

FABELA

Memorandum for Respondent

MEDBERG CO.

CLAIMANT

v.

**THE GOVERNMENT OF THE REPUBLIC OF
BERGONIA**

RESPONDENT

II Annual Foreign Direct Investment International Moot Competition

International Center for Settlement of Investment Disputes

ICSID Case No. ARB/X/X

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
LIST OF ABBREVIATIONS.....	iii
INDEX OF AUTHORITIES.....	v
INDEX OF CASES.....	xi
INDEX OF LEGAL ACTS, MODEL LAWS AND OTHER SOURCES	xviii
INDEX OF INTERNET SOURCES	xx
STATEMENT OF FACTS	1
PART ONE: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO RULE IN THE PRESENT CASE.....	2
I Claimant is not a foreign national within the meaning of the Convention nor has Respondent agreed to treat it as one.....	2
1. Claimant is not under relevant foreign control.....	3
a. Relevant control is the indirect control	4
b. Dr. Frankensid and MedSciences do not have the nationality of the.....	7
2. Respondent did not agree to treat Claimant as a Conveniencian investor.....	8
a) MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT does not extend to dispute resolution matters	9
b) Art. VI(8) of Bergonia – Tertia BIT cannot be applied in the present case	11
II The dispute does not arise directly out of an investment	13
1. The subject of the dispute is not an investment within the meaning of Art. (1)(1) Bergonia – Conveniencia BIT.....	13
2. The subject of the dispute is not an investment under Article 25(1) ICSID Convention.....	14
PART TWO: RESPONDENT HAS NOT VIOLATED ITS OBLIGATIONS REGARDING CLAIMANT’S INVESTMENT.....	17
I RESPONDENT’S ISSUANCE OF COMPULSORY LICENSE IS NOT UNLAWFUL	17
1. Compulsory license does not amount to expropriation	18
a) Respondent’s actions do not amount to expropriation.....	18
b) Respondent’s issuance of compulsory license is state regulatory action ..	21
c) Compulsory licenses are not to be considered expropriation according ...	23
2. Even if Tribunal considers compulsory license as an expropriation, all criteria for lawful expropriation are fulfilled.....	26
a) Compulsory license was issued for a public purpose	27
b) There was no discriminatory behavior	28

c) Adequate compensation was offered to Claimant	29
d) Due process requirements were followed.....	31
II RESPONDENT PROVIDED CLAIMANT’S INVESTMENT ALL REQUIRED STANDARDS OF TREATMENT.....	32
1. Respondent provided Claimant fair and equitable treatment	32
a) Respondent provided Claimant fair and equitable treatment defined as an autonomous self-contained concept.....	33
b) Respondent provided Claimant fair and equitable treatment defined as minimum standard of treatment in international law	36
1) Respondent acted vigilantly and protected Claimant’s investment	36
2) Respondent provided Claimant the benefit of due process.....	37
3) Respondent acted transparently	37
4) There is no evidence of Respondent acting in bad faith	38
2. Respondent provided full protection of Claimant’s investment.....	39
3. Claimant was afforded national treatment.....	41
4. Respondent actions were reasonable and non-arbitrary	42
REQUEST FOR RELIEF	43

LIST OF ABBREVIATIONS

Art./Arts.	Article/Articles
BIT	Bilateral Investment Treaty
Bergonia–Conveniencia BIT	Treaty between the Democratic Commonwealth of Bergonia and the Sultanate of Conveniencia concerning the Encouragement and Reciprocal Protection of Investments
Bergonia–Tertia BIT	Treaty between the Government of Tertia and the Government of Bergonia concerning the Reciprocal Encouragement and Protection of Investment
Claimant	MedBerg Co.
Co.	Company
Corp.	Corporation
e.g.	Exempli gratia (for example)
ed.	Edition
Ed.	Editor
emph. add.	Emphasis added
et seq.	Et sequentes (and following)
etc.	Et cetera (and so on)
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
i.e.	Id est (that means)
ILC	International Law Commission
Inc.	Incorporated
inter alia	Among other things

LCIA	London Court of International Arbitration
Ltd.	Limited
Minutes	Minutes of the First Session of the Arbitral Tribunal
NAFTA	North American Free Trade Agreement
No./Nos.	Number/s
OECD	Organisation for Economic Co-operation and Development
p./pp.	Page/pages
Prof.	Professor
Respondent	The Government of the Republic of Bergonia
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
Uncontested facts	Annex 3 of the Minutes of the First Session of the Arbitral Tribunal
UNCTAD	United Nations Conference on Trade and Development
Vol.	Volume
v.	Versus
&	And
¶	Paragraph

INDEX OF AUTHORITIES

CITED AS:

- AMARAL Junior, Alberto do:** *Compulsory Licensing and Access to Medicine in Developing Countries*
Available at:
[http://islandia.law.yale.edu/sela/SELA%2002005/Alberto%20Amaral%20\(Final%20English%20Version\)%20v%201.0.pdf](http://islandia.law.yale.edu/sela/SELA%2002005/Alberto%20Amaral%20(Final%20English%20Version)%20v%201.0.pdf)
(cited as: *Amaral*)
- ASOUZU, Amazu:** *A Review and Critique of Arbitral Awards on Article 25(2)(b) of ICSID Convention*
The Journal of World Investment 3 (3), June 2002, 397.
(cited as: *Asouzu*)
- BISHOP, Doak, R;
CRAWFORD, James;
REISMAN, Michael W.:** *Foreign Investment Dispute: Cases, Materials and Commentary*
Kluwer Law International, 2005
(cited as: *Bishop/Crawford/Reisman*)
- CARVALHO, Nuno Pires de:** *The TRIPS Regime of Patent Rights*
Kluwer Law International, London, 2004
(cited as: *Carvalho*)
- CORDERO MOSS, Giuditta:** *Full Protection and Security*
in Standards of Investment Protection,
Oxford University Press, Oxford, 2008
(cited as: *Cordero Moss*)
- DAILEY, Robert:** *Thailand's Compulsory Licensing of Pharmaceuticals Under TRIPS Stirs Controversy*
Available at:
<http://www.biohealthinvestor.com/2007/02/thailand-compulsory-licensing-of-pharmaceuticals-under-trips-stirs-controversy.html>
(cited as: *Dailey*)
- DELAUME, Georges:** *How to Draft an ICSID Arbitration Clause*
Published in:

- 7 ICSID Rev.-FILJ, 1992, 168.
(*cited as: Delaume*)
- DOLZER, Rudolf;
STEVENS, Margrete:** *Bilateral Investment Treaties*
Martinus Nijhoff Publishers, 1995
(*cited as: Dolzer/Stevens*)
- DUMBERRY, Patrick:** *Pope & Talbot Inc. v. Government of
Canada - Fair and Equitable Treatment
for Investors Under International Law:
An Overview of the Recent NAFTA
Chapter 11 Awards*
ASA Bulletin, Vol. 20 – No. 3, 453, 2002
(*cited as: Dumberry*)
- FIETTA, Stephen:** *Expropriation and the “Fair and
Equitable”
Standard*
(2006) 23(5) Journal of International
Arbitration
375
(*cited as: Fietta*)
- GAILLARD, Emmanuel:** *Establishing Jurisdiction through a most
favoured nation clause*
New York Law Journal, volume 233, no.
105
(*cited as: Gaillard*)
- GRIERSON-WEILER, Todd;
LAIRD, Ian:** *Standards of Treatment*
in *The Oxford Handbook of International
Investment Law*, Oxford University
Press, Oxford, 2008
(*cited as: Grierson-Weiler, Laird*)
- HIRSCH, Moshe:** *Interactions between Investment and
Non-investment Obligations*
in *The Oxford Handbook of International
Investment Law*, Oxford University
Press, Oxford, 2008
(*cited as: Hirsch*)
- HO, Cynthia:** *On Breaking Patents: Separating Strands
Of Fact From Fiction Under TRIPS*
Available at:
http://works.bepress.com/cynthia_ho/2/
(*cited as: Ho*)
- HOFFMANN, Anne:** *Indirect Expropriation*
in *Standards of Investment Protection*,

Oxford University Press, Oxford, 2008
(cited as: Hoffmann)

JUILLARD, Patrick:

L' évolution des sources du droit des investissements
Recueil des Cours, Tome, 1994
(cited as: Juillard)

KHOR, Martin:

Patents, Compulsory License and Access to Medicines: Some Recent Experiences
Available at:
<http://www.twinside.org.sg/title2/par/TRIPS.Flexibilities.30jan07.with.cover.doc>.
(cited as: Khor)

KAHN, Phillipe:

L'interprétation des Contrats Internationaux
108 Clunet 5, 1981
(cited as: Kahn)

**KINNAER, Meg;
BJORKLUND, Andrea K.;
HANNAFORD, John F.G.:**

Investment Disputes Under NAFTA, An annotated Guide to NAFTA Chapter 11,
Meg N. Kinnaer et al., 2006
(cited as: Kinnaer/Bjorklund/Hannaford)

LAVIEC, J.P:

Protection et promotion des investissements: étude de droit international économique,
Genève, PUF, 1985
(cited as: Laviec)

LEBEN, Charles:

L'évolution du Droit International des Investissements in *Journée d'études "Un accord multilatéral sur l'investissement: d'un forum de négociation à l'autre?"*
Société Française pour le Droit International, 1999
(cited as: Leben)

**McLACHLAN, Campbell;
SHORE, Laurence;
WEINIGER, MATTHEW:**

International Investment Arbitration: Substantive Principles
Oxford University Press, Oxford, 2007
(cited as: McLachlan/Shore/Weiniger)

MUCHLINSKI, Peter:

Multinational Enterprises and the Law
Blackwell, Oxford, 1999
(cited as: Muchlinski)

- Multinational Enterprises and the Law*
2nd Edition, Oxford University Press,
Oxford, 2007
(cited as: Muchlinski2)
- REDFERN, Alan;**
HUNTER, M.;
BLACKABY, N.;
PARTASIDES, C.:
- Chapter 11 Arbitration Under Investment Treaties,*
in *Law and Practice of International Commercial Arbitration*, 2004
(cited as: Redfern/Hunter/Blackaby/Partasides)
- REINISCH, August:**
- Expropriation*
in *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford, 2008
(cited as: Reinisch)
- Legality of Expropriations*
in *Standards of Investment Protection*, Oxford University Press, Oxford, 2008
(cited as: Reinisch2)
- ROYLE, Matthew;**
WESSING, Taylor:
- Compulsory licenses and access to medicines - Rwanda experience*
Available at:
<http://www.currentpartnering.com/articles/982>
(cited as: Royle/Wessing)
- RUBINS, Noah:**
- The Notion of 'Investment' in International Investment Arbitration*
in *Arbitrating Foreign Investment Disputes*, Kluwer Law International, 2004
(cited as: Rubins)
- SACERDOTI, Giorgio:**
- Bilateral Treaties and Multilateral Instruments on Investment Protection*
Recueil des Cours, Tome 1997
(cited as: Sacerdoti)
- SCHLEMMER, Engela:**
- Investment, Investor, Nationality and Shareholders*
in *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford, 2008
(cited as: Schlemmer)
- SCHREUER, Christoph. H:**
- The ICSID Convention : A Commentary*
1st edition, Cambridge University Press

and the International Centre for Settlement of Investment Disputes, 2001
(cited as: Schreuer1)

Fair and Equitable Treatment (FET): Interactions with other Standards
Transnational Dispute Management, Vol. 4, Issue 5, September 2007
(cited as: Schreuer2)

SORNARAJAH M.:

The International Law on Foreign Investment
2nd ed., Cambridge University Press, Cambridge, 2004
(cited as: Sornarajah)

TORREMANS, Paul:

Holyoak and Torremans Intellectual Property Law
4th ed., Oxford University Press, Oxford, 2004
(cited as: Torremans)

TEITELBAUM, Ruth:

Who's afraid of Maffezini? Recent Developments in the Interpretation of Most Favoured Nation Clauses
(2005) 22 Journal of International Arbitration 225
(cited as: Teitelbaum)

UKPE, Aniekan Iboro:

Applicability Of The Most-Favoured-Nation Clause To Dispute Settlement Provisions In Bilateral Investment Treaties: A Uniform Approach?
Available at:
www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11_7_357301624.pdf
(cited as: Ukpe)

VASCIANNIE, S.:

The Fair and Equitable Treatment Standard in International Investment Law and Practice,
70 The British Year Book of International Law 104/105, 1999
(cited as: Vasciannie)

VESEL, Scott:

Clearing a path through a tangled jurisprudence: Most-Favored Nations clauses and dispute settlement provisions in bilateral investment treaties

32 Yale Journal of International Law 125, 2007

(cited as: Vesel)

YANNACA-SMALL, Katia:

Fair and Equitable Treatment Standard: Recent Developments

in Standards of Investment Protection, Oxford University Press, Oxford, 2008

(cited as: Yannaca-Small)

INDEX OF CASES

- ARBITRATION INSTITUTE OF
THE STOCKHOLM CHAMBER OF
COMMERCE** *CCL v. Republic of Kazakhstan*
Case no: 122/2001
Final Award, 2004
Available at:
<http://ita.law.uvic.ca/documents/CCLvKazakhstan.pdf>
(*cited as: CCL v Republic of Kazakhstan*)
- RosInvestCo UK Ltd. v. Russian Federation*
Case no: Arbitration V 079 / 2005
Award on Jurisdiction,
October 2007
Available at:
http://ita.law.uvic.ca/documents/RosInvestjurisdiction_decision_2007_10_000.pdf
(*cited as: RosInvest v. Russia*)
- INTERNATIONAL COURT OF
JUSTICE** *Ambatielos case (Greece v. United Kingdom)*
Judgment ,
19 May, 1953
Available at:
<http://www.icj-cij.org/docket/files/15/1983.pdf>
(*cited as: Ambatielos case*)
- The Oscar Chinn Case*
Judgment,
12 December, 1934
Available at:
http://www.icj-cij.org/pcij/serie_AB/AB_63/01_Oscar_Chinn_Arret.pdf
(*cited as: The Oscar Chinn Case*)
- INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT
DISPUTES** *Amco Asia Corporation and others v. Republic of Indonesia*
ICSID Case No. ARB/81/1
Award on Jurisdiction,
25 September, 1983
Published in:
23 International Legal Materials 351, 1984
(*cited as: Amco v. Indonesia*)
- American Manufacturing & Trading, Inc. v. Republic of Zaire*
ICSID Case No. Arb./93/1
21 February, 1997
Published in:

36 International Legal Materials, 1534, 1997
(cited as: *AMT v Zaire*)

Alex Genin, Eastern Credit Ltd., Inc. and A.S Baltoil (US) v. The Republic of Estonia
ICSID Case No. ARB/99/2
25 June, 2001
Published in:
17 ICSID Review – Foreign Investment Law
Journal 395, 2002
(cited as: *Genin v. Estonia*)

Asian Agricultural Products Ltd. v. Republic of Sri Lanka
ICSID Case No. Arb./87/3
27 June, 1990
Published in:
30 International Legal Material, 580, 1991
(cited as: *AAPL v. Sri Lanka*)

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela
ICSID Case No. ARB/00/5
Decision on Jurisdiction,
27 September, 2001
Available at:
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC609_En&caseId=C192
(cited as: *Aucon v Venezuela*)

Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic
ICSID Case No. ARB/97/4
Decision on Objections to Jurisdiction,
24 May, 1999
Available at:
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC556_En&caseId=C160
(cited as: *Ceskoslovenska Obchodni Banka v Slovakia*)

Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica
ICSID Case No. ARB/96/1
Award,
17 February, 2000
Available at:
<http://icsid.worldbank.org/ICSID/FrontServlet?re>

questType=CasesRH&actionVal=showDoc&docId=DC538&caseId=C152

(cited as: *Santa Elena v. Costa Rica*)

Eudoro A. Olguin v. Republic of Paraguay

ICSID Case No. ARB/98/5

Award,

26 July, 2001

Available at:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>

(cited as: *Olguin v. Paraguay2*)

Fedax N.V. v. Republic of Venezuela

ICSID Case No. Arb./96/3

Decision on Objections to Jurisdiction,

July 11, 1997

Published in:

5 ICSID Report 186 (2002)

(cited as: *Fedax v. Republic of Venezuela*)

Marvin Feldman v. Mexico

ICSID Case No. ARB(AF)/99/1

Final Award,

16 December, 2002

Available at:

<http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanFinalAward.pdf>

(cited as: *Feldman v. Mexico*)

Gas Natural SDG, S.A. v. Argentine Republic

ICSID Case No. ARB/03/10

Decision of the Tribunal on Preliminary Questions on Jurisdiction,

June 17, 2005

Available at:

<http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>

(cited as: *Gas Natural v. Argentina*)

Joy Mining Machinery Limited v. Arab Republic of Egypt

ICSID Case No. ARB/03/11

Award, August 6, 2004

19 ICSID Rev.—FILJ 486 (2004)

(cited as: *Joy Mining v. Egypt*)

Liberian Eastern Timber Corporation v. Republic of Liberia

ICSID Case No. ARB/83/2

Award, 14 May, 1986

Published in:

26 International Legal Materials 647, 1987

(cited as: *Letco v Liberia*)

Malaysian Historical Salvors, SDN, BHD v. Malaysia

ICSID Case No. ARB/05/10

Award on Jurisdiction, 17 May, 2007

Available at:

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC654_En&caseId=C247

(cited as: *Malaysian Historical Salvors v Malaysia*)

MTD Equity Sdn. Bhd. and MTD Chile S.A v. Republic of Chile

ICSID Case No. ARB/01/7

25 May, 2004

Available at:

<http://www.asil.org/ilib/MTDvChile.pdf>

(cited as: *MTD v. Chile*)

PSEG Global et al. v. Republic of Turkey

ICSID Case No. ARB/02/5

19 January, 2007

Available at:

<http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>

(cited as: *PSEG v. Turkey*)

Hussein Nuaman Soufraki v. The United Arab Emirates

ICSID Case No. ARB/02/07

Decision on Jurisdiction

7 July, 2004

Available at:

http://ita.law.uvic.ca/documents/Soufraki_000.pdf

(cited as: *Soufraki v. UAE*)

Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic

ICSID Case No. ARB/03/17

Decision on Jurisdiction,
16 May, 2006
Available at:
[http://icsid.worldbank.org/ICSID/FrontServlet
?requestType=CasesRH&actionVal=showDo
xxiv
c&docId=DC514_En&caseId=C18](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC514_En&caseId=C18)
(*cited as: Suez v. Argentina*)

*Salini Costruttori S.p.A. and Italstrade S.p.A. v.
Kingdom of Morocco*
ICSID Case No. ARB/00/4
Decision on Jurisdiction,
July 23, 2001
Published in:
[English translations of French original in 42 ILM
609 (2003), 6 ICSID Report 400 (2004)]
(*cited as: Salini v. Morocco*)

Siemens A.G. v. Argentina,
ICSID Case No. ARB/02/08
Decision on Jurisdiction,
6 February, 2007
Available at:
[http://ita.law.uvic.ca/documents/Siemens-
Argentina-Award.pdf](http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf)
(*cited as: Siemens v. Argentina*)

*Société Ouest Africaine des Bétons Industriels v.
Senegal*
ICSID Case No. ARB/82/1
Decision on Jurisdiction,
1 August, 1984
Available at:
[http://icsid.worldbank.org/ICSID/FrontServlet?re
questType=CasesRH&actionVal=showDoc&docI
d=DC668_Fr&caseId=C128](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC668_Fr&caseId=C128)
(*cited as: Soabi v Senegal*)

*Técnicas Medioambientales Tecmed, S.A. v.
United Mexican States ,*
ICSID Case No. ARB (AF)/00/2
29 May, 2003
Available at:
[http://ita.law.uvic.ca/documents/Tecnicas_001.pd
f](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf)
(*cited as: Tecmed v. Mexico*)

Tokio Mokuoka v. Ukraine
ICSID Case No. ARB/02/18

Dissenting Opinion of Professor Prosper Weil
29 April, 2004
Available at:
http://ita.law.uvic.ca/documents/tokios-dissenting_opinion_000.pdf
(cited as: *Tokio Tokeles Dissenting Opinion*)

Wena Hotels Ltd v. Arab Republic of Egypt
ICSID Case No. ARB/98/4
8 December, 2000
Available at:
<http://ita.law.uvic.ca/documents/Wena-2000-Final.pdf>
(cited as: *Wena Hotels v. Egypt*)

LCIA

Occidental Exploration and Production Company v. The Republic of Ecuador
LCIA Case No. UN3467
Final Award
1 July, 2004
Available at:
http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf
(cited as: *Occidental v. Ecuador*)

NAFTA

Metalclad Corporation v. The United Mexican States
Final Award
Case No. ARB (AF)/97/1
30 August, 2000
Available at:
<http://ita.law.uvic.ca/documents/MetacladAward-English.pdf>
(cited as: *Metalclad v. Mexico*)

Methanex Corporation v. United States of America
Final Award
3 August, 2005
Available at:
http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf
(cited as: *Methanex v. United States of America*)

S.D Myers, Inc. v. Canada
Separate, Concurring Opinion
13 November, 2000
Available at:
<http://www.naftaclaims.com/Disputes/Canada/SD>

Myers/SDMyersMeritsAwardOpinion.pdf
(*cited as: S.D Myers v. Canada Separate Opinion*)

Pope & Talbot Inc. v. Government of Canada
Interim Award on the Merits – Phase Two

10 April, 2001

Available at:

<http://www.naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf>

(*cited as: Pope & Talbot v. Canada*)

**UNCITRAL ARBITRATION RULES
1976**

CME Czech Republic B.V. v. The Czech Republic
Partial Award, 13 September, 2001

Available at:

ita.law.uvic.ca/documents/CME-2001PartialAward.pdf

(*cited as: CME v. The Czech Republic*)

Martin Lauder v. The Czech Republic
Award, 3 September, 2001

Available at:

<http://ita.law.uvic.ca/documents/LauderAward.pdf>

(*cited as: Lauder v. Czech Republic*)

Saluka Investments BV (The Netherlands) v. The Czech Republic

Partial Award

17 March, 2006

Available at:

<http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>

(*cited as: Saluka v. Czech Republic*)

**CONSOLIDATED ARBITRATION
OF THE NAFTA AND UNCITRAL
ARBITRATION RULES**

Canfor Corporation v. US; Tembec et al. v. US
and *Terminal Forest Products Ltd. v. US*

Decision on Preliminary Question

6 June, 2006

Available at:

<http://ita.law.uvic.ca/documents/CanforTerminalDecision6June2006.pdf>

(*cited as: Canfor Corporation v. USA*)

INDEX OF LEGAL ACTS, MODEL LAWS AND OTHER SOURCES

Drafting History

Documents Concerning the Origin and the Formulation of the Convention, Memorandum of the Meeting of the Whole

25 February, 1965, Vol. II, Part 2 – ICSID Publications, 1968

Draft US Model BIT (2004)

Draft US Model BIT (2004)

Available at:

http://www.bilaterals.org/IMG/doc/2004_update_US_model_BIT.doc

ICSID Executive Directors Report

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

Available at:

http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

(cited as: *Report*)

NAFTA Interpretation

Notes of Interpretation of Certain Chapter 11 Provisions

NAFTA Free Trade Commission

July 31, 2001

Available at:

http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf

OECD F&E

Fair and Equitable Treatment Standard in International Investment Law

OECD, Working Papers on International Investment, No. 2004/3

September 2004

Available at:

<http://www.oecd.org/dataoecd/22/53/33776498.pdf>

UNCTAD F&E

Fair and Equitable Treatment

UNCTAD Series on issues in international investment agreements, 1999

UNCTAD/ITE/IIT/11(Vol. III)

Available at:

<http://www.unctad.org/en/docs/psiteiitd11v3.en.p>

df

- UNCTAD Bilateral Investment Treaties 1995-2006*** ***Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking***
UNCTAD/ITE/IIT/2006/5
Available at:
<http://www.unctad.org/Templates/Download.asp?docid=8080&lang=1&intItemID=2340>
- UNCTAD International Investment Agreements*** ***International Investment Agreements: Key Issues***
UNCTAD/ITE/IIT/2004/10 (Vol. II)
Available at:
<http://www.unctad.org/Templates/Download.asp?docid=5952&lang=1&intItemID=2095>
- UNCTAD Taking of Property*** ***Taking of Property***
UNCTAD Series on issues in international investment agreements, 2000
UNCTAD/ITE/IIT/15
Available at:
<http://www.unctad.org/en/docs/psiteiitd15.en.pdf>
- Vienna Convention on the Law of Treaties*** ***Vienna Convention on the Law of Treaties***
23 May, 1969
Available at:
http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
- Declaration on the TRIPS Agreement and Public Health*** ***World Trade Organization Declaration on the TRIPS Agreement and Public Health***
14 November, 2001
Available at:
http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

INDEX OF INTERNET SOURCES

WHO Obesity

World Health Organization Obesity site

Accessed on 10 September, 2009

Available at:

<http://www.who.int/topics/obesity/en/>

(cited as: *WHO Obesity*)

US Patent Office

United States Patent and Trademark Office fy 2009 Fee Schedule

Accessed on 8 September, 2009

Available at:

http://www.uspto.gov/web/offices/ac/qs/ope/fee2009january01_2009may01.htm

(cited as: *US Patent Office*)

European Patent Office

European Patent Office Schedule of Fees

Accessed on 8 September, 2009

Available at:

http://www.epoline.org/portal/public/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4i3dAHJgFjGpvqRqCKOcAFvfV-P_NxU_QD9gtzQiHJHRUUA43OWZA!!/delta/base64xml/L3dJdyEvUUd3QndNQSEvNEIVRS82XzBfOUk!

(cited as: *European Patent Office*)

STATEMENT OF FACTS

1. 1997 Bergonian IP laws, modeled in accordance with TRIPS, came into force.
2. 01/01/2003 CC123 Holding Ltd incorporated by Convenient Companies SARL.
3. 01/12/2003 CC123 Holding Ltd changed its name to MedX Holding Ltd and it was transferred to MedScience and Dr. Frankensid.
4. 30/01/2004 Claimant, MedBerg Co, established in Bergonia.
5. 05/02/2004 Claimant applied for a patent in relation to Dr. Frankensid's invention.
6. 15/03/2005 Bergonian Patent No. AZ2005 granted to Claimant.
7. 31/03/2005 Claimant licensed BioLife Co. to utilize Patent No. AZ2005.
8. 31/03/2007 License Agreement with BioLife terminated by Claimant in accordance with notice and termination provisions contained therein.
9. 01/06/2007 Bergonian IP Office commenced proceedings for the issuance of a compulsory license, stating that this action would address important domestic medical needs.
10. 01/06/2007-01/11/2007 Claimant on numerous occasions communicated its objections about the compulsory license to the Bergonian IP Office. No objections were resolved to the Claimant's satisfaction.
11. 01/11/2007 Bergonian IP Office issued a compulsory license for Patent No. AZ2005.
12. 01/11/2007-01/01/2009 BioLife and five other companies invoked the compulsory license.
13. 01/12/2007 Claimant wrote to the Bergonian IP Office with copies to the Foreign, Economics and Justice Ministries referring to Art. 10(2) of the Bergonia - Conveniencia BIT.
14. 01/11/2008 ICSID Secretary General registered the dispute for arbitration.
15. 16/02/2009 The Tribunal held its First session.

**PART ONE: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO
RULE IN THE PRESENT CASE**

16. The present case was brought before the International Center for Settlement of Investment Disputes (hereinafter the Center or ICSID) on 1 November 2008 when the Secretary General of the Centre registered the dispute for arbitration. The Parties agree that the arbitral tribunal (hereinafter the Tribunal) was properly constituted in accordance with Art. 37(2)(b) of the Convention on Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the Convention or ICSID Convention). According to Article 25 of the Convention on the Settlement of Investment Disputes between States and nationals of other States (hereinafter the Convention), in order for the jurisdiction of the Centre and this Tribunal to be established, the dispute has to be of a *legal* nature, it has to *arise directly out of an investment*, it has to be a dispute *between a Contracting State and a national of another Contracting State* and there has to exist a *written consent* between the parties to the dispute. Respondent accepts that the dispute at hand is of a legal nature. However, it will be demonstrated that all the other criteria laid down in Article 25 of the ICSID Convention are not met. Therefore, Respondent challenges the jurisdiction of the Tribunal on two accounts – Claimant is not a foreign national within the meaning of the Convention nor has the Respondent agreed to treat it like one **(I)** and the patent in the present case does not constitute a protected investment **(II)**.

**I CLAIMANT IS NOT A FOREIGN NATIONAL WITHIN THE MEANING
OF THE CONVENTION NOR HAS RESPONDENT AGREED TO TREAT IT
AS ONE**

17. Pursuant to Art. 25(1) of ICSID Convention, the jurisdiction of the Centre and of this Tribunal extends to legal disputes between a Contracting State (or its constituent subdivisions or agencies) and a national of *another* Contracting State. In the present case, Claimant, MedBerg Co, is clearly a national of Bergonia¹, the State which

¹ Uncontested facts, para. 1.

appears on the side of Respondent in the present proceedings. Therefore, Claimant is not a national of another Contracting State in the sense of Art. 25(1) of ICSID Convention and the requirement for establishment of the Tribunal's jurisdiction set out in the aforementioned provision is not met.

18. Admittedly, under certain circumstances, locally incorporated companies can be treated as foreign ones. Art. 25(2)(b) of the Convention provides ICSID arbitral protection to entities that have nationality of the Contracting State party to the dispute where:

“because of foreign control, the parties have agreed [it] should be treated as a national of another Contracting State for the purposes of this Convention”.

19. Claimant alleges that it has fulfilled *ratione personae* requirements for establishing jurisdiction on the basis of the existence of foreign control, pursuant to Art. 25(2)(b). However, Respondent submits that the conditions set out in Art. 25(2)(b) of the Convention in order to treat Claimant as a national of Conveniencia are not fulfilled. Namely, Claimant is not controlled by a national of another Contracting State **(1)** nor has Respondent consented to treat Claimant as a national of Conveniencia **(2)**. Consequently, the Tribunal should find that it lacks jurisdiction over the present dispute.

1. Claimant is not under relevant foreign control

20. The first requirement under the ICSID Convention that has to be met in order for a company to bring investment claims against the State in which it is incorporated and has its seat is the existence of foreign control. In addition, such control must be exercised by a national of another Contracting State. Respondent will demonstrate that the relevant control is the indirect control exercised by Med Sciences and Dr. Frankensid **(a)** and that, consequently, the criteria for establishing the *ratione personae* jurisdiction of the Centre and of this Tribunal are not met **(b)**.

a. Relevant control is the indirect control

21. It is uncontested that Claimant is 100% owned by MedX Holdings Ltd, a company incorporated in Conveniencia, which is an ICSID Contracting State and has ratified the Convention.² However, this fact *per se* should not lead to the automatic conclusion that MedX also has the effective control over Claimant. MedX, the direct holder of Claimant, is itself 50% owned by MedSciences Co. and 50% by Dr. Frankensid. The technology which led to the registration to the patent in question was developed by MedSciences and Dr. Frankensid so it would be safe to conclude that they had the decisive control over the work of Claimant. Therefore, Respondent urges the Tribunal to look beyond the first layer of control and take into consideration the existence of indirect control when determining the nationality of the foreign controller.
22. Claimant might also submit that in cases such as the one at hand determining direct control is sufficient to determine whether the Tribunal has jurisdiction over the merits of the case. Respondent dissents to this opinion, asserting that a restrictive view, elaborated in the *obiter dictum* of the award in case *Amco v. Indonesia*, according to which the only decisive factor would be the nationality of the investor in direct control of the local company, regardless of the possibility that the direct controller itself might be controlled by other interests, should be disregarded.³ Maintaining that the origin of capital is not relevant runs counter to the object and purpose of the whole ICSID system.⁴ Therefore, Respondent urges the Tribunal to look beyond the first layer of control because after doing so it will appear indisputable that the origin of the capital is not connected with Conveniencia contrary to Claimant's allegations.
23. Furthermore, Claimant might invoke some other cases in an attempt to convince the Tribunal not to look beyond the first layer of control such as *Letco v. Liberia* or *Aucon v. Venezuela*. However, Respondent impels the Tribunal to distinguish those cases from the one at hand. Indeed the tribunals stopped their search of foreign control on the first level, but they did so only because they decided that relevant

² Uncontested facts, para. 2.

³ Delaume, pp. 177-178.

⁴ *Tokio Tokelés Dissenting Opinion*, para. 19.

control was found on that level. This differs from the situation at hand since relevant control, the one without this business enterprise would not have happened, is exercised indirectly by MedSciences and Dr. Frankensid. In *Letco v. Liberia* the Tribunal stated that control was not only the a result of the fact that the Letco capital stock was 100% owned by French nationals but it also results from what it appeared to be *effective* control by French nationals – apart from shareholding, French nationals dominated the company’s decision making, majority of Letco directors were French nationals etc. It seems that the tribunal did take into considerations other layers of control, since all of them were consisted of French nationals, the result would be the same.⁵ Similar approach was consequently taken in *AMT v. Zaire*.⁶

24. Finally, in *Auconen v. Venezuela*, the parties defined control to mean direct control. The tribunal accepted the agreement between parties and concluded that there is no reason for it to examine different criteria (nationality of the board members, frequency of visits of board members of the direct shareholder, financial support etc.), even if such criteria might be relevant in different circumstances.⁷ Had the *Auconen* Tribunal applied or adverted its attention to the Soabi principle (i.e. to the question of indirect control) , it certainly would gave declined jurisdiction, since the ultimate controller of both the Venezuelan and the US subsidiaries was, effectively, a national of a non – Contracting State.⁸ Additionally, the Tribunal stated that:

”As a general matter, the arbitral Tribunal accepts that economic criteria often better reflect reality than legal ones.”⁹

25. The economic criteria in the case at hand clearly points to Dr. Frankensid and MedSciences Co, where he was employed. Not only did they develop the patent but transferred their technology to Claimant in exchange for shares in MedX Holdings Ltd.¹⁰ Therefore, Claimant cannot contend that MedX Holdings was their direct foreign controller since all of the shares were held by Dr. Frankensid and MedSciences which *de facto* made them indirect controllers of Claimant.

⁵ *Letco v. Liberia*, para. 3(a).

⁶ *AMT v. Zaire*, para. 5.15.

⁷ *Auconen v. Venezuela*, para. 65.

⁸ Asouzu, p. 452.

⁹ *Auconen v. Venezuela*, para. 119.

¹⁰ Clarifications, response to request No. 23.

26. However, it would not be a precedent for this Tribunal to consider the indirect control as relevant in the sense of Art. 25(2)(b). In *Soabi v. Senegal* the Tribunal agreed that foreign control could mean indirect control stating that determining the nationality of the foreign interests could not be done by referring only to immediate control since it would be contrary to the purpose of Art. 25(2)(b) *in fine*. It also stated that in absence of any specific provision in the Convention regarding the issue of indirect control, the decision to search for indirect control is the correct one since it is consistent with the manner in which many investments are made and especially those involving transnational companies, which, for various reasons, may elect to channel their investment through affiliated companies under their control.¹¹ In the case at hand the patent was ultimately assigned to Claimant by Dr. Frankensid and MedSciences in an exchange for shares in MedX. Therefore it could be inferred that the primary aim of Dr. Frankensid and MedSciences was to invest in Claimant. The acquisition of shares in MedX was apparently just an instrument to arrive at that aim.
27. On the practical side, Claimant might also assert that it would be quite difficult and time-consuming for any tribunal to take care of control at the second, and possibly third, fourth or xth degree and that this approach might threaten the efficient working of the ICSID arbitration system. These allegations are not true, especially not in the present case since the shareholding of MedX Holdings is fairly straightforward and the Tribunal could easily determine relevant foreign control, without compromising its productivity. Consequently, the Tribunal should reject jurisdiction since Dr. Frankensid is to be considered a national of the host State for the purposes of this dispute (as explained in paras xxx above) thus unable to shelter under ICSID arbitration and MedSciences cannot ask for protection at all since Laputa it is not Contracting State. The Tribunal should not only analyze indirect control when searching for its jurisdiction but oppositely whenever there are grounds for it since indirect controllers are often the real source of the investment.
28. Therefore the Tribunal should apply the reasoning adopted in *Soabi v. Senegal* case, go beyond the first layer of control and find that Claimant is effectively controlled by Dr. Frankensid and MedSciences.

¹¹ Delaume, p. 178.

b. Dr. Frankensid and MedSciences do not have the nationality of the Contracting State

29. As it will be demonstrated the effective control over Claimant is exercised by Dr. Frankensid and MedSciences. Neither Dr. Frankensid nor MedSciences fulfilled the criteria for establishing the *ratione personae* of the Centre or this Tribunal.
30. Dr. Frankensid is a Bergonian national by descent and birth and was naturalized in Amnesia in 1991. However, Dr Frankensid's habitual residence and place of employment has been in Laputa since 1998, and his only present connection with Amnesia is a vacation home in it.¹² What is more, Dr Frankensid never relinquished his Bergonian nationality. For natural persons, possession of the host State's nationality is an absolute bar to becoming a Party to ICSID proceedings and the dual national would be disqualified from invoking the ICSID clause in the BIT and Dr Frankensid obviously does not maintain a particularly strong link with Amnesia, which could potentially allow the Tribunal giving primacy to Dr Frankensid's Amnesian nationality over the Bergonian one.¹³ Claimant might ignorantly allege, relying on Soufraki v. UAE decision, that by acquiring Amnesian nationality Dr. Frankensid had been deprived of his Bergonian nationality.¹⁴ However, naturalization does not automatically annul previous nationality. Additionally, the applicable law in Soufraki case was Italian law, which contains a rule than an Italian national automatically loses his Italian nationality when he acquires nationality of another country.
31. There is no information that would indicate that the laws of Bergonia contain the same provision. The fact that Dr Frankensid acquired Amnesian citizenship in 1991 and that he is still considered a national of Bergonia *prima facie* leads to the conclusion that such provision does not exist under Bergonian law. Therefore, there is clearly no analogy between the Soufraki case and the dispute at hand. Consequently, should Claimant raise any arguments based on Soufraki jurisprudence, respondent

¹² Clarifications, responses to requests No. 54. and 22.

¹³ Schreuer1, p. 265.

¹⁴ *Soufraki v. UAE*, paras. 47-84.

respectfully requests the Tribunal to disregard them as they would not be applicable in the case at hand.

32. MedSciences is a company incorporated in Laputa, a country which is not an ICSID Contracting State.¹⁵ Even if Claimant would allege that shareholding structure of MedScience is not straightforward and that this company might be controlled by a national or nationals of ICSID Member States, Respondent submits that majority MedScience shareholders are Laputans.¹⁶ Therefore the Tribunal should not have any doubts with respect to the fact that MedSciences is a Laputan company.
33. Consequently, in the light of the evidence presented, Respondent submits that the first condition in order to treat Claimant as a national of Conveniencia is not fulfilled.

2. Respondent did not agree to treat Claimant as a Convenencian investor

34. The second requirement that has to be met in order for a company to bring investment claims against the State in which it is incorporated and has its seat is that there is an agreement between the parties to treat such company as a national of another Contracting State for the purposes of the Convention. Claimant contends that such consent is given through an MFN clause which is incorporated in Art. 3 of Bergonia – Conveniencia BIT.¹⁷ However, Respondent submits that such consent was never given nor could it have been given through an MFN clause. Therefore, it is Respondent's submission that the MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT cannot be extended to dispute resolution matters **(a)** and that Art. VI(8) of Bergonia - Tertia BIT may not be invoked in this way **(b)**.

¹⁵ Uncontested facts, para. 3.

¹⁶ Clarifications, response to request No. 17.

¹⁷ Minutes, para. 14.

a) MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT does not extend to dispute resolution matters

35. Respondent respectfully submits that the MFN clause contained in Art. 3(1) of the Bergonia – Conveniencia BIT does not extend to dispute resolution mechanisms. The main reason for such a conclusion is the wording of the mentioned clause which clearly shows that the State Parties have not intended to include dispute resolution provisions within the scope of the MFN clause.

36. The principle of the most favored nation is introduced into the Bergonia – Conveniencia BIT by Art. 3(1) and it generally stipulates that the MFN clause is applicable to investments. Paragraphs 2 and 3 of the said Article further limit the scope of the MFN clause only to very specific activities in relation to an investment:

”management, maintenance, operation, enjoyment or disposal of their investments”.

37. Article 31 of the Vienna Convention stipulates that the general rule of interpretation of treaties is that a treaty has to be interpreted in good faith in accordance with the ordinary meaning that has to be given to the terms of the treaty in their context and in light of its object and purpose. It gives primacy to the text of the treaty as evidence of the intention of the parties. Intention of the parties in the present case is very clear. They limited the scope of the MFN clause by not including dispute resolution mechanism within it. This conclusion is not only supported by case law, but is also confirmed by numerous scholars.¹⁸ As correctly observed by prof. Gaillard, when settlement of disputes is not part of enumeration contained in an MFN clause, then it is excluded from its scope.¹⁹ Any other conclusion would be contrary not only to the agreement between the parties, their intentions, general principles of treaty interpretation, but also to the *ejusdem generis* principle which provides that the MFN clause attracts matters belonging only to the same category of subject as that to which the clause itself relates.²⁰

¹⁸ Ukpe, p. 7; Gaillard, p. 3; Vesel, fn.. 95.

¹⁹ Gaillard, p. 3.

²⁰ ILC Report, Article 7; *Ambatielos case*, p. 107.

38. Given that dispute resolution mechanism is not included in any of the categories to which the MFN clause in question relates (and those are management, maintenance, operation, enjoyment or disposal of investments), Art. 3 of the Bergonia – Conveniencia BIT, which deals exclusively with dispute resolution matters, cannot serve as a basis for jurisdiction of this Tribunal.
39. Claimant might argue that some tribunals have applied the MFN clause to procedural issues.²¹ However, the Tribunal should not accept such a line of argument because the cases where the MFN clause was applied to procedural issues clearly differ from the dispute at hand. In all of these cases MFN clauses contained in the basic treaties were broadly phrased and covered, without limitations, any treatment of investments. Therefore, although there might be cases where the MFN clause can be extended to dispute resolution matters, it is widely accepted in arbitral theory and practice that this cannot be justified when parties to a BIT have clearly excluded dispute resolution provisions from the scope of the MFN clause as they did in the case at hand.²² The more recent cases on the question of the MFN treatment and dispute settlement, such as *Salini v. Jordan and Plama v. Bulgaria*, appear to indicate an increased focus by tribunals upon the specific text of the treaty as the most authoritative expression of the contracting parties' intention.²³ Therefore, the narrowly worded MFN clause in the present case differs from those that served as a basis for allowance of extension of the MFN provisions to dispute settlement mechanisms.
40. In addition, Respondent once more points the Tribunal's attention to the principle of teleological interpretation, according to which every term in a treaty should be given some effect.²⁴ It is hard to believe that the parties included paragraph 2 and 3 to the MFN clause and still had the intention of keeping the same broad scope that paragraph 1 gives to the MFN clause.
41. In conclusion, the Parties to the Bergonia – Conveniencia BIT have clearly shown the intention to exclude dispute resolution matters from the scope of the MFN clause

²¹ *Maffezini v. Spain, Siemens v. Argentina, Gas Natural v. Argentina, Suez v. Argentina and RosInvest v. Russia.*

²² Gaillard, p. 3; Teitelbaum, pp. 228-229.

²³ Fietta, p.132.

²⁴ Kahn, p. 5.

contained in Art. 3 and, therefore, Art. VI(8) of the Bergonia – Tertia BIT should not be applied.

b) Art. VI(8) of Bergonia – Tertia BIT cannot be applied in the present case

42. As previously explained in paras 35-41, although Bergonia – Conveniencia BIT contains MFN clause, dispute resolution matters are excluded from its scope. If, however, for some reason the Tribunal decides to extend this clause, Respondent submits that, nevertheless, Art. VI(8) of Bergonia – Tertia BIT cannot be applied since it was specifically negotiated and according to Art. I(2) of Bergonia – Tertia BIT, Respondent may deny Claimant the benefits of Art. VI(8).²⁵

43. Bergonia – Tertia BIT in its Art. VI(8) states that any company legally constituted under applicable law of one Party shall be treated as a company of the other Party if, immediately before the occurrence of events giving rise to the dispute, it was an investment of nationals or companies of the other Party. Indisputably, a more favorable treatment is given to investors of a third State, Tertia. However, these terms were specifically negotiated between Bergonia and Tertia and Art. I(2) which states that:

“Each Party reserves the right do deny to any company the advantages of this Treaty if national of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.” (emph. add.)

44. Denial of benefits stipulated in this article blatantly proves that the parties’ intent was to negotiate specific terms which are to be denied to anyone except the signees. Therefore it is obvious these provisions:

“due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.”²⁶

45. Without these provisions BIT would not have been signed. Claimant might try to distract the Tribunal claiming that *Tecmed* case dealt with retroactive application of

²⁵ Minutes, para. 14.

²⁶ *Tecmed v. Mexico*, para. 69.

the BIT and that it was the only reason why the tribunal rejected application of the MFN clause. This is not true and Respondent hopes that the Tribunal will agree that specifically negotiated terms cannot only refer to retroactivity. Although *Tecmed* case, to the best of Respondent's knowledge, is the only one which refers to this subject in ISCID caseload, it cannot be regarded as limitation to definition of "specifically negotiated terms".

46. Respondent further submits that Art. VI(8) of Bergonia - Tertia BIT can be invoked only in conjunction with Art. I(2) of the same BIT, which consequently denies Claimant the benefits established by this BIT. Should the tribunal decide that the relevant foreign control is exercised by MedX, it should firstly determine whether MedX has "*substantial business activities*" in the territory of Bergonia. Respondent submits that MedX rents a small office and has only two employees²⁷ – activity that can hardly be regarded as substantial. Furthermore, if the Tribunal decides that relevant control is found through MedSciences and Dr. Frankensid, MedSciences has Laputan nationality and there have been tensions between Bergonia and Laputa since Laputa has imposed sanctions on several occasions.²⁸ On that account, Respondent would have the right to deny benefits since "it does not maintain normal economic relations" with Laputa. As it can be seen in both cases outcome is the same – denial of benefits.
47. Claimant also might submit that the MFN clause relates only to more favorable treatment and that the application of all disadvantageous provisions from the third – party BIT should be rejected. Respondent urges the Tribunal not to allow "cherry – picking" hence if Claimant wants to benefit from the third – party BIT, it must accept the disadvantages from that BIT as well. A third party BIT can only be applied as a whole.
48. In addition, Respondent would like to point out once more that it has never agreed to treat Claimant as a foreign investor nor has it indirectly treated it as such (e.g. in terms of special registrations, investment agreements, taxation, privileges, patent application fees/procedures).²⁹

²⁷ Clarifications, response to request No. 76.

²⁸ Clarifications, response to request No. 36.

²⁹ Clarifications, response to request No. 14.

49. In conclusion, Respondent states that the Tribunal should not accept its jurisdiction since it has proven beyond any doubt that Claimant clearly cannot be treated as a national of Conveniencia for the purposes of this dispute.

II THE DISPUTE DOES NOT ARISE DIRECTLY OUT OF AN INVESTMENT

50. This dispute has arisen from Bergonian Patent No. AZ2005 (hereinafter Patent) registered in Bergonia by Claimant.³⁰ Respondent submits that in the present case the dispute does not arise directly out of an investment since the Patent cannot be treated as an investment within the meaning of Art. (1)(1) Bergonia – Conveniencia BIT (1). Even if for some reason the Tribunal disagrees, the Patent does not fulfill the objective definition of investment under Art. 25(1) of the ICSID Convention (2), therefore not satisfying the so-called “two-fold” or “double-barrelled test”.³¹

1. The subject of the dispute is not an investment within the meaning of Art. (1)(1) Bergonia – Conveniencia BIT

51. Respondent does not contest that patents *per se* are included are within the scope of Art. 1(d) of the Bergonia-Conveniencia BIT. However, taking into account all of the circumstances of the case at hand, uncritical application of this Article by the Tribunal would lead to an unjust result.

52. Namely, Respondent submits that the fact that Claimant has ownership rights over the Patent does not constitute an investment. The definition offered by the Bergonia-Tertia BIT is asset based, but in this case it is not enough to merely investigate the formal existence of the investment, because closer examination, as will be shown, indicates that Claimant’s investment is actually just an “empty shell” and that true substance of the investment was created and transferred by a third parties.

³⁰ Uncontested facts, para. 5.

³¹ *Ceskoslovenska Obchodni Banka v. Slovakia*, para. 68; *Salini v. Morocco*, paras. 44, 52; *Joy Mining v. Egypt*, paras. 49-50; *Malaysian Historical Salvors v. Malaysia*, para. 55.

53. As is stated in doctrine, there is a strong opinion that in order to have an investment there must be a transfer or a movement in capital, namely:

“that the origin of capital should be known and that it must clearly transpire that the capital moved across borders.”³²

54. In this case the true capital that moved across the borders is the developed invention, technology, which is the basis for the issuance of the patent AZ2005. But this actual investment practically has no meaningful relation to Claimant or its efforts. As is clear from the record, all the expenses and other R&D efforts were borne by MedScience, and not MedBerg.³³ On the global level, the dissemination of technology behind Patent AZ2005 is in the hands of MedX and its subsidiaries, and not MedBerg.³⁴ Only connection MedBerg had with the Patent was the fact that invention was ultimately assigned to it in a transaction that had no actual relation with investing in Bergonia, but with shareholding of a company in Conveniencia.³⁵ Practically, all the necessary data and technology needed for the issuance of Patent were transferred to Bergonia by MedX. MedBerg was only a receiver of this, and all Claimant actually did was to register the Patent, which is a mere formality that essentially should not be considered an investment. Respondent submits that the only entity that could rightfully claim to have actually made a capital transfer necessary for the investment is MedX, which did not do so.

55. Consequently, the Tribunal should dismiss Claimant’s contention that it has made investment in Bergonia.

2. The subject of the dispute is not an investment under Article 25(1) ICSID Convention

56. The ICSID Convention gives no definition of “investment”. It simply provides, in Art. 25(1), dealing with ICSID jurisdiction *ratione materiae*, that:

³² Schlemmer, p. 58.

³³ Clarifications, response to request No. 105.

³⁴ Clarifications, response to request No. 101.

³⁵ Clarifications, responses to requests No. 23 and 74.

”[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.”³⁶

57. The lack of definition deliberate since any specific definition risked excluding new and innovative forms of economic activity from coverage.³⁷ A perusal of cases that have come before ICSID tribunals show that they have covered widely diverse areas of activity (building and operation of hotels, mining of minerals, manufacturing of plastic bottles, banking, etc.) and investments in sense of the Art. 25 of the Convention may cover almost any economic activity.
58. Nevertheless, certain features which are typical for most of investments are identified in order to help determining if a project is an investment. Those features are *certain duration, regularity of profit and return, assumption of risk by both sides, substantial commitment and significance for the host State’s development*.³⁸ This test, of course, is not mandatory, but it presents a good guideline for the Tribunals when deciding.
59. Therefore, if for any reason the Tribunal refuses to accept the argumentation put forth in paras. 56-58 above, Respondent submits still lacks jurisdiction in the case at hand since the subject of the present dispute should not be treated as an investment due to the fact that it does not fulfill all the criteria needed. Namely, it lacks substantial commitment.
60. Although no quantitative limit is included in the Convention, the tribunals quite frequently examine the magnitude of the claimant’s total expenditures in determining whether there is an investment.³⁹ Indeed, the epithet “substantial” depends a great deal on the position of the parties⁴⁰ but nonetheless, even for an economically underdeveloped State, which Conveniencia is not,⁴¹ there must be a borderline which would determine if an investment can be accepted as substantial.
61. Respondent submits that expenditures made by Claimant were not significant enough since they only included the registration of patent. Generally speaking, registering a

³⁶ ICSID Convention, Art. 25 (1).

³⁷ Rubins, p. 287.

³⁸ *Fedax v. Venezuela*, para. 43; *Joy Mining v. Egypt*, para. 53; *Salini v. Morocco*, para. 52; Schreuer1, p. 140.

³⁹ *Letco v. Liberia*, para. 2(1).

⁴⁰ Rubins, p. 298.

⁴¹ Clarifications, response to request No. 89.

patent is not financially burdening, especially not for a company with considerable incomes. For example in United States of America, the filing fee, search fee and examination fee are approximately 1200 dollars⁴²; in European Union these expenditures are approximately 3000 euro⁴³ etc. Although there are no official record of registration fee in Conveniencia, in the light of this evidence it is obvious that the money contribution given by the Claimant is not as significant as it is claimed. Although the Convention stays silent on this matter, at some point a line must be drawn by the Tribunal and a minimum value of an investment should be determined. It is felt by many that the Center should only be concerned with investments of a certain magnitude. In fact, the Working Paper provided that, subject to special agreement by the parties, the Center would not exercise jurisdiction in respect of disputes involving claims of less than 100,000 US \$.⁴⁴ Although this clause was eliminated from the Preliminary Draft, it continued to attract the delegates' attention and there was considerable support for introducing a minimum limit in order to exclude insignificant claims.⁴⁵ In the end, it is unlikely that claims worth under 100,000 US \$, would ever be accepted in investor-state arbitration due to the expense of prosecuting claims.

62. Claimant might assert that substantiality of its investment can be perceived in research and development of the Patent, but this cannot be taken into consideration since it did not participate in these activities – it only enjoyed the benefits of other people's labor. (see paras. 53-54 above)
63. Respondent would also like to draw the Tribunal attention to the fact that in 37 years-long case history, not one subject of dispute was related exclusively to patents. In conclusion, Respondent submits that the Tribunal should not accept jurisdiction since it has been proven that the Patent does not fulfill all of the features to be considered as an investment within the meaning of Art. 25(1) of the ICSID Convention.

⁴² US Patent Office.

⁴³ European Patent Office.

⁴⁴ Drafting History, p. 34.

⁴⁵ Schreuer, para. 83.

PART TWO: RESPONDENT HAS NOT VIOLATED ITS OBLIGATIONS REGARDING CLAIMANT'S INVESTMENT.

64. As has been previously explained in Part One, Respondent submits that the Tribunal has no jurisdiction in the present case. However, if the Tribunal decides that it has jurisdiction in the present case, Respondent submits that it has in no manner violated obligations it had towards Claimant or its investment.
65. Having in mind that the Parties have not agreed on the applicable law in the present case, the Tribunal should reach its decision by relying on applicable rules of international law and domestic law of Bergonia, to the extent that it is in compliance with international law.⁴⁶
66. Contrary to Claimant's contentions,⁴⁷ Respondent submits that issuance of compulsory license related to the Patent is not unlawful (I). In addition, Respondent treated Claimant in accordance with all standards required by general international law and applicable treaties (II).

I RESPONDENT'S ISSUANCE OF COMPULSORY LICENSE IS NOT UNLAWFUL

67. Respondent submits that compulsory license issued in relation to the Patent cannot be deemed as unlawful by the Tribunal because it does not amount to expropriation as sanctioned in applicable international investment law (1). Alternatively, even if Respondent's compulsory license is considered as an expropriation, it still fulfills all necessary conditions for a lawful expropriation (2).

⁴⁶ ICSID Convention Article 42(1); Redfern/Hunter/Blackaby/Partasides, paras. 11.19-11.22.

⁴⁷ Minutes, para. 14.

1. Compulsory license does not amount to expropriation

68. Respondent submits that the compulsory license issued in relation to the Patent does not constitute an expropriation. Firstly, actions taken by Respondent do not meet the threshold of expropriation (a). Furthermore, the issuance of the said license represents a legitimate and allowed state regulatory action which does not fall within the scope of expropriation (b). Alternatively, compulsory licenses are in any case excluded as expropriation measures by the virtue of Art. III(4) of Bergonia-Tertia BIT, if the Tribunal decides to apply this BIT (c).

a) Respondent's actions do not amount to expropriation

69. Respondent submits that actions taken in relation to the Patent do not constitute an expropriation and that all contrary contentions by Claimant⁴⁸ should be disregarded by the Tribunal. As is generally established, expropriations can take the form of direct and indirect expropriations or takings.⁴⁹ Indirect expropriations can also be described as measures tantamount to expropriation, *de facto* expropriations and similar terms, but Respondent submits that there are no essential differences between these terms.⁵⁰ As can be seen from the facts, neither form of expropriation is present in the case at hand.

70. Direct takings are characterized by the transfer of title over property, depriving the former owner of any rights toward the expropriated investment.⁵¹ It is obvious and uncontested by Claimant that no direct taking has taken place in the present case. Claimant's title as the owner of the Patent is by no means in question.⁵²

71. Claimant might argue that Respondent's actions constitute an indirect expropriation of Claimant's property. Respondent submits that existence of expropriation should be

⁴⁸ Minutes, para. 14.

⁴⁹ UNCTAD Taking of Property, pp. 11-12.

⁵⁰ McLachlan/Shore/Weiniger, p. 292; Dolzer/Stevens, p. 99; *Feldman v. Mexico*, para. 366.

⁵¹ UNCTAD Taking of Property, pp. 11-12.

⁵² Uncontested facts, para. 5.

assessed in the light of the following criteria that have been set out in legal doctrine: degree of interference with the investment, durational aspect of the host State's actions, (non)existence of the enrichment of the host State and, finally, host State's intentions.⁵³ As will be shown, examination of all of these criteria indicate that there is no indirect expropriation in the present case.

72. Firstly, the interference with the Claimant's investment in the present case should have been substantial, significant or radical in order to be treated as an expropriation.⁵⁴ The meaning of substantiality requirement has been defined in case law as the existence of a persistent or irreparable obstacle to the enjoyment of the investment.⁵⁵ It is clear that no such irreparable obstacle exists in the present case. Claimant still enjoys practically every right related to the Patent, for example to use the Patent itself or import patented products (which it continues to do⁵⁶). Actually, Claimant is in a position to enjoy further financial benefit from its Patent as he is offered royalties by the Bergonian IP Office.⁵⁷ What is more, Claimant still enjoys the right to license the Patent since nothing in the facts of the case indicates that the issued compulsory license prohibits Claimant from issuing its own licenses under new license agreements and conditions it sees fit. The issued compulsory license, as explained in paras. 118-119, can be deemed as just another business circumstance or risk that should have been taken into account by Claimant at the moment of making its investment. Thus, no irreparable damage to the Claimant's investment has been done, it being fully able to enjoy its rights given by the Patent, and no effective neutralization of the benefits of the property, as sometimes required in case law,⁵⁸ has actually taken place.

73. Secondly, important issue that needs to be addressed is whether temporary interference (if Respondent's compulsory license is indeed seen as an interference by the Tribunal) could constitute an expropriation. Claimant submits that, as stated in

⁵³ Hoffmann, pp. 156-164.

⁵⁴ McLachlan/Shore/Weiniger, pp. 296-297.

⁵⁵ *PSEG v Turkey*, paras. 272 et seq; *Enron v Argentina2*, paras. 234 et seq.

⁵⁶ Clarifications, response to request No. 19.

⁵⁷ Uncontested facts, para. 8.

⁵⁸ *CME v. Czech Republic*, para. 236.

cases such as *Tecmed*, *Tippets* and *Phelps Dodge*,⁵⁹ this interference must be permanent and irreversible. This condition is obviously not met in the case at hand, as Respondent's compulsory license is limited in its duration to 48 months⁶⁰. Even if the Tribunal would find that temporary measures might constitute an expropriation, Respondent submits that the duration necessary for the existence of expropriation must be examined in the light of specific circumstances of each case.⁶¹ In the present case the 48 month period is not dictated by expropriatory intentions but by the empirical and medical necessity to establish the efficiency of the Patent in reducing obesity.⁶² Anyhow, the limited duration of the compulsory license is an indication of the fact that there has been no expropriation.

74. Thirdly, it has been admitted in case law that for the existence of expropriation it is necessary that the entity conducting allegedly expropriatory measures (in this case Respondent) directly benefits from the conducted measure.⁶³ This has been stated, for example, in *Olguin v Paraguay*⁶⁴ and *Lauder v Czech Republic*⁶⁵. The Government of Bergonia has not directly benefited from the compulsory license in any manner. Nothing in the facts of the case indicates that Respondent obtained any financial or other benefit from the compulsory license or that any entity directly related to the Respondent obtained such benefit. The positive impact that this compulsory license has on the overall health of Bergonian population cannot be attributed as a material benefit to Government of Bergonia, as such equating of Respondent and population would be obviously blatantly wrong. Thus, Respondent's actions do not fulfill this criterion in order to be considered expropriatory.
75. Finally, the intentions of the State government play a role in determining the existence of expropriation.⁶⁶ While certain tribunals relied on this intention exclusively in

⁵⁹ Hoffmann, p. 159.

⁶⁰ Clarifications, response to request No. 24.

⁶¹ Hoffman, p. 160.

⁶² Clarifications, response to request No. 66.

⁶³ Hoffmann, p. 160.

⁶⁴ *Olguin v Republic of Paraguay*2, para. 84.

⁶⁵ *Lauder v Czech Republic*, para. 203.

⁶⁶ Hoffmann, p. 161; McLachlan/Shore/Weiniger, p. 301.

determining whether expropriation occurred,⁶⁷ and others took in into consideration alongside other factors⁶⁸ it should still be assumed that State intentions are to be taken into serious consideration. Respondent's intentions in the case at hand were clear, and were not expropriatory in nature. As explained in paras. 99-100, Respondent's actions were at all times aimed at improving the general health of the population and fighting the serious health problem of obesity. Nothing in the facts indicates that Respondent had an intention to harm Claimant's interests, its investment or its position in Bergonia.

76. When all of the above mentioned circumstances are taken into account it can be concluded that there is no basis for the Tribunal to consider Respondent's actions as an act of expropriation and that Claimant should have no right to remedy in this aspect.

b) Respondent's issuance of compulsory license is state regulatory action aimed at public welfare

77. As has been stated in investment case law and supported in doctrine, the general body of precedent usually does not treat regulatory action as expropriation.⁶⁹ Additionally, it has been stated in doctrine that protection of investor's expectations must be qualified by the need to maintain a reasonable degree of regulatory flexibility on the part of the host State to respond to changing circumstances in the public interest.⁷⁰ More specific criteria that this regulatory action by the State should fulfill have been aptly summarized by the Tribunal in the *Methanex* case:

“as a matter of general international law, a *non-discriminatory* regulation for a *public purpose*, which is enacted in accordance with *due process* and, which affects, inter alia, a foreign investor or investment is *not deemed expropriatory and compensable unless specific commitments had been given* by the regulating government to the then putative foreign investor

⁶⁷ *CCL v Republic of Kazakhstan*, p. 173.

⁶⁸ *Tecmed v Mexico*, para. 116;

⁶⁹ *S.D Myers*, para. 281; Reinisch, p. 432.

⁷⁰ *McLachlan/Shore/Weiniger*, p. 239.

contemplating investment that the government would refrain from such regulation.”⁷¹(emph. add.)

78. As can be seen from the facts of the case at hand, Respondent’s issuing of compulsory license fulfills all of the necessary criteria. Namely, it is non-discriminatory, aimed at a public purpose, enacted in due process and does not contravene any specific commitments given by the Government of Bergonia.
79. Non-discriminatory character of the measure is explained in detail in paras. 101-102, but it suffices here to remind that compulsory license was issued as a part of package of other measures,⁷² that other compulsory licenses have been issued in regards to domestic entities⁷³ and that the main reason for this particular compulsory license can be seen in the effectiveness of the Patent⁷⁴ and not nationality of the investor. The fact that compulsory license has been issued to domestic companies gains in importance because it has been stated that one test that can indicate whether or not regulation is intended for expropriation is whether this regulation is also applied to locally-owned enterprises.⁷⁵ Since this is the case, it is clear that Respondent does not use compulsory licenses as a mean of discriminatory expropriatory measure.
80. Public purpose of the compulsory license should not come into question in the present case. Such legitimate purposes are actually a key point in distinguishing true allowed regulatory measures.⁷⁶ Bergonia has a long-standing obesity problem, spanning appallingly high percentage of population⁷⁷ and causing numerous medical problems.⁷⁸ The importance of resolving this problem in order to promote public welfare is beyond doubt, and exclusion of public health measures from the scope of expropriatory measures is present in recent BIT developments.⁷⁹

⁷¹ *Methanex v USA*, Part IV-Chapter D, para. 7.

⁷² Clarifications, response to request No. 85.

⁷³ Clarifications, response to request No. 83.

⁷⁴ Clarifications, response to request No. 68.

⁷⁵ McLachlan/Shore/Weiniger, p. 308.

⁷⁶ Reinisch, p. 434.

⁷⁷ Clarifications, response to request No. 65.

⁷⁸ Clarifications, response to request No. 40.

⁷⁹ Draft US Model BIT (2004), Annex B, Article 4(b).

81. Respondent followed due process requirements demanded by the domestic law of Bergonia, as is explained in detail in paras. 108-111.
82. Finally, Respondent's actions did not contravene any specific commitments given to the investor as there were no such commitments by the Government of Bergonia towards Claimant. Nothing in the facts of the case indicates that Respondent gave Claimant any specific assurances about not issuing compulsory license in relation to the Patent. As will be explained in para. 118, the possibility of compulsory license being issued was always present and known not only to Claimant but to all possible foreign investors.
83. Consequently, it can be concluded that Respondent's issuance of compulsory license falls within the scope of state regulatory action which does not entitle Claimant to any other special remedy or compensation not already offered by Respondent.

c) Compulsory licenses are not to be considered expropriation according to Article III(4) of Bergonia-Tertia BIT

84. As explained in paras. 42-49, Claimant cannot invoke the terms of Bergonia-Tertia BIT in a manner it contends.⁸⁰ Even if Claimant is to invoke the terms of Bergonia-Tertia BIT, these terms should be applied in their wholeness in order to avoid unfair results (see para. 47). Specifically, regarding the alleged expropriation due to the issuance of compulsory license, Respondent submits that Article III(4) of the Bergonia-Tertia BIT, which sanctions the prohibition of expropriation and prescribes the conditions for lawful exceptions, should be applied.
85. Article III(4) of Bergonia-Tertia BIT states:

“ This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.”

⁸⁰ Minutes, para. 14.

86. Facts of the case at hand clearly fulfill the criteria set above. Respondent issued a compulsory license⁸¹ and this license was issued in relation to a patent, which undoubtedly falls under the scope of intellectual property rights.⁸² More importantly, this compulsory license was issued in accordance with the TRIPS Agreement.
87. Article 31 of the TRIPS Agreement contains necessary conditions for the compulsory licenses to be legal. First requirement, found in Art. 31 (a) is that authorization of such use shall be considered on its individual merits, which is clearly fulfilled in the present case as Respondent did not issue large scale compulsory license for an undetermined number of products but a very patent-specific license motivated by the products efficiency⁸³ and widespread health problems of the population.⁸⁴
88. Secondly, according to Art. 31 (b), compulsory license may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. The issue who can be assessed as a proposed user is not easy to resolve, as the language in this paragraph has been deemed as unclear and open to different interpretations.⁸⁵ Respondent submits that by examining circumstances of the case (the fact that BioLife was the previous licensee under the License Agreement and that it later invoked the compulsory license) it is strongly indicated that BioLife can be given such a status. Accordingly, it can be concluded that BioLife's efforts to obtain authorization from Claimant, based on commercial terms of the License Agreement and unreasonably cut short by Claimant,⁸⁶ fulfilled one of the possible conditions for the issuance of the compulsory license.
89. However, even if this reasoning is not accepted by the Tribunal, compulsory license is still lawful bearing in mind the existence of urgency in which Respondent found itself

⁸¹ Uncontested facts, para. 8.

⁸² Torremans, p. 4.

⁸³ Clarifications, response to request No. 68.

⁸⁴ Clarifications, responses to requests No. 40 and 65.

⁸⁵ Carvalho, p. 321.

⁸⁶ Uncontested facts, para. 6.

in. Apart from the fact that widespread obesity was a serious medical problem, which could in itself be deemed as an urgent situation, the necessity for the products manufactured using the Patent became more acute after the cancellation of the License Agreement.⁸⁷ It is of utmost importance to take into consideration that Member States to TRIPS Agreement have every right to determine for themselves when a certain situation constitutes a national emergency or a situation of extreme urgency.⁸⁸ Bearing all this in mind, Respondent had a right to issue compulsory license even without any efforts by BioLife. Additional condition of informing Claimant as soon as reasonably practicable was also fulfilled.⁸⁹

90. Thirdly, the scope and duration of the compulsory license was limited to the purpose for it was issued, as is required by Art. 31 (c) and clear from the facts.⁹⁰

91. Fourthly, the issued compulsory license is non-exclusive (obvious from the fact that compulsory license was invoked by six different entities⁹¹) as is necessary under Art. 31 (d).

92. Fifthly, Art. 31 (e) states that license must be non-assignable. Assignment of the compulsory license would encompass both transfer of the title or certain rights obtained by invoked compulsory license (i.e. (sub)licensing).⁹² There is no evidence that in this case there was any occurrence of such behavior.

93. Sixthly, as required by Art. 31 (f) manufactured products were used to predominantly supply the domestic market. Despite the fact that there have been some exports and that there are no conclusive data about their amount in relation to the total of products manufactured, circumstances of the case strongly indicate that the manufactured products were used to supply domestic market. Domestic and not foreign health issues were the main motive for the issuance of the compulsory license in the first place.⁹³ Furthermore, only three of the companies which invoked the compulsory license

⁸⁷ Clarifications, response to request No. 26.

⁸⁸ Declaration on the TRIPS Agreement and Public Health, para. 5 (c).

⁸⁹ Clarifications, response to request No. 46.

⁹⁰ Clarifications, response to request No. 66.

⁹¹ Uncontested facts, para. 8.

⁹² Carvalho, p. 328.

⁹³ Uncontested facts, para. 7.

actually engaged in exports⁹⁴ and even these companies exported amounts that have been described as “*some of the product*”⁹⁵(emph.add.) and significant portion,⁹⁶ but not as predominant or main. Finally, the increase of sales in domestic market⁹⁷ also indicates the products’ increased availability, which would be unlikely if the predominant part of the manufactured products was exported.

94. Seventhly, compulsory license, in addition to being limited in duration was also under scrutiny of the Bergonian IP Office which had rights to manipulate the license as needed by the circumstances,⁹⁸ as is required by the Art. 31 (g) of TRIPS.

95. Eighthly, Claimant was offered adequate remuneration, as is required by Art. 31 (h) and which is elaborated in detail in paras. 103-107.

96. Finally, the requirements of Art. 31 (i) and (j) for review of the decisions about the issuance of the license and offered remuneration (essentially due process requirements) are fulfilled as explained in paras. 108-111.

97. In conclusion, Respondent fulfilled all the necessary conditions found in Art. III(4) of Bergonia-Tertia BIT. Consequently, the issued compulsory license does not fall within the scope of expropriation and should not be discussed as such by the Tribunal.

2. Even if Tribunal considers compulsory license as an expropriation, all criteria for lawful expropriation are fulfilled

98. Even if the Tribunal decides to consider compulsory license as an expropriation, Claimant submits that States have the right to expropriate and even indirect expropriation can be lawful provided that the necessary conditions set out in applicable BITs and international law in general are fulfilled.⁹⁹ In the case at hand, the criteria for assessing lawfulness of an indirect expropriation should be found in

⁹⁴ Uncontested facts, para. 8.

⁹⁵ Ibid.

⁹⁶ Clarifications, response to request No. 61.

⁹⁷ Clarifications, response to request No. 19.

⁹⁸ Clarifications, response to request No. 66.

⁹⁹ Reinisch2, p. 176.

the applicable Bergonia – Conveniencia BIT and in international law, and they are the following¹⁰⁰ : **(a)** taking must serve a public purpose; **(b)** there should be no discrimination; **(c)** adequate compensation must be paid; and **(d)** due process must be observed. It must be emphasized that all of these conditions must be fulfilled cumulatively in order for an expropriation to be lawful. Respondent submits that issuance of compulsory license and other measures fulfilled all of these requirements.

a) Compulsory license was issued for a public purpose

99. According to Art. 4 of the Bergonia - Conveniencia BIT, expropriation is allowed if it is needed for the public benefit. Respondent submits that products based on the Patent have significant impact on regulating domestic medical needs. Consequently, the issuing of compulsory license was needed for improvement of the public benefit. Obesity presents a grave threat to public welfare of Bergonia, as it is widespread¹⁰¹ and causes numerous associated health problems for a large part of the population.¹⁰² It is clear that subduing this problem would enormously help the public welfare and thus all measures aimed at it should be considered as having a public purpose. The gravity of the problem that obesity presents is emphasized for example by the foremost health authorities, such as World Health Organization and their publications.¹⁰³ It is important to note that compulsory license is not the only measure taken by the Respondent,¹⁰⁴ but only one part, indicating clear intent to help a public cause and lack of other, hidden motives.

100. It is easy to establish that the issued compulsory license has a clear public purpose. Patent AZ.2005 is considered to be the most effective treatment for the obesity problem in Bergonia.¹⁰⁵ It was thus necessary to make it as available to Bergonian population as possible. Compulsory licenses in general allow the lowering of prices

¹⁰⁰ UNCTAD Taking of Property, pp. 12-13.

¹⁰¹ Clarifications, response to request No. 65.

¹⁰² Clarifications, response to request No. 40.

¹⁰³ WHO Obesity.

¹⁰⁴ Clarifications, response to request No. 85.

¹⁰⁵ Clarifications, response to request No. 68.

due to domestic manufacture and this has been confirmed in practice.¹⁰⁶ This results in increased availability of products to the domestic population and this increased availability is strongly indicated by the increase in sales of the products manufactured under the Patent after the issuance of compulsory license.¹⁰⁷ This shows that compulsory license is reaching its public purpose goal and is fully justified, thus making this condition for lawful expropriation fulfilled.

b) There was no discriminatory behavior

101. Discriminatory action, as can be inferred, exists when the taking is conducted on singled out persons or entities, in an arbitrary manner or without legitimate justification.¹⁰⁸ However, Respondent did not in this case arbitrarily or discriminatorily single out Claimant. It can clearly be concluded that the reason for issuing compulsory license in regards to Claimant's investment is the fact that this investment would more than any other help promote public benefit, since Patent is most effective obesity cure on the market.¹⁰⁹ There is no evidence that Respondent had other motives, such as Claimant's nationality, which is often cited as a possibility in practice.¹¹⁰ This is especially obvious from the fact that compulsory licenses had been issued in the past in relation to domestic entities¹¹¹ and they are, thus, not something reserved just for the Claimant or foreign investors. Claimant could argue that there was discrimination based on the fact that there are other entities in the same business sector to which no similar measure was taken.¹¹² However, this is clearly unfounded as there was no reason to conduct such measures when these entities had

¹⁰⁶ Khor, pp. 5-10.

¹⁰⁷ Clarifications, response to request No. 19.

¹⁰⁸ UNCTAD Taking of Property, p. 20.

¹⁰⁹ Clarifications, response to request No. 68.

¹¹⁰ UNCTAD Taking of Property, p. 20.

¹¹¹ Clarifications, response to request No. 83.

¹¹² Clarifications, response to request No. 84.

no effective product.¹¹³ In addition, as explained in paras. 99-100, Respondent had legitimate justification for its actions.

102. In conclusion, it is apparent that there was no discriminatory behavior and that this condition for existence of lawful expropriation is also fulfilled.

c) Adequate compensation was offered to Claimant

103. As set out in Art. 4 of the Bergonia - Conveniencia BIT, the compensation for expropriation needs to be prompt, adequate and effective (which corresponds to the so-called Hull formula, expressing minimum customary international law standard¹¹⁴). In the case at hand, compensation offered by the Bergonian IP can be considered prompt, adequate or effective compensation.

104. Since the issue of compulsory license regarding patents is predominantly an issue related to intellectual property rights, Claimant submits that relevant standards of royalty fees in cases of compulsory licenses should be taken into account. This is in accordance with the view that legal rules deriving from investment and non-investment obligations often complement and reinforce each other.¹¹⁵ Respondent does not contest that in investment case law there is a standard of the necessary compensation being equal to what could be obtained between willing buyer and seller¹¹⁶ and in comparable transactions.¹¹⁷ However, as has been stated in doctrine and confirmed in practice, royalty fees in cases of compulsory licenses are not to be equated with commercial ones, as such demands would put States using compulsory licenses in serious problems and could actually make the whole system of compulsory licenses meaningless.¹¹⁸ Accordingly, Claimant submits that adequate compensation in the present case is to be determined by combining the standards existing in

¹¹³ Clarifications, response to request No. 68.

¹¹⁴ Reinisch2, p. 194.

¹¹⁵ Hirsch, p. 156.

¹¹⁶ *Santa Elena v. Costa Rica*, para. 73.

¹¹⁷ *McLachlan/Shore/Weiniger*, p. 322.

¹¹⁸ Amaral, p. 13.

international investment law and international intellectual property law. As can be seen from the facts of the case, such adequate amount was offered by the Respondent.

105. If the amount of royalty fee from the License Agreement is to be considered as the one that would exist between willing buyers and sellers and License Agreement is considered as a comparable transaction, then this amount would present a commercial royalty fee. As explained above, in cases of compulsory licenses such a fee is to be taken as a ceiling. Thus, Respondent was justified in offering a lower royalty fee. However, adequacy of the compensation is obvious from the fact that, despite existing similar cases in comparative practice,¹¹⁹ Respondent did not offer drastically lower fee. On the contrary, the offered fee was only *moderately* lower than the one which existed in the License Agreement,¹²⁰ making it in perfect accordance with existing international intellectual property law and at the same time perfectly acceptable in terms of international investment law. At the same time it should be noted that this fee was offered from six sources instead of one as was the case with the License Agreement, thus potentially increasing Claimant's revenues beyond its expectations in Bergonian market and further adding to the adequacy of the compensation.

106. As for the promptness of the compensation, it can be seen that the fee was offered on a yearly basis¹²¹ thus negating any possibility of unclear or indefinitely prolonged deadlines for the payment of the compensation. Furthermore, the fee was actually collected and offered to Claimant,¹²² making it obvious that Respondent had an actual and not only expressed will to pay a prompt compensation.

107. Regarding effectiveness of the compensation, it has been stated in doctrine that this condition requires that offered compensation is expressed in convertible currency and easily transferable out of the country.¹²³ As can be seen from the fact of the case, the fee was expressed in Bergonian currency and there have been no recorded problems in transferability of funds between Bergonian and Conveniencian currency.¹²⁴ There

¹¹⁹ Dailey; Ho, p. 3.

¹²⁰ Clarifications, response to request No. 88.

¹²¹ Clarifications, response to request No. 87.

¹²² Uncontested facts, para. 8.

¹²³ Reinisch2, p. 196.

¹²⁴ Clarifications, response to request No. 85.

is nothing else in the fact of the case that could possibly indicate that effectiveness of the compensation would be hindered in any manner.

d) Due process requirements were followed

108. Art. 4 of the Bergonia - Conveniencia BIT demands that the expropriation is performed in accordance with the applicable laws, which is a formulation that fits the requirement widely known as due process in international investment law and international law in general.¹²⁵ Respondent submits that this condition is not considered to be universal¹²⁶ and that Tribunal should take this into account despite of the due process requirement found in the Bergonia-Conveniencia BIT. However, even if Tribunal is to address this issue in its full scope, Respondent still fulfilled this criterion by providing Claimant with necessary due process.

109. Applicable laws in the present case are the laws of Bergonia, and these laws are modeled in accordance with TRIPS Agreement.¹²⁷ Accordingly, in order for due process requirements to be followed in regards to compulsory licenses, Respondent needed to observe the conditions set out in Art. 31 (i) and (j) of the TRIPS Agreement. These requirements are that in relation to the decision to issue compulsory license and to the amount of the offered remuneration there must be a possibility of judicial review or other independent review by a distinct higher authority. These requirements are fulfilled. As can be seen from the facts of the case, after Bergonian IP Office issued the compulsory license Claimant was able to appeal to Patent Review Board. Since this board is clearly not the same organ which issued the compulsory license (being clearly stated as a separate body and consisted out of judges and not IP Office employees) it can be concluded that it is a distinct authority. Furthermore, as it is in a position to act on appeal on IP Office decision¹²⁸ and thus quash them if necessary, it is clear that it acts as a higher authority. As for the independent review, since this review is conducted by the Bergonian judges which are

¹²⁵ UNCTAD Bilateral Investment Treaties 1995-2006, p. 47.

¹²⁶ UNCTAD International Investment Agreements, p. 235; Muchlinski2, p. 692.

¹²⁷ Clarifications, response to request No. 80.

¹²⁸ Clarifications, response to request No. 37.

in no manner otherwise part of Bergonian IP Office, it can be safely concluded that they are in a position to offer independent review, in a quasi-judicial manner obviously differentiated from the regular administrative dealings of the IP Office. On top of this, it is clear from the facts of the case that all proceedings before the Patent Review Board in general follow all due process requirements.¹²⁹

110. When all the circumstances are taken into consideration, it can be concluded that Respondent followed all necessary due process requirements in regards to the issuance of the compulsory license.

111. Consequently, since all of the requirements for lawful expropriation are fulfilled there is no basis for any remedies in favor of Claimant even if the Tribunal considers Respondent's actions to constitute an expropriation.

II RESPONDENT PROVIDED CLAIMANT'S INVESTMENT ALL REQUIRED STANDARDS OF TREATMENT

112. Respondent provided Claimant's investment the standard of treatment that was guaranteed both by the Bergonia-Conveniencia BIT as well as by the customary international law, and refrained from any unlawful interference with the Claimant's investment. In particular, Claimant's investment was afforded fair and equitable treatment (1), full and constant protection and security (2), and national treatment (3). Furthermore, all Respondent's actions were reasonable and non-arbitrary (4).

1. Respondent provided Claimant fair and equitable treatment

113. Art. 2(2) of the Bergonia-Conveniencia BIT provides that each Contracting State shall at all times accord in its territory to investments of investors of the other Contracting Party fair and equitable treatment. At all times, Respondent provided Claimant's investment fair and equitable treatment.

¹²⁹ Clarifications, response to request No. 29.

114. Due to the abstract nature of the fair and equitable treatment standard there have been several interpretations thereof in scholarly writings, judicial decisions and government statements. Two main interpretations that have surfaced are that, on the one hand, this standard should be equated with the customary international law minimum standard, and, on the other hand, that this is an autonomous self-contained concept that is different from the customary international law minimum standard.¹³⁰ Respondent contends that either of these interpretations leads to the same conclusion: that Respondent did not breach Art. 2 of the Bergonia-Conveniencia BIT.

a) Respondent provided Claimant fair and equitable treatment defined as an autonomous self-contained concept

115. Should the Tribunal interpret the fair and equitable treatment standard in light of its “additive character,” under which the fairness and equity elements are distinct from the customary international law minimum standard,¹³¹ Respondent ascertains that it has fulfilled its obligations incumbent in this standard.

116. More precisely it has been found that this standard requires host States:

“to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”¹³²

117. Respondent has in no way impaired Claimant’s legitimate expectations. It is safe to assume that Claimant’s legitimate expectations in regard to its investment in Conveniencia were that it would be allowed to perform its ordinary commercial activities, namely to import its licensed product and/or license its Patent. Nothing in the facts of the case indicates that Claimant had any other special expectations from

¹³⁰ Schreuer², pp. 9, 17; OECD F&E, p. 2; UNCTAD F&E, pp. 10, 34; Sornarajah, pp. 332-333; Grierson-Weiler/Laird, p. 262.

¹³¹ *Pope & Talbot v. Canada*, paras. 105-118; *PSEG v. Turkey*, paras. 239; *MTD v. Chile*, paras. 110-112; *Saluka v. Czech Republic*, p. 309; Dumberry, p. 455; Dolzer/Stevens, p. 60. Muchlinski, p. 626; Lavieć, p. 94; Vasciannie, pp. 139-144.

¹³² *Tecmed v. Mexico*, para. 154; *Saluka v. Czech Republic*, para. 302.

its presence in Bergonia. As the facts show, Claimant obtained its Patent, concluded the License Agreement with BioLife, and fully enjoyed benefits from it for two years.¹³³ Claimant then terminated the License Agreement by its own will¹³⁴ and continued to exploit Bergonian market by importing and selling its products.¹³⁵ Nothing in the facts indicates that during all this period Claimant's expectations regarding the treatment of its Patent, products or MedBerg Co. itself were in any way impaired.

118. Claimant could potentially argue that its expectations were not fulfilled because of the issuance of the compulsory license. However, this issuance cannot be considered as a circumstance that Claimant could not have expected. Specifically, Bergonian laws in the area of intellectual property are modeled according to TRIPS.¹³⁶ These laws should have been known by a prudent investor dealing in the same area, as Claimant is ought to be considered. Furthermore, since Conveniencia is also a party to the TRIPS Agreement, its relevant provisions should have been known to the Claimant as his own national law (if Claimant is indeed considered as a foreign entity, see paras. 17-49). From these facts, it is safe to assume that Claimant was well aware of the provisions of Art. 31 of the TRIPS Agreement which allows Member States such as Bergonia to enact compulsory licenses under certain conditions, all of which were fulfilled in the present case (see paras. 87-97). It was reasonable to expect from Claimant that compulsory license could be issued, especially when taking into consideration the well-known increasing comparative practice in this regard¹³⁷ and the longevity and seriousness of the obesity problem in Bergonia, including already initiated measures against it.¹³⁸ As has been correctly concluded in doctrine, an investor cannot bring a complaint of unfair treatment for a subsequent faithful application of host State law it knew beforehand.¹³⁹

¹³³ Uncontested facts, paras. 5-6.

¹³⁴ Uncontested facts, para. 6.

¹³⁵ Clarifications, responses to requests No. 114 and 19.

¹³⁶ Clarifications, response to request No. 80.

¹³⁷ Khor, pp. 5-10; Ho, p. 4; Royle/Wessing.

¹³⁸ Clarifications, responses to requests No. 85, 65 and 40.

¹³⁹ McLachlan/Shore/Weiniger, p. 237.

119. It must be also taken into account that compulsory license did not end Claimant's business in Bergonia (as explained in para. 72), but merely altered the business situation, making this issuance of compulsory license a certain business risk that should have been taken into account by the Claimant. As has been famously stated in case law:

“[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes.”¹⁴⁰

Consequently, this cannot be deemed as failing the expectations that Claimant could have reasonably had.

120. Furthermore, it must be noted that Claimant itself did not expect to enjoy economic benefit from licensing its Patent in the period after the cancellation of the License Agreement.¹⁴¹ Such economic expectations have been described as a touchstone in assessing the validity of the expropriation claim.¹⁴² Consequently, issuance of compulsory license did not actually impair Claimant's expectations in this regard, further proving that Claimant's expectations have been in no way impaired.

121. The situation could have been different and Claimant's legitimate expectations could have been affected had the relevant State authorities of Bergonia failed to live up to the some specific assurances they had given to international investors.¹⁴³ However, facts clearly show that Respondent had not given any specific assurances to Claimant as there were not any agreements concluded between MedBerg Co. and Bergonia.¹⁴⁴ Therefore, Claimant could only base its legitimate expectations on the Bergonia-Conveniencia BIT and the standards which it invokes, as well as the provisions of Bergonian law, namely the ones modeled on TRIPS Agreement. As has been shown throughout the Memorandum, Respondent fully complied with all of its obligations, stemming either from Bergonia-Conveniencia BIT or other instruments of law. Since non-impairment of expectations and/or specific assurances has been described as a

¹⁴⁰ *The Oscar Chinn Case*, p.88.

¹⁴¹ Clarifications, response to request No. 42.

¹⁴² McLachlan/Shore/Weiniger, p. 302.

¹⁴³ Fietta, p. 386; *Metalclad v. Mexico*, paras. 74-101; *Waste Management v. Mexico*, para. 98.

¹⁴⁴ Clarifications, response to request No. 11.

dominant element of the fair and equitable standard,¹⁴⁵ Respondent submits that by fulfilling its obligations in this aspect it fully complied with its duties regarding this treatment.

b) Respondent provided Claimant fair and equitable treatment defined as minimum standard of treatment in international law

122. The second interpretation of the fair and equitable treatment standard is that it is sometimes regarded as being equal to the minimum standard of treatment in international law.¹⁴⁶ It is generally accepted under customary international law that foreign investors are entitled to a certain level of treatment, and that any treatment which falls short of this level, gives rise to responsibility on the part of the State.¹⁴⁷ In particular, the international minimum standard encompasses the following obligations a host State has towards foreign investors: **1) obligation of vigilance and protection, 2) due process, including non-denial of justice and lack of arbitrariness, 3) transparency, and 4) good faith.**¹⁴⁸ It is Respondent's submission that all of the following obligations were met by the Respondent in the present case.

1) Respondent acted vigilantly and protected Claimant's investment

123. The State has an obligation of vigilance, i.e. an obligation to exercise due diligence in protecting foreign investments.¹⁴⁹ Such general obligation is supplemented in this particular case by the provision of Art. 2(2) of the Bergonia - Conveniencia BIT which provides that:

¹⁴⁵ McLachlan/Shore/Weiniger, p. 234.

¹⁴⁶ *AAPL v. Sri Lanka*, Judge Asante's Dissenting Opinion, paras. 634-639; *AMT v. Zaire*, para. 6.10; *Genin v. Estonia*, para. 367; Leben, pp. 7-28; Sacerdoti, p. 341; Juillard, pp. 132 -134; NAFTA Interpretation, paras. B.1, B.2, B.3; OECD F&E, p. 9; Commentary OECD Draft Convention 1967, p. 9.

¹⁴⁷ OECD F&E, p. 8; UNCTAD F&E, p. 12.

¹⁴⁸ OECD F&E, p. 26.

¹⁴⁹ OECD F&E, p. 26.

“[E]ach contracting State shall in its territory in any case accord investments by investors of the other Contracting State [...] full protection under the Treaty.”

124. As is explained in paras. 131-137 below, Respondent acted vigilantly and provided Claimant with full protection.

2) Respondent provided Claimant the benefit of due process

125. Due process in general encompasses behavior of the host State which is in full accordance with procedures and provisions of applicable laws. During the whole process of issuing of the compulsory license Respondent observed due process. As has already been explained in detail in paras. 108-111, Respondent fulfilled all of the requirements set by the applicable law. In addition, the issuance process was no abrupt or hasty procedure as proceedings lasted from 1 June 2007 to 1 November 2007¹⁵⁰ and during this period Claimant freely communicated its objections to Bergonian institutions,¹⁵¹ showing that it was in no manner shut out from the process. Bearing all this mind, it can be concluded that Respondent treated Claimant fairly and equitably in this regard.

3) Respondent acted transparently

126. Transparency plays an important role in enhancing and promoting legal security and it is thus crucial for achieving objectives and purposes of international investment treaties.¹⁵² As has been observed in case law:

“[T]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and *totally transparent in its relations with the foreign investor*, so that it may know beforehand any and all rules and regulations that will govern its investments, *as well as the goals of the relevant*

¹⁵⁰ Uncontested facts, paras. 7-8.

¹⁵¹ Clarifications, responses to requests No. 111 and 72.

¹⁵² Yannaca-Small, p. 123.

policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”¹⁵³ (emph. add.).

127. It has been already explained in para. 118 that all rules and regulations regarding Claimant’s investment were transparent and have been known beforehand to Claimant. Regarding the policies of Bergonia, measures already taken by the government of Bergonia were well publicized and were a clear indication of future goals of Bergonian government.¹⁵⁴ Even more, an investor is expected to conduct its own investigation to increase transparency.¹⁵⁵ Also, one should take into account that the whole issuance procedure was conducted in a transparent due process manner, as explained in paras. 108-111. Therefore, it is easy to conclude that Respondent’s behavior fulfilled all requirements of transparency.

4) There is no evidence of Respondent acting in bad faith

128. According to Art. 26 of the Vienna Convention and as has also been stated in the doctrine and case law, the good faith principle is the basic guiding principle in performance of a treaty by the State.¹⁵⁶ When all the facts of the case are taken together it is clear that there was no bad faith on the behalf of Respondent. As shown throughout the Memorandum, each and every action taken by the Respondent has its clear legitimate objective in improving public welfare of Bergonia, while at the same time fulfills necessary legal requirements. There are no facts in the case that would suggest that any of the Bergonian actions were with malicious intent toward Claimant or its investment. What is more, neither the Claimant itself felt that it was treated in bad faith, as it has not raised that issue at any point. As has been stated in doctrine, public interest factors and objective basis for decision of the State, all existing in the

¹⁵³ *Metalclad v. Mexico*, para. 154.

¹⁵⁴ Clarifications, response to request No. 85.

¹⁵⁵ *McLachlan/Shore/Weiniger*, p. 241.

¹⁵⁶ *Canfor Corporation v. USA*, paras. 182,323; *Yannaca- Small*, p. 122; *Grierson-Weiler/Laird*, p. 272.

case at hand, are a strong indication that there was no breach of the fair and equitable treatment standard.¹⁵⁷

129. Furthermore, a good faith effort on the part of the host State organs to fulfill requirements of host State law, also present in the case at hand, is a powerful indication that the standard of good faith has been met.¹⁵⁸

130. Consequently, it should be concluded by the Tribunal that Respondent fulfilled the good faith requirement of fair and equitable standard of treatment.

2. Respondent provided full protection of Claimant's investment

131. Art. 2(2) of the Bergonia - Conveniencia BIT states that:

“[E]ach Contracting State shall in its territory in any case accord investments by investors of the other Contracting State [...] full protection under the Treaty.[...]”

132. Some tribunals have equated the standard of full and constant protection and security with the fair and equitable treatment.¹⁵⁹ Having in mind that Respondent treated Claimant's investment in a fair and equitable manner, as shown above, there is nothing to prevent the Tribunal from automatically finding that there has been no breach of the full protection and security standard.

133. However, should the Tribunal decide to regard these two standards as two separate obligations, it is Respondent's assertion that there has nevertheless been no breach of the full and constant protection and security standard.

134. The obligation of full and constant protection and security does not constitute an absolute obligation.¹⁶⁰ While determining whether there has been a breach of the full and constant protection and security treatment, the standard of due diligence is to be applied. This standard requires the host State to exercise reasonable care when

¹⁵⁷ McLachlan/Shore/Weiniger, p. 235.

¹⁵⁸ McLachlan/Shore/Weiniger, p. 243.

¹⁵⁹ *Wena Hotels v. Egypt*, paras. 84-95; *Occidental v. Ecuador*, para. 187; *PSEG v. Turkey*, para. 258.

¹⁶⁰ *Tecmed v. Mexico*, para. 177; *Wena Hotels v. Egypt*, para. 84.

protecting investments, rather than a “strict liability” standard.¹⁶¹ Moreover, it obliges the host State to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.¹⁶² Respondent ascertains that it has taken all necessary measures to ensure the full enjoyment of protection and security of Claimant’s investment.

135. Traditionally and most frequently the standard of full protection encompasses physical protection and requires engagement of the host State’s police and judicial system in this regard.¹⁶³ In the present case, due to the abstract nature of the investment (Patent is an intellectual property right and not a physical object) it is clear that this standard cannot be applied regarding the investment. In addition, there are no indications in the facts of the case that Claimant as an investor has been subject to any form of physical harassment or that the Patent has been illegally exploited by third parties. All of this indicates that Respondent acted vigilantly in this regard.

136. Even if the Tribunal for some reason decides to expand the scope of the standard beyond physical protection, despite the fact that this expansion is controversial¹⁶⁴ and opposed to in case law¹⁶⁵, Respondent still could not be found in contravention of the standard. Even when expanded, the standard of full protection deals with non-availability of the legal (judicial and administrative) system and stability of the legal framework.¹⁶⁶ Nothing in the facts of the case indicates that judicial or administrative system of Bergonia was not available to resolve potential issues Claimant had. Claimant might argue that review of the decision to issue compulsory license somehow amounts to denial of justice. However, as explained in paras. 108-111, Respondent followed thoroughly the procedures prescribed in domestic law, the same procedures which, it can be safely assumed (see para. 118) were known and reasonably expected by Claimant.

137. As for the legal framework, Respondent submits that issuing of the compulsory license did not actually alter the legal framework for investments in Bergonia.

¹⁶¹ Redfern/Hunter/Blackaby/Partasides, paras. 11-28; *Lauder v. Czech Republic*, para. 307.

¹⁶² *Lauder v. Czech Republic*, para. 307; *CME v. Czech Republic*, para. 353.

¹⁶³ Cordero Moss, p.131; McLachlan/Shore/Weiniger, p. 247.

¹⁶⁴ Cordero Moss, p. 142.

¹⁶⁵ *Saluka v. Czech Republic*, para. 484.

¹⁶⁶ Cordero Moss, pp. 144-145.

Domestic laws of Bergonia remain unaltered, and the actual issuance by the Respondent is merely using its right already existing in domestic law (and indeed, international intellectual property law symbolized by TRIPS) and not alteration of it. Simply put, this compulsory license and situation created by it should correctly be regarded as a fact, a business circumstance which occurred in past¹⁶⁷ and could possibly occur again in future, and not a substantive alteration of legal framework. As explained above (see paras. 118-119), such changes of business and not legal climate should not be taken into consideration, and this conclusion remains the same even with possible expanded notion of full protection standard.

3. Claimant was afforded national treatment

138. Respondent at all times provided Claimant with national treatment as stipulated in Article 3 of the Bergonia-Conveniencia BIT. The concept of national treatment is designed to prevent discrimination on the basis of nationality, or “by reason of nationality”.¹⁶⁸ It has also been stated that the meaning of this treatment is to obtain a level playing-field for foreign investors.¹⁶⁹ It is Respondent’s submission that all of its actions were undertaken in accordance with this principle and international law and that Claimant was given equal treatment as domestic entities.

139. On a general level, it is obvious from the facts of the case that Claimant was not treated as a foreign entity, meaning that it was always given the same treatment as domestic Bergonian companies. Specifically, Claimant was not subject to any special registration, taxes, privileges or patent applications and procedures.¹⁷⁰

140. Regarding the compulsory license, it has been already explained in detail in paras. 99-100 that all actions of Respondent were legitimately aimed at improving the public health situation in Bergonia. Nothing indicates that Respondent’s actions were motivated based on Claimant’s nationality (even if Claimant is indeed of

¹⁶⁷ Clarifications, response to request No. 83.

¹⁶⁸ Kinnaer/Bjorklung/Hannaford, p. 1102-10, 1102-35; Bishop/Crawford/Reismann, Ch.9.III, p. 1150; *Pope & Talbot v. Canada*, para. 3.

¹⁶⁹ McLachlan/Shore/Weiniger, p. 251.

¹⁷⁰ Clarifications, response to request No. 14.

Conveniencian nationality). It is a mere coincidence that the most effective obesity cure was in the hands of Claimant. From all the facts and circumstances of the case, it can be safely assumed that the compulsory license regarding the Patent would be issued irrespective of the identity of the Patent owner, thus negating any possibility of discrimination based on nationality.

4. Respondent actions were reasonable and non-arbitrary

141. Some of the most important restrictions imposed by the international law to the ability of a State to take actions towards foreign investors and their investments are, *inter alia*, principle of nondiscrimination and non-arbitrariness.¹⁷¹ Art. 2(3) of the Bergonia - Conveniencia BIT clearly supports this approach and prohibits Respondent from impairing Claimant's investment by unreasonable, arbitrary or discriminatory measures. Respondent submits that at all times its actions were in full conformity with Art. 2(3) of Bergonia-Conveniencia BIT.

142. As has already been explained in paras. 99-100, Respondent's actions had clearly legitimate motives and objectives. When accompanied with good faith on behalf of Respondent it is clear that no unreasonableness or arbitrariness can be inferred on the behalf of Respondent. In addition, it has already been established in paras. 101-102 that there was no occurrence of discrimination in any manner. Thus, as has been stated in case law, if state officials can demonstrate that the decision (in this case issuance of compulsory license) was actually made in an objective and rational manner, they will defeat any claim made under the standard of non-arbitrary behavior.¹⁷²

143. Consequently, it should be concluded that Respondent fully complied with its obligations and at all times acted reasonably and non-arbitrarily.

¹⁷¹ Bishop/Crawford/Reisman, Ch.8. II and III.

¹⁷² *Saluka v. Czech Republic*, para. 307.

REQUEST FOR RELIEF

In light of the above submissions, the Counsel for Respondent respectfully requests the Tribunal to find that:

- The Tribunal does not have the jurisdiction to rule in the present case;
- Compulsory license issued by Respondent is not unlawful and does not constitute expropriation;
- Respondent provided Claimant's investment treatment in accordance with the Bergonia-Conveniencia BIT and customary international law;
- Claimant has no right to any further compensation or damages;
- Respondent should cover all costs of the arbitration, including all costs incurred by Claimant.

For Respondent, Government of Bergonia

Signed

21 September 2009