balance of rights and responsibilities of private investors and governments should be determined by states in a public forum and through progressive legal decisions that will provide essential and firm guidance for the future.

¹⁵⁹ Mendenhall, 6, citing *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, 29 May 2003 (Award), at para. 154.

¹⁶⁰ See Biadgleng, 26; 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. 287, at 288 (2005).

¹⁶¹ See Gibson, 45, FN 176.

¹⁶² See Correa, 14.

119. As has been shown, the Tribunal should deny jurisdiction because of the nationality of Claimant, the conflict arising solely out a domestic dispute, and Bergonia has not consent to jurisdiction for domestic companies. Furthermore, as stated in the B-C BIT, Claimant does not meant the requirements of nationality as the subsidiary lacks standing under international law, the seat of incorporation is not in a foreign state, and the MFN clause is not applicable. As discussed in section II(2)(b), the B-C BIT does not extend to dispute settlement provisions and the intent of the contracting parties would be frustrated should the MFN clause be permitted to extend the scope of the treaty, Also, incorporation of Article 6(8) necessitates that Article I(2) of the B-T BIT should also be incorporated in the treaty to permit Bergonia to refuse national treatment for third party nationals.

120. Consequently, Respondent requests that the Tribunal deny jurisdiction, as the subject matter does not fall within the scope of the Convention, as Claimant's business activities and utilization of patent, do not constitute protected investment in these circumstances. These conclusions can be drawn because IPRs do not constitute a protected investment as the patent does not possess the required characteristics of an investment, as interpreted in light of the ICSID Convention. This is clear as stated in Section 2.a. Case law is clear that on the fact that IPRs have never explicitly been held to be an investment. For the foregoing reasons the Tribunal should not arbitrate this dispute. Even if the Tribunal was to entertain the Claimant's allegations and consider them on substantive grounds, the Tribunal should interpret the dispute using applicable law of TRIPs and Doha and in light of these agreements, it should find that the issuance of the compulsory license was valid and does not constitute expropriation, direct or indirect, nor any other violation of international law.